

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 41485
Docket No. MW-41384
12-3-NRAB-00003-100283

The Third Division consisted of the regular members and in addition Referee Richard Mittenthal when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference**
PARTIES TO DISPUTE: (
(BNSF Railway Company (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [Level S thirty (30) day record suspension with a three (3) year probation] imposed upon Mr. J. Galutia by letter dated October 23, 2009, for alleged violation of MOW Safety Rules S-1.1-Job Safety Briefing, S-1.1.2-Alert and Attentive, S-1.2.4-Co-Workers Warned and MOW Operating Rule 1.1.1-Maintaining a Safe Course, while assigned as a sectionman on Gang TMGX0598, temporarily headquartered at Casper, Wyoming on August 31, 2009 in connection with an injury to another employe applying angle bars to a panel track at/or near Mile Post 201.8 on the Casper Subdivision was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File C-10-D040-1/10-10-0006 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Galutia shall now receive the remedy prescribed by the parties in Rule 40(G).”**

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

In late August 2009, the Casper, Wyoming, Subdivision experienced a derailment that caused severe damage to the track structure. Segments of the damaged track needed to be replaced. Management chose to replace the damaged track with track panels, that is, track segments which are pre-built off-site. Such panels are generally readily available and serve to minimize the track-restoration process. A typical track panel is 39 feet in length and is constructed of the same material and in the same manner as the track structure of any main line railroad track – cross-ties, tie plates, rails, spikes, angle bars, and so on. Angle bars are standard track components that are used regularly in track maintenance work. They vary in size and weight to accommodate the various rail sizes used by different railroad companies.

The angle bars in this case were about 36 inches in length and 60 pounds in weight. Track bolts and lock washers are used to fasten an angle bar into place at the joint where the non-damaged rail is attached to the rail in the new track panel. When attached properly, the joint is secure and a continuous rail structure has been created. Each track panel installation requires eight angle bars and is evidently performed by a two-person maintenance crew whose work is coordinated in a relatively small area. After the angle bars are attached to the track panel, each panel must be properly fitted to the undamaged rail and secured. One member of the crew works on the “field side” of the rail; the other works on the “gauge side” of the rail. Much of this work is done in a “kneeling position.”

The two employees on the crew involved in this case were J. Galutia, a Sectionman, and J. Strauss, a Laborer. They were under the supervision of Roadmaster M. Shropshire although he did not witness any of the events that led to Galutia being disciplined.

One of the initial steps in this project called for locating the necessary materials and transporting them to the area where the derailment occurred. Management discovered that there were not enough angle bars in the immediate Casper area and made arrangements to collect extra bars in nearby areas. Galutia was involved in that effort – traveling to such areas, finding angle bars, loading them in a Carrier truck and returning them to the derailment area in Casper. In the course of doing so, Galutia found that some of the angle bars were heavily coated with grease and that such a condition made it more difficult to handle such bars.

At the start of the workday on August 31, a “job safety briefing” was held with respect to the work to be done by the crew that day. Part of the discussion dealt with the hazard posed by the handling of grease-coated angle bars. Galutia explained the need to be careful in performing this work. His cautionary advice to the others present was confirmed by Shropshire. By early afternoon, Galutia had already handled all but one of the heavily-greased bars. During the course of the Investigation, he gave the following account of what happened with the final greasy bar:

“... I was extra careful in handling the bar ... I looked at it to make sure it wasn’t cracked ... I grabbed it by the ends [one hand holding one end of the bar and the remaining hand holding the other end] and held it close to my body ... to give it a little more support ... I knew it was going to possibly be hard to hold onto ... more difficult than a bar that was dry ... I knelt down to install the bar in the web of the rail As I did so, I crouched down on one knee [to position the angle bar end] ... it slid out of my right hand, dropped on the ball of the rail and slid over and struck ... [Strauss] on top of his ... hand”

Strauss’ right hand was fractured. A report of the incident was promptly made. Roadmaster Shropshire appeared on the scene an hour or so later and talked to those involved. The Carrier decided on September 8 that a formal Investigation was necessary to ascertain the facts and “determine [Galutia’s] responsibility, if any, in connection with [his] alleged failure to be alert and attentive, causing injury to another employee while applying angle bars to panel track. . . .” The Investigation was held on October 1. The Carrier’s decision on October 22 was that

Galutia was guilty of violating certain Safety and Operating Rules and assessed a Level S, 30-day record suspension with three years probation.

The Organization protested the discipline on several grounds, urging that the Carrier “failed to hold a fair and impartial investigation” and “failed to prove the charges leveled against the Claimant [Galutia.]”

Throughout the initial stages of this case, the Carrier appeared to charge Galutia with just one violation, namely, Safety Rule S-1.2.3 which requires employees to be “alert and attentive . . . when performing duties.” Later, in the course of the formal Investigation, the Carrier added several other charges, all of which pertain in general to Galutia’s failure to take other steps to improve his chances of avoiding an accident.

The Board will focus primarily on his alleged failure to be sufficiently “alert and attentive.” This is essentially a question of fact. The Carrier urges that Galutia realized that heavily greased angle bars were hard to handle safely and posed risks to him and others who were not presented with clean bars. It believes that he did not take sufficient steps to minimize the risk and that such carelessness caused the accident. The Organization concedes that he was aware of the risk, but took reasonable steps to avoid an accident and was able to accomplish that goal until dealing with the very last of the several angle bars he handled. It believes that he was “alert and attentive” and that discipline was unjustified.

Several points should be emphasized. First, there was a “job safety briefing” early in the workday in question. The hazard involved in handling greasy bars was discussed. And Galutia told those attending this “briefing” that extra care would be necessary in handling those angle bars. Everyone, at least those who were listening, was made aware of the hazard. No one objected to working under these circumstances although the only employees who were likely to handle the greasy bars were Galutia and Strauss. After the “briefing,” Galutia handled at least five or six greasy bars with a higher degree of care than he would otherwise have used. He explained how he picked up each of the bars in question with a hand on each end of the bar and placed it tightly against his chest to maximize his control of the bar and prevent it from slipping through his hand. And he was able to do this successfully through most of the workday. By the time he reached the last greasy bar, he surely had good reason to believe that he could safely perform the task again. After moving the bar to the track panel to which it would be attached, he knelt down with

the bar just four to five inches away from its destination. Then, suddenly, it began to slip from his grasp and fell on the rail and fracturing Strauss' hand.

Of course, Galutia could have prevented the accident any time that day by refusing to handle any greasy angle bar or by insisting the job be delayed until the greasy bars were cleaned or clean bars were located. However, apparently there were no replacement bars available. At least the Carrier made no such contention. Had Galutia refused to work in such circumstances, there would have been a further delay in replacing the damaged track. There was no Management person in the immediate area who Galutia could have consulted. At least no such person was identified at the formal Investigation. So, he used his best judgment as to what he was capable of safely performing as established by his handling of greasy bars during the previous four or five hours.

Perhaps Management was aware that these greasy bars were going to be handled that day. If so, it did not issue any instruction that this type of work should be postponed until the grease could be removed from the bars or until other clean bars could be located and transported to the repair site. Nothing in the record evidence reveals that Management had earlier considered such alternatives. None of its Safety or Operating Rules appears to have addressed this kind of contingency. Absent such guidance, it cannot be said that Galutia acted unreasonably under the peculiar circumstances confronting him.

The Board hence concludes that the Carrier failed to establish through "substantial evidence" that Galutia was guilty of a failure to be "alert and attentive" to his work responsibilities on the day in question. Even assuming that the other alleged violations of the Safety and Operating Rules are properly before the Board, it should be apparent from what we have already said that Galutia did not violate Safety Rule S-1.1.1. True, he did not call for another "Job Safety Briefing" before handling the heavily greased angle bars. But that particular Rule comes into play only "before beginning work," "before performing new tasks," and "where working conditions change." There was a "Briefing" regarding the greasy bars at the start of the day; Galutia was not engaged in "new tasks;" no "change . . . [in] working conditions" occurred, inasmuch as the greasy bars problem had already been discussed. Nor did he violate Safety Rule S-1.2.4. For Strauss had been "warned" of this possibly "unsafe . . . condition . . ." at the beginning of the workday. He did not remember the warning, but there is no doubt that it was given. Finally, for the reasons already stated, Galutia had good reason to believe that he was taking a "safe

course” in handling the final angle bar. Hence, there was no violation of Operating Rule S-1.1.1. Accordingly, the claim must be sustained.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 13th day of December 2012.