

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41490
Docket No. MW-41519
12-3-NRAB-00003-100258**

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
(
(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 three (3) year probation] imposed upon Mr. D. Welsch by letter dated September 23, 2009 for alleged violation of MOW Safety Rules S-1.2.3 Alert and Attentive, S-12.1.1 (MOTOR VEHICLES & TRAILERS) General Requirements and S-12.8.1 (BACKING) Vehicles, while assigned as a welding foreman on Gang TRWX0271, temporarily headquartered at Guernsey, Wyoming, in connection with charges of alleged failure to be alert and attentive and alleged failure to survey the work area for potential hazards before backing up and damaging a signal at/or near Mile Post 95.47 on the Canyon Subdivision on July 13, 2009 was arbitrary, capricious, unwarranted and in violation of the Agreement [System File C-09-D040-6/10-09-0523 BNR].
- (2) As a consequence of the violation referred to in Part (1) above, Claimant D. Welsch 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.

On July 13, 2009, D. Welsch was a Welder Foreman assigned to work with a mobile welding gang. The gang was engaged in repairing track on the Canyon Subdivision. He was driving his welding truck near the end of his workday. He had to prepare a daily work report, but realized he did not have one necessary piece of information, namely, the specific location of the gang. The Helper who assisted him was not present at the time; the information he required was not available in the Carrier's documents in his possession. Hence, Welsch chose to drive his truck to the area where the gang had been working. He drove along a narrow right-of-way adjacent to a "live" track. On the other side of that right-of-way was a steep embankment.

When Welsch arrived at the mile post he was seeking, he came close enough to read the mile post number and wrote it down. He knew he could not drive farther in the same direction because there was no exit; he knew he would have to back out the way he came in. But he did not get out of his truck to survey the situation, or to consider the safety hazard in backing up. Nor did he attempt to summon anyone to help him with such a move. He began to back out, remaining as close to the track as he could. In the course of doing so, he ran into a signal apparatus. The collision caused no damage to his truck and no injury to any employee. It did, however, result in damage to a signal light; its top mast was completely separated from the light fixture. The Carrier spent roughly \$1,000.00 to repair the damage and the absence of this signal disrupted train movements for some period of time. Welsch examined the damage and promptly reported the incident to Management.

These essential facts are not really in dispute. Management, after a review of what had happened, believed a formal Investigation was necessary. It was held on September 3, 2009, after two postponements. The Carrier concluded that Welsch was guilty of a serious safety offense and sent the following notice of discipline to his home by certified mail on September 23, 2009:

“... [because of ...] your failure to be alert & attentive and failure to survey the work area for potential hazards before backing up & damaging a signal at/or near MP 95.47 on the Canyon Subdivision ... while assigned as Welding Foreman. ... You are hereby issued a Level S, thirty (30) day record suspension with three (3) year probation as a result of violation of MOW Safety Rules S-1.2.3 ... S12.1.1 ... and S 12.8.1...”

The Organization promptly protested the suspension on both procedural and substantive grounds. It relies on the following four contentions:

- (1) the Carrier did not meet its burden of proof on all charges made against Welsch;**
- (2) the discipline imposed was “excessive, unwarranted, and an abuse of the Carrier’s discretion ... [and also] represents disparate treatment”**
- (3) alleged failure to provide Welsch with “timely written notice of the initial investigation ... ”**
- (4) alleged “prejudice” against Welsch by the “multiple roles undertaken by Division Engineer Turnbull” in connection with the handling of this case.**

To begin with, the Carrier has the burden of proof in a discipline case. It must show through “substantial evidence” that the accused employee was guilty of a Rule violation. Welsch was trained in the meaning and application of the Safety Rules. He does not contend that he misunderstood any of the Rules he is alleged to have violated. S-1.2.3 requires employees to be “alert and attentive...when performing duties;” S-12.1.1 requires employees who “operate” motor vehicles to do so “in a careful and safe manner;” S-12.8.1 requires that employees, when “backing up” a vehicle such as the one operated by Welsch, are required “to position someone near the back of the vehicle to guide, when available” and “before backing, [to] inspect areas to the rear to verify that no ... obstructions are in the path of movement.”

However, Welsch satisfied none of these requirements before backing up his welding truck on the day in question. He did not get out of the truck to view the area behind him or to check for obstructions he had to avoid in backing up. He did not contact his supervisor, presumably the Roadmaster, to ask for help in backing out of

the right-of-way road. His need for such guidance should have been apparent to him given the narrowness of the road. In short, he failed to take reasonable steps to protect the safety of men and equipment. Given these circumstances, it was hardly surprising that he backed into a signal apparatus. There were no extenuating circumstances. He admitted at the Investigation that he backed up without bothering to inspect the area behind him. Had he done so, he probably would have avoided the collision. That is true as well of his failure to ask his supervisor to provide him with a Helper who could alert him to any obstruction as he backed up. Such failure to take reasonable measures of care was, as the Carrier alleges, a “serious” safety violation.

The Carrier presented substantial evidence of Welsch’s guilt.

Second, the Organization asserts that the discipline assessed Welsch was “excessive, unreasonable, and an abuse of the Carrier’s discretion”

It should be emphasized again that Welsch’s offense was serious. The consequences of his carelessness could have been far more severe. Employees could have been injured; property damage could have been far greater; and the disruptive effect on train movements on the one active track could have been far greater. And his employment record is not unblemished as the Organization asserted. He had been disciplined three times prior to this September 2009, 30-day record suspension – a censure in December 1996, a 20-day suspension in October 1997, and a 30-day record suspension in October 2007 along with a one-year probationary period.

Given these circumstances, the discipline imposed in September 2009 in the current case was neither excessive nor unreasonable. And it cannot be said, on the record made in this case, that Welsch’s discipline in September 2009 represented disparate treatment.

The Organization asks that the discipline be set aside on the grounds that the Carrier failed to provide Welsch with the required Notice of Investigation and failed as well to provide Welsch with fundamental “due process” rights.

Neither of these arguments is persuasive. It is true that Rule 40 establishes the following notice obligation:

“C. At least five (5) days . . . advance notice of the investigation shall be given the employee and the appropriate local organization

representative, in order that the employee may arrange for representation by a duly authorized representative or an employee of his choice, and for the presence of necessary witnesses he may desire....”

The Investigation was initially scheduled to be held on July 27, 2009. The Carrier sent a notice to that effect to Welsch’s home on July 20, 2009, some seven days before the Hearing. It could not be personally delivered because Welsch was working away from home with a mobile welding gang. Another unsuccessful effort was made to deliver the notice through certified mail on July 22. Then the parties apparently agreed to two postponements of the Hearing. It was finally held on September 3. Not until then did Welsch see a copy of the Carrier’s notice.

The Organization contends that because the Carrier knew (or should have known) Welsch was not at home in July, it should have arranged an alternate form of delivery and should be held responsible for its failure to adhere to Rule 40-C. There are several difficulties with this argument. A number of Board Awards have held that, absent evidence that the employee was prejudiced by the Carrier’s failure to provide timely notice, this failure does not justify invalidating the discipline. What evidence there is reveals that Welsch was ably represented at the Investigation by a representative of the Organization and was given full opportunity to call witnesses and present evidence. Welsch made no effort to show how he had been adversely affected by the Carrier’s late notice. Indeed, it is difficult to believe he had not known of the Investigation date for some time well before September 3.

The Organization alleges too that because Division Engineer Turnbull had “multiple roles” to play in this case, Welsch was denied fair and impartial treatment.

Turnbull participated in the pre-investigation of Welsch, helping to determine whether there should be a formal Investigation; he was in charge of the formal Hearing; he presumably had a large voice in determining whether to issue a notice of discipline and signed the notice. The Board does not know whether this arrangement is customary or unusual. In either event, nothing in the parties’ Agreement or in the Rules appears to limit the number of roles a Carrier official can play in the disciplinary process for a given employee. We recognize the benefits of a fresh, unbiased look at the facts and arguments in a case at each stage of the review procedure. But we recognize too the benefits from a past familiarity with a given problem so long as the decision-maker has an open mind. The parties themselves are in a much better position to

determine how to balance such approaches than a Referee. If changes are to occur in the way an Investigation chair is to function, that is for the parties to decide. What is important, for purposes of this dispute, is that the “multiple roles” have not been shown to have prompted pre-judgment by Turnbull. We can find no evidence that Welsch was denied fair treatment. Accordingly, the claim must be denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

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