

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41077
Docket No. MW-41182
11-3-NRAB-00003-090434**

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig 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] imposed upon Mr. P Fries by letter dated October 24, 2008 for alleged violation of ‘ ***BNSF Railway MOW Operating Rule 1.6.1 Conduct – Careless of the safety of themselves and others, effective October 31, 2004 including revisions up to February 29th, 2008, MOW Safety Rule S-1.1 Job Safety Briefing. S-14.2 Working On or About Equipment and Machines, effective October 30, 2005 including revisions up to June 5, 2008, & Engineering Instructions 1.10 Lockout/Tagout revised November 2007.’ in connection with his personal injury and charges of alleged failure to properly lock/out and tag/out the BNSF Grove Crane #X1600076 and alleged failure to have proper job safety briefing when working at/or near mile Post 29.2 on the Valley Subdivision on July 28, 2008 while assigned as GP2 Machine Operator, Gang TMOX2241 working with Guernsey Lowboy was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement [System File C-08-D040-3/10-08-0547 (MW) BNR].**

- (2) The discipline [Level S thirty (30) day record suspension] imposed upon Mr. S. Joyce by letter dated October 24, 2008 for alleged violation of ‘*** BNSF Railway MOW Operating Rule, 1.6.1 Conduct – Careless of the safety of themselves and others, effective October 31, 2004 including revisions up to February 29, 2008, MOW Safety Rule S-1.1 Job Safety Briefing, S-14.2 Working On or About Equipment & Machines, effective October 30, 2005 including revisions up to June 5, 2008, & Engineering Instructions 1.10 Lockout/Tagout revised November 2007.’ in connection with charges of alleged failure to properly lock/out and tag/out the BNSF Grove Crane #X1600076 and alleged failure to have proper job safety briefing which allegedly resulted in an injury to Mr. P. Fries when working at/or near Mile Post 29.2 on the Valley Subdivision on July 28, 2008 while assigned as GP2 Machine Operator, Gang TRPX0004 working with Guernsey Lowboy was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement.
- (3) As a consequence of the violation referred to in Part (1) above, Claimant P. Fries shall now receive the remedy prescribed by the parties in Rule 40(g).
- (4) As a consequence of the violation referred to in Part (2) above, Claimant S. Joyce 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 28, 2008, Claimant P. Fries, with almost 29 years of service, was assigned to operate a lowboy tractor-trailer as a Group 2 Operator on Mobile Gang TMOX2241. Claimant S. Joyce, with 27 years of service, was assigned to operate a Grove Crane as a Group 2 Operator on Rail Gang TRPX0004.

On July 28, 2008, Claimant Joyce's crane was scheduled for transport from Scottsbluff, Nebraska, to Council Bluffs, Iowa, via Claimant Fries' lowboy tractor-trailer. Prior to loading the equipment, Claimant Joyce made a move near Mile Post 29.2 that required the use of the crane's outriggers. In order to properly transport this crane on the lowboy, Claimant Fries requested each outrigger be stowed, which involved retracting the outrigger to an upright position and the engagement of a safety lock pin to resist vertical movement. Claimant Fries offered to help engage the safety lock pins after Claimant Joyce retracted each of the four outriggers on his crane. During the combined effort of stowing the outriggers, Claimant Fries discovered that the safety lock pin would not engage for one outrigger and told Claimant Joyce to lower the outrigger slightly "to line the holes up" while he attempted to re-engage the pin. This course of action caused the safety lock pin to pinch Claimant Fries' hand between the lock pin and the frame of the crane, resulting in his left index finger being crushed.

By letter dated August 4, 2008, the Carrier directed the Claimants to report for a formal Investigation on August 12, 2008:

"... for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to properly lock/out and tag/out the BNSF Grove Crane # X1600076 according to the Owner's Manual and BNSF Policy, which resulted in an injury to yourself when working at or near MP 29.2 on the Valley Subdivision, on July 28, 2008, while assigned as GP2 Machine Operator, Gang TMOX2241 working with Guernsey Lowboy."

The Hearing took place on October 2, 2008, pursuant to which, in letters dated October 24, 2008, the Claimants were notified that they were each being assessed a Level S 30-day record suspension as a result of their violation of BNSF Railway MOW Operating Rule 1.6.1 Conduct, as well as MOW Safety Rules S-1.1 and S-14.2.

By letter dated October 30, 2008, the Organization appealed the decision based on the contentions (1) the Carrier did not meet its burden of proof (2) the discipline assessed was unwarranted and excessive, and (3) the Claimants were denied a fair and impartial Hearing. On December 2, 2008, General Manager S. Sexhus denied the appeal. On December 23, 2008, the Organization appealed the matter to General Director of Labor Relations W. A. Osborn, who denied the appeal on February 19, 2009. A conference was held, but the parties were unable to resolve the matter. The matter was then appealed to the Third Division.

According to the Organization, the discipline imposed upon the Claimants was unwarranted, harsh, and excessive. The Organization contends that the burden of proof in a discipline matter such as this is on the Carrier and asserts that burden has not been met. The Organization claims that (1) the Carrier has been arbitrary and capricious in its treatment of the Claimants (2) the Carrier abused its discretion and (3) the Carrier's determination to discipline the Claimants was based on inconclusive evidence, thus rendering the discipline harsh and excessive. The Organization further contends that the Claimants were denied a fair and impartial Hearing and asserts that the Carrier should now be required to overturn the discipline and make the Claimants whole for all losses.

Conversely, the Carrier takes the position that it met its burden of proof. The Claimants were afforded a fair and impartial Hearing in accordance with the requirements of the Agreement. According to the Carrier, a review of the transcript developed during the Hearing makes it clear that the Claimants are guilty as charged. The evidence shows that the Claimants engaged in the unsafe behavior alleged. Based on their behavior, the Claimants' discipline was appropriate.

In discipline cases, the Board sits as an appellate forum. We do not weigh the evidence de novo. As such, our function is not to substitute our judgment for that of the Carrier, nor to decide the matter in accord with what we might or might not

have done had it been ours to determine, but to rule upon the question of whether there is substantial evidence to sustain a finding of guilty. If the question is decided in the affirmative, we are not warranted in disturbing the penalty unless we can say it appears from the record that the Carrier's actions were unjust, unreasonable or arbitrary, so as to constitute an abuse of the Carrier's discretion. (See Second Division Award 7325 and Third Division Award 16166.)

After a thorough review of the case record, the Board found substantial evidence to uphold the Carrier's position in whole. The Board notes that the Carrier proved that the Claimants engaged in the unsafe behavior that led to the accident and subsequent discipline. The Claimants were afforded a fair and impartial Hearing. Further, the Board finds that the 30-day record suspensions were appropriate based on their transgressions. Accordingly, the Board will not overturn the assessed discipline.

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 18th day of October 2011.