Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41143
Docket No. MW-41441
11-3-NRAB-00003-100285

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

(Brotherhood of Maintenance of Way Employes 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 Agreement was violated when the Carrier imposed discipline (removed and withheld from service) upon Mr. S. Wolfe on December 18, 2008 and continuing, and when the Carrier failed to offer Mr. Wolfe the Alternative Handling pursuant to the Safety Agreement, or timely respond to a request for Alternative Handling, in connection with separate investigation notices dated December 18, 2008 and December 19, 2008 (System File B-M-1951-M/11-09-0191 BNR).

(2) As a consequence of the violations referred to in Part (1) above, Claimant S. Wolfe shall now '. . . be returned to service and made whole for any loss of earnings from December 18, 2008, until Claimant is returned to service. We further request that Claimant be reimbursed for personal mileage, on a round trip basis, from his home in Whitefish, Montana to Shelby, Montana where the investigations were held and reimbursement for lodging and meals to attend the investigations. We also request that Claimant be made whole for any loss of fringe benefits, including but not limited to, insurance, railroad retirement credit, vacation credit, etc.'"

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.

Claimant S. Wolfe has held seniority in various classifications during his more than 27 years of service as a BMWE-represented employee.

On the morning of December 18, 2008, the Claimant was working as a Relief Track Inspector on the Hi Line Subdivision of the Montana Division. The Claimant was operating a Hy-Rail vehicle over the Carrier's mainline track. It is uncontested that anyone occupying the main track using such a vehicle must strictly comply with the relevant Rules and Instructions. The Carrier contends that the Claimant violated certain Rules and Instructions, resulting in a collision between the Claimant's Hy-Rail vehicle and a westbound freight train. According to the Carrier, the Claimant committed two Rule violations that ultimately led to the collision. First, he did not engage the HLCS mechanism that would have indicated the location of his Hy-Rail. Second, he violated his track authority.

By letter dated December 18, 2008 the Carrier directed the Claimant to report for a formal Investigation on December 26, 2008:

> ". . . for the purpose of ascertaining the facts and determining responsibility, if any in connection with alleged failure to have Main Track Authority between East Switch Devon and West Switch Lothair which resulted in westbound Train Q-CHCPTL3-13A

striking HyRail BNSF Vehicle 17561 on Single Main near Mile Post 1042.3 at approximately 1030 hours on Thursday, December 18, 2008 while working as a Relief Track Inspector on the Hi Line Subdivision.

You will be withheld from service pending the results of the investigation."

The Hearing was postponed by mutual agreement and eventually took place on January 20, 2009, pursuant to which, in a letter dated February 9, 2009, the Claimant was notified that he was assessed a 30-day Level S record suspension for his violation of the BNSF Engineering Instruction 15.4.11 - Hy-Rail Limits Compliance System (HLCS). The Claimant was also dismissed for his violation of the following Rules, both of which were categorized as dismissible offenses:

- BNSF Maintenance of Way Operating Rule 10.3 - Track and Time. Your failure to have Track and Time authority caused a collision that resulted in Hy-Rail vehicle 17561 which has a replacement value greater than $100,000- being deemed a total loss.

- BNSF Maintenance of Way Operating Rule 1.6 - Conduct. Employees must not be: 1 Careless of the safety of themselves or others, and 2. Negligent. You were both careless of your own safety and the safety of the train crew, and negligent, when you failed to consult your manual or track profile after being granted specific Track and Time authority, which resulted in your being on the track without authority.

By letters dated December 22, 2008 and January 5, 2009, the Organization requested Alternative Handling for the Claimant. On January 12, 2009, Division Engineer R. A. Rindy denied the request for Alternative Handling. On January 12, 2009, the General Chairman requested a conference to discuss the matter. On January 18, 2009, Assistant Vice President Engineering D. Hestermann responded to the request. Thereafter, on February 6, 2009, the Organization filed the instant claim. On April 7, 2009, Director of Maintenance Support Baker denied the

request. On May 20, 2009, the Organization appealed the matter to General Director of Labor Relations W. A. Osborn, who denied the appeal on July 16, 2009. A conference was held, but the parties were unable to resolve the matter. The matter was then appealed to the Third Division.

The Alternative Handling Procedure (AHP) reads, in relevant part, as follows:

"Section 1-Alternative Handling Eligibility

* * *

B. When a disciplinary 'notice' is issued to an employee, the charged employee, if eligible, will receive notice of alternative handling eligibility. If a disciplinary 'notice' to the employee is not required under the applicable CBA, an equivalent ' notice' to the employee will be used as notification.

C. Each employee subject to this Agreement is eligible for alternative handling provided he/she acknowledges accountability for the violation within five (5) days of receipt of the investigation notice. If an investigation notice is not required under the applicable CBA, employee must acknowledge accountability within five (5) days of the equivalent 'notice' of discipline.

D. Alternative handling, if requested, will be made available for rule violations except as defined in a) through f) below. Such rule violations to which alternative handling is applicable are referred to as 'covered' rule violations.

The following Rule violations are not covered:

* * *

c) Rule violation resulting in very serious personal injury to anyone (life threatening or career ending) or major property damage ($100,000 or greater)

* * *

Section 2 - Alternative Handling Process

A. Requests for alternative handling must be made in writing. If the employee is eligible for alternative handling, as defined in Section 1, training and corrective action will be appropriate to the type of offense and the employee's work history.

B. Alternative handling shall be accomplished through a written plan of employee education. Each written plan will be developed based on the following general guidelines . . . ."

According to the Organization, the Carrier acted unreasonably when it denied utilization of the AHP. First, the amount of damage did not exceed $100,000.00, contrary to the Carrier's contention. Second, because the Carrier did not timely respond to the Organization's request for AHP, the Claimant is entitled to AHP. The Organization asserts that the Carrier should now be required to grant AHP to the Claimant.

Conversely, the Carrier takes the position that the Organization has the burden of proof and failed to meet that burden. First, it is clear that the amount of damage to the vehicle exceeded $100,000.00. The replacement cost was in excess of $103,000.00. Because the vehicle was considered "totaled," the nature of the accident rendered the Claimant ineligible for AHP. Second, the Carrier contends that there was no need to respond to the Organization's request for AHP because the Claimant did not qualify for AHP in this case. Therefore, the Carrier asks that the matter be denied.

The burden of proof in this matter is on the Organization to prove that the instant matter was eligible for AHP. The Board finds that the Organization failed to meet its burden of proof. After a thorough review of the record, the Board does

not find that the Carrier acted unreasonably. The replacement cost of the vehicle clearly exceeded $100,000.00. Therefore, the Claimant was not eligible for AHP. Accordingly, the claim is 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 21st day of November 2011.

LABOR MEMBER'S DISSENT
TO
AWARD 41143 , DOCKET MW-41441
(Referee Bierig)

Although Awards 41142 and 41143 involve the same Claimant and the same incident, the awards address separate disputes over the interpretation and application of the Agreement. Inasmuch as the Board in the end ordered that the Claimant be reinstated to service with seniority unimpaired, a limited concurrence to Award 41142 is warranted. However, in its decision in Award 41143, the Majority has made a fundamental error which has led it to an erroneous decision in each of these awards. Therefore, dissent is also required.

As recounted within Awards 41142 and 41143, the parties to the Agreement, i.e., the Carrier and BMWE, had in place a negotiated agreement for Alternative Handling of certain incidents that might otherwise result in disciplinary proceedings. Said agreement was fashioned to apply in just such a case as this one. Under the terms of that Agreement, rather than face a disciplinary hearing and subsequent imposition of punitive measures meted out by the Carrier, if found guilty, the employe could accept responsibility for a rule violation and receive additional coaching and training aimed at preventing a recurrence of the rule violation, resulting in a safer workplace for all of the employes. The parties' Agreement provided that the Carrier could deny Alternative Handling to an employe under certain circumstances. It is unnecessary to list all those criteria here, because throughout the handling of this matter, the Carrier made it clear that it was denying Alternative Handling to the Claimant based on its unfounded contention that the incident involved here resulted in property damage in excess of $100,000. There was no dispute that the Claimant was entitled to Alternative Handling Procedures in the event the property damage was determined to be less than $100,000. Hence, the disposition of the claim in Award 41143 turned on a determination of whether the Carrier had met its burden of proof regarding the monetary value of the property damage involved. It did not.

In order to arrive at a monetary figure for the property damage incurred in this instance, a reasonable person habitually engaged with valuation issues, working under the universally accepted American rule of law, would look at the value of the vehicle in question as the actual value at the time of the collision. That is, in insurance, in commercial contracts, in cases of railroad damage to lading, in cases when a railroad hits a vehicle at a crossing, etc., the value of property that is destroyed is the value of the property, as is, at the time it is damaged. In this connection, the Organization pointed out that the vehicle in question had been in service eight (8) years, had recorded 166,620 miles on the odometer and had been parked for some time but was taken out of storage, with the Claimant being directed to use it to perform his track inspection duties. Given the undisputed condition of the vehicle, its value was at or near its fully depreciated salvage value. Indeed the auto industry "Blue Book" value of the vehicle was listed as approximately $7,500. Even with some allowance for usable equipment with which it may have been outfitted for railroad use, the value of the vehicle could not remotely have approached $100,000.

In addition to the foregoing, in fulfilling its legal duty to accurately report damages incurred from the accident to the Federal Railroad Administration (FRA) in a contemporaneous fashion, BNSF reported damages from the collision at a mere $51,500.00 ($50,000.00 for the truck, coupled with $1,500.00 worth of damage to the locomotive involved). While no one could reasonably

believe that the value of the eight year old equipment attached/installed on the vehicle could even approach $40,000, even taking the damage report to the FRA at face value, the dollar value of the property damages from the incident barely exceeded half of the amount that would have allowed the Carrier to deny Alternative Handling to the Claimant under the Agreement that was in effect at the time. The Board clearly erred when it failed to give any weight to the Carrier's own federally mandated report of damages filed with the FRA.

In order to arrive at its ridiculously inflated estimate of the cost of the property damage due to this incident, the Carrier chose not to rely on the actual value of the truck, not on its own report of property damage to the FRA, but, instead, argued that for the special purpose of denying the Claimant access to the Alternative Handling procedures, its estimate of the replacement cost of the vehicle should control. Moreover, the Carrier further insisted that it need not use the cost of a similarly equipped model as its comparison, but that it would use the cost of an upgraded model of truck that was not even designed to be used by a track inspector. The reason for these accounting gymnastics is clear when one realizes that the Carrier went as far as it needed to go in order to assert that the property damage exceeded $100,000, providing the Carrier with grounds – however bogus – upon which to arbitrarily deny Alternative Handling to the Claimant.

In the face of the valuation shenanigans in which BNSF engaged, the Organization provided evidence of the cost of the so-called replacement vehicle – evidence that showed the cost to be less than $100,000 – and challenged the Carrier to provide some evidence to support its contention concerning that vehicle's cost. However, the Carrier refused to provide a shred of competent evidence (such as an invoice or a bill of sale) to support the estimate of the cost. Instead, the Carrier relied on an unsigned e-mail purportedly from a Carrier official that was issued months after it had become apparent that all of the actual direct evidence of the cost of the truck involved in the collision supported the opposite conclusion, i.e., that the dollar cost of the property damage did not remotely approach $100,000. Awards of this Board are legion concerning the weight to be given generalized and unverified "statements" when confronted by competent evidence with which they conflict. In Award 41143, the Board chose to ignore those well-established principles. Therefore, Award 41143 is palpably in error and cannot serve as precedent in any future case.

Finally, it is undisputed that had the Claimant been afforded Alternative Handling in this case, the dispute decided in Award 41142 would never have arisen. Consequently, the effect of the Board's error in Award 41143 is compounded in Award 41142, inasmuch as the result is a "lengthy suspension" that would not have been imposed absent the Carrier's violation of the Agreement.

For these reasons, the Organization respectfully dissents.

Respectfully submitted,

Gary L. Hart
Labor Member