

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41431
Docket No. MW-41564
12-3-NRAB-00003-110032**

The Third Division consisted of the regular members and in addition Referee William R. Miller 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 and a three (3) year probation period] imposed upon Mr. G. Sportsman by letter dated January 8, 2010 for alleged violation of MOWOR 1.6 Conduct and MOWSR S-7.3.1 Swinging Tools for alleged carelessness and/or negligence concerning swinging tools when, while working near Mile Post 375.8 on the Marcelline Sub on November 24, 2009, he was involved in a work incident that resulted in his personal injury while in the process of making a thermite weld, was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File C-10-D040-9/10-10-0105 BNR).**
- 2. As a consequence of the violation referred to in Part (1) above, Claimant G. Sportsman 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.

The undisputed facts indicate that on November 24, 2009, the Claimant was assigned as a Truck Driver. The Claimant and another Truck Driver were assisting the Marceline Section Gang repairing rail defects.

The Claimant and fellow employee Florine were in the process of moving a tie, a task they had successfully done on three occasions earlier in the day. The task required removing ballast, rock and mud around the tie in order to have a hole deep enough for a hydraulic jack and supporting blocks - 4" x 6" blocks of wood, one foot in length.

The Claimant set the hydraulic jack in the hole while Florine placed blocks behind the jack. As they began raising the tie, they recognized that they did not have enough jack to complete the task, so they let off the pressure and then turned the blocks end for end so that there would be more pushing power.

Florine attempted to set the wooden block in place, but it did not go down far enough. He then tapped the block lightly with a ten-pound sledgehammer without success. Florine then decided to strike it harder, and while preparing to strike the block a second time, the Claimant readjusted the block. Unfortunately, Florine did not notice the Claimant adjusting block and swung the hammer hitting the Claimant on his right finger breaking it in three places.

On November 25, 2009, the Carrier directed the Claimant to report for a formal Investigation on December 7, which was mutually postponed until December 14, 2009:

“ . . . for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged carelessness and/or negligence concerning swinging tools when on November 24, 2009, at approximately 1515 hours near MP 375.8 on the Marceline Sub, you were involved in a work event that resulted in a personal injury while in the process of making a thermite weld.”

On January 8, 2010, the Claimant was found guilty as charged and assessed a Level S 30-day record suspension and a three year probationary period.

It is the position of the Organization that the Claimant was denied a “fair and impartial” Hearing because the charges were not precise and the Carrier allowed “hearsay” testimony, after which he was subjected to disparate treatment. Additionally, it argued that the record shows that the fault of the accident was due to the fact that Florine swung the hammer without alerting the Claimant that he intended to hit it harder, which was not fault of the Claimant. It concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the Carrier's position that there were no technical violations in the handling of the Claimant's case and he was not denied a “fair and impartial” Hearing. It argued the facts indicate that the Claimant carelessly attempted to adjust a block without telling his co-worker who was about to strike it with a sledgehammer; he admitted as much during the Hearing and in his personal injury report. The Carrier closed by asking that the claim remain denied.

The Board thoroughly reviewed the record and transcript and is not persuaded that any alleged procedural violations rise to the level to sustain the claim without reviewing the merits, or that the Claimant was denied his Agreement “due process” rights.

The facts as set forth above are not in dispute. The transcript reveals the Claimant admitted that he attempted to adjust a block while his co-worker was

swinging a maul to strike that block. Specifically, the Claimant was questioned as follows:

“Michael Heille: But you did place your hand in ...?”

Gary Sportsman: That is correct, that is correct.

Michael Heille: And it was struck by a hammer?

Gary Sportsman: Yes, it was.

Michael Heille: So it could have been prevented if you didn't put your hand on a block that was gonna be struck by a hammer?

Gary Sportsman: That is correct.” (Emphasis added.)

The record clearly reveals that the accident that occurred on November 24 was the result of the Claimant being careless when he placed his hand on top of the block for readjustment purposes without saying anything and fellow employee Florine swinging the maul without forewarning. Simply put, the Claimant's injury was the result of both employees being careless. Substantial evidence was adduced at the Investigation so as to warrant the conclusion that the Carrier met its burden to prove that the Claimant was guilty as charged.

The only issue remaining is whether the discipline assessed was appropriate. The record reveals that Florine accepted responsibility for his part in the accident. In this instance, the Carrier deemed it appropriate to discipline Florine. It did so in an alternative fashion in accordance with its Safety Incident Analysis Process (SIAP). The Carrier assessed Florine a ten-day record suspension. As noted in the Statement of Claim, the Claimant was administered a harsher penalty. The Organization argued that it proved the Claimant was subjected to disparate treatment. Contrary to the Organization's assertion, the Board concludes that the fact that Florine was treated in a different manner does not substantiate disparate treatment. As the Board held in Third Division Award 31628:

“Disparate treatment means that similarly situated employees have been treated differently. Without having any detailed facts and surrounding circumstances of the other incidents, we are unable to say that the employees involved were situated similarly to the Claimant.” (Emphasis added)

In this case, as in the aforementioned Award, the Board has no information as to how employee Florine's disciplinary record compared to that of the Claimant. Additionally, the record indicates that unlike the Claimant, Florine accepted responsibility for his part in the accident immediately after the incident. Therefore, absent any evidence in the record substantiating that both employees were similarly situated, the Board cannot conclude that the Claimant was subjected to disparate treatment. The Board finds and holds that the discipline was assessed in accordance with the Carrier's Policy for Employee Performance Accountability (PEPA). Consequently, the assessed discipline will not be set aside because it was not excessive, arbitrary or capricious. The claim will remain 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 5th day of September 2012.