

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41489
Docket No. MW-41487
12-3-NRAB-00003-100268**

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 one (1) year probation] imposed upon Mr. S. Jensen by letter dated September 30, 2009 for alleged violation of MOW Safety Rule S-12.8 (BACKING) Vehicles, while assigned as a machine operator on Gang TMOX0683, headquartered at Douglas, Wyoming, on charges of alleged failure to use proper backing procedure in connection with a collision with a vehicle at/or near Mile Post 82.3 on the Orin Subdivision on August 14, 2009 was arbitrary, capricious, unwarranted and in violation of the Agreement (System File C-09-D040-5/10-09-0522 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant S. Jensen 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.

This case arose as a result of the Carrier having disciplined S. L. Jensen, a Machine Operator, for his alleged violation of its Safety Rules in connection with backing a motor grader into a parked Carrier truck. The Organization protests this discipline on several grounds: (1) the Carrier failed to satisfy its burden of proof with respect to the charges made against Jensen (2) the level of discipline imposed constituted disparate treatment and an abuse of the Carrier's discretion, and (3) the Carrier denied Jensen the due process generated by the Agreement, namely, failing to provide him with timely written notice of the initial investigation and failing in such notice to provide him with accurate and specific information as to his alleged violation. It requests, accordingly, that the discipline be set aside.

The facts are largely undisputed. On August 14, 2009, Jensen's gang was engaged in rehabilitating a track in the vicinity of Mile Post 83 near Bill, Wyoming. After the track switch had been dragged out of the track by a front-end loader, Jensen's job was to use a motor grader to groom and realign the track and roadbed in preparation for the insertion of a new track switch. At the same time, other employees were preparing the new switch for insertion in the track structure. There was a Carrier truck parked alongside the track where Jensen was performing his grading work. He was fully aware of the truck as he worked. He drove his motor grader back and forth with the parked truck plainly in view through the grader's windshield or through its rear and side mirrors. Indeed, he had backed the grader up numerous times until on one such move, he hit the parked truck and promptly

reported the incident to supervision. Neither Jensen nor any other employee was injured and the motor grader suffered no damage. However, the parked truck was damaged. The cost of repairing such damage was estimated to be \$2,068.00.

The Carrier believed Jensen had violated its Safety Rules and called for a formal Investigation. That Hearing was held on September 9, 2009. The Carrier's decision on September 30, 2009, was that he was guilty of a "failure to use the proper backing procedure, in your collision with a vehicle near MP 82.3. . . ." It assessed him a Level S, 30-day record suspension with a one-year probation relying on Safety Rule S-12.8 Backing, which reads in part:

"Vehicles . . . Before backing, inspect areas to the rear to verify that no personnel or obstructions are in the path of movement. When backing vehicles, including vans, but other than automobiles and pickup trucks:

Position someone near the back of the vehicle to guide movement, when available . . . Stop if the person guiding the movement disappears from view." (Emphasis added)

The Organization promptly protested the discipline.

There are three distinct issues. Whether the Carrier established Jensen's guilt through "substantial evidence?" If so, whether the discipline imposed should be reduced or set aside because of Jensen's years of service or because of alleged "disparate treatment?" If not, whether the Carrier committed certain procedural violations which served to deny Agreement due process to Jensen and thus warrant overruling the disciplinary action taken? Each of these questions will be considered separately.

Jensen was aware of Safety Rule S-12.8.1 and was aware of the truck parked in the area in which he had to operate his motor grader. Given these circumstances, the Safety Rule required that he take certain precautions when backing up his grader, namely, "position someone near the back of the vehicle [grader] to guide [his] movement, when available." Jensen did not attempt to find another employee to help guide him in backing his motor grader and thus minimize the possibility of

an accident. Rather, he determined he could complete the necessary grading without any such ground guidance. He offered no satisfactory explanation for ignoring this particular Safety Rule.

Consider, in this connection, his testimony at the formal Investigation. The questions were posed by the Conducting Officer at the Hearing; the answers were Jensen's:

“Q: You were running the motor grader, is that correct?

A: Yes . . .

Q: . . . Did you back into this vehicle [the parked truck]?

A: Yes.

Q: . . . but you had went by it [the truck] several times during the day?

A: Yes . . .

Q: Was this the first time you had backed up in this area . . . ”

A: I backed up numerous times, back and forth.

Q: Are you familiar with the Rule S-12.8.1 . . . ?

A: Yeah.

Q: . . . did you follow this rule?

A: . . . I looked in the mirror for my backing movement and then my attention was focused on other parts of the work.

Q: . . . What would that be?

A: I was grading out and . . . I was focusing on the wind row that I was grading out. There was signal wires and other things right there above. I'm afraid my focus got on those." (Emphasis added)

Jensen's words illustrate why this Safety Rule exists – namely, to prevent employees, however competent, from relying on their own view and driving skill in situations that plainly call for ground help. Had Jensen sought such help, the collision would probably never have happened. Disciplinary action was plainly justified.

The Organization asserts that three other employees had committed Rule S-12.8.1 backing violations in August 2009 and each had received a ten-day record suspension whereas Jensen was given a 30-day record suspension and placed on a one-year probation for the same offense in this case. It contends that such "disparate treatment" by the Carrier justifies setting aside Jensen's discipline.

There are several problems with this argument. The fact that Jensen appears to have been treated more harshly than the others for the same violation does not, by itself, establish "disparate treatment." This defense can prevail only where the Organization can show that "similarly situated" employees have indeed been treated differently. No such showing has been made. Consider the notice of discipline issued in each of the three other cases. Each of those notices stressed that the employee's misconduct was a "non-serious violation." But there is nothing in the record as to why the Carrier characterized the misconduct in this manner. We can only presume that those employees were found guilty of just "garden variety" carelessness. That certainly was not true of Jensen in the present case. The Carrier's notice of discipline described his behavior not just as contrary to a Safety Rule, but also as something more than carelessness. And, indeed, Jensen's behavior was a "serious" violation – driving his motor grader back and forth, ever closer to the parked truck, instead of seeking the kind of guidance available to him from another employee stationed on the ground. The Board cannot contrast such behavior with the behavior of the three other employees who received lesser discipline because no such evidence was introduced at the Hearing. Absent such evidence, it cannot be said that the other employees were "similarly situated" to Jensen. The "disparate treatment" claim is not persuasive.

The Organization further asserts that Jensen's long service, as well as the absence of prior discipline, call for a reduction in the penalty imposed. This is essentially a plea for leniency. Prior Awards have held that the Carrier has broad discretion in determining the appropriate penalty for misconduct. There has been no abuse of that discretion in this case. Indeed, the Carrier's policy called for a somewhat higher level of discipline than it imposed here.

The Organization alleges too that Jensen was denied a "fair and impartial investigation" under Rule 40C. There are two aspects to this argument, largely procedural.

The first concerns the Carrier's obligation to provide ". . . 5 days' advance written notice of the investigation . . ." so that Jensen could arrange for "representation" and the "presence of necessary witnesses." The Carrier sent the necessary "notice" by certified mail to Jensen's home on Wednesday, August 19, advising him that the formal Investigation would be held on Wednesday, August 26. The U.S. Postal Service tried to deliver the letter on Friday, August 21, but no one appeared to be at Jensen's home. It left a note at the home advising him of the attempted delivery. The letter was hand-delivered to Jensen's home by the Carrier on Monday, August 24. Subsequently, the parties agreed to postpone the Investigation to September 9.

Even assuming that the Carrier failed to meet its five-day advance notice obligation, this technical violation did not prejudice Jensen's rights under Rule 40. There is no evidence that he was disadvantaged in any way by the postponement. In any event, prior Awards establish that the date the notice is mailed, rather than received, is ordinarily treated as the application date for purposes of complying with the 5-day notice requirement.

The second concerns the Carrier's obligations to "specify [in this advance notice] the charges for which the investigation is being held. . . ." It apparently placed incorrect Mile Post numbers in its Notice of Investigation. Here too, however, there is no evidence that this typographical error unfairly prejudiced Jensen in any way.

For all of these reasons, we find there is no sound basis for the relief sought by the Organization. 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.