

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41707
Docket No. MW-41658
13-3-NRAB-00003-110093

The Third Division consisted of the regular members and in addition Referee Burton White 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 discipline [Level S thirty (30) day record suspension with a one (1) year probation period] imposed upon Mr. C. Russell by letter dated December 22, 2009 for alleged failure to utilize the steering wheel cover during boom operation and alleged failure to brief on such on October 8, 2009 at approximately 1000 hours while working at/or near Mile Post 75.7 on the Angora Subdivision while assigned to Gang TSEC0381 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File C-10-D040-15/10-10-0149 BNR).**
- (2) The discipline [Level S thirty (30) day record suspension with a three (3) year probation period] imposed upon Mr. N. Oleson by letter dated December 22, 2009 for alleged failure to utilize the steering wheel cover during boom operation and alleged failure to brief on such on October 8, 2009 at approximately 1000 hours while working at/or near Mile Post 75.7 on the Angora Subdivision while assigned to Gang TSEC0381, 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 C. Russell 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 N. Oleson 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.

According to the Organization's version of the facts, Claimant C. Russell has been an employee of the Carrier since May 16, 1994. Claimant N. Oleson has more than four years of seniority with the Carrier.

The date of the conduct addressed in this matter was October 8, 2009. On October 8, 2009, Claimant Russell was the Foreman of the two-man crew. The Claimants were charged with the following misconduct:

- a. Failure to use a steering wheel cover during boom operation
- b. Failure to brief in reference to boom operation

The Claimants acknowledged that they did not brief in reference to boom operation. Claimant Russell reported that when the steering wheel cover is stored, "It's folded up in the visor, folded up in like a pie shape kind of, up in the visor." He further asserted that he took the steering wheel cover from its storing place.

Claimant Oleson acknowledged that he saw Russell remove the steering wheel cover from its storing place. The steering wheel cover was found on the driver's seat. Tony Grothe, Manager Signals, Powder River Division, asserted that the steering wheel cover was folded into a form shaped like a quarter of a pie. Teddy Robinson reported: "When they (Grothe and Russell) opened the door (of the vehicle) Mr. Grothe reached in, grabbed the steering wheel cover off the seat . . . It was folded in a pie shape, so two folds, I believe, folded in half and then over again."

Claimant Russell asserted that it was "lying on the seat I was sitting in, obviously it slid off the steering . . . wheel." Claimant Russell further asserted, without contravention, that he had never before been cited for not using a steering wheel cover and that he had never failed an audit for a steering wheel cover.

Although Grothe had a camera with him, no pictures were taken of the cover in place immediately after discovery.

Claimant Russell had previously received a formal reprimand for absenting himself from duty without proper authority on March 23, 24 and 25, 1998. Claimant Oleson had a clear record.

Foreman Russell was assessed a Level S 30-day record suspension with a one year probation period for his failure to use a steering wheel cover during boom operation and his failure to conduct a safety briefing. Claimant Oleson was assessed a Level S 30-day record suspension with a three year probation period for his failure to use a steering wheel cover during boom operation and his failure to conduct a safety briefing.

It is undisputed in the record that although the Claimants conducted a job briefing at the start of their day and as they drove to the worksite, they failed to conduct the briefing required at the very start of their activities at the work site. Consequently, both were in violation of Maintenance of Way Operating Rule 1.1 Job Safety Briefing.

There is dispute about whether Claimant Russell placed the cover on the steering wheel as required. However, there is no dispute that the steering wheel cover was found on the seat.

Tony Grothe, the Carrier official who raised the allegations against the Claimants, asserts that when found, the steering wheel cover was folded like a wedge of pie. Teddy Robinson, Grothe's fellow member on the Engineering Test Team, supported this report. The record evidence confirms that is the shape the steering wheel cover is in when stored above the visor. If it truly were folded as contended by the Carrier's witnesses, the conclusion that the cover was never placed on the steering wheel becomes inescapable.

Claimant Russell acknowledges that when the steering wheel cover was found, it was laying on the seat. However, he asserted that he placed the cover on the steering wheel, and because it was later found on the seat, he concludes that it must have fallen off of the steering wheel.

During his testimony at the Investigation, Grothe conceded the "possibility" of a cover falling onto the seat:

"Well, the steering wheel cover is round, and we have seen them slide off the steering wheel before. They'll either end up on the floor, or they'll end up in the seat. But normally they'll still be in the, you know, they'd be lying flat in a round position."

Later in his account at the Investigation, Grothe stated:

"In my 34 years of railroad experience, so let's just say in my years of experience as an Officer, when we find the steering wheel covers that have fallen off, they're on the floor. They are not folded up on the seat."

The question then becomes: What was the condition of the cover when it was found lying on the seat? As argued by the Organization, the burden of proof is on the Carrier. One aspect of the record raises a question. The Organization is correct when it notes that the photographs introduced at the Investigation were "staged." They were taken after the fact and they were arranged to illustrate the charge leveled against the Claimants. As the Organization contends, they have no probative value.

The fact that no pictures were taken at the scene is also of concern. Grothe had a camera with him at the time of the event. Nevertheless, he did not take any

pictures. His reason for not doing so was: "I could not take a picture of it that day because Mr. Russell wanted me to drop the steering wheel cover to the ground to, so he could show me how this thing could fold itself into that position."

Grothe was the superior at the scene. It is hard to understand why he could not have taken a picture of the cover as he found it and then allowed Claimant Russell to demonstrate whatever he cared to. Moreover, it is hard to understand why Russell, who claimed the cover had fallen from the steering wheel onto the seat, would want to illustrate his position to Grothe by dropping the cover onto the ground.

Although there are weaknesses in each party's presentation, after considering all the input, the Board concludes that it is more likely than not that the cover was found on the seat in the shape contended by the Carrier. Thus, we conclude that the charges levied against the Claimants were established by substantial evidence.

However, based on the totality of the unique circumstances of this case the Board finds it appropriate to reduce the penalty for each of the Claimants to a Coaching and Counseling letter.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 16th day of September 2013.