Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
THIRD DIVISION

Award No. 41814
Docket No. MW-41739
14-3-NRAB-00003-110358

The Third Division consisted of the regular members and in addition Referee Burton White when award was rendered.

PARTIES TO DISPUTE: **(Brotherhood of Maintenance of Way Employes 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 and a one (1) year probation] imposed upon Mr. J. Fulton by letter dated March 25, 2010 for alleged violation of MOWSR S-12.1.1 - 'Every company driver must: Know and obey local, state, and federal laws and regulations for operating vehicles, both on and off company property.' in connection with alleged failure to operate a vehicle in a careful and safe manner when he collided with another vehicle at approximately 1600 hours on January 19, 2010, on Interstate 5, near Tacoma, Washington, while working as a track inspector (TINS0432) headquartered at Tacoma, Washington, on duty at 0700 hours was improper, unjust, on the basis of unproven charges and in violation of the Agreement (System File S-P-1492-G/11-10-0296).

(2) As a consequence of the violation referred to in Part (1) above, Claimant J. Fulton 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.

There is no dispute about the fact that the Claimant, an employee with 17 years of seniority, was involved in an accident while driving a Carrier vehicle. The accident took place on a public thoroughfare. A four page Police Traffic Collision Report (Report) was issued by a State of Washington police officer.

The Report contained the following information:

- **From page one:**
    - **The accident took place**
        - **at 3:53 P.M. on January 19, 2010,**
        - **at mile post 0.11 on State Route 16,**
        - **25 feet east of Nalley Valley.**
    - **Vehicle number one (driven by the Claimant) was damaged on the left front corner.**
    - **Vehicle number two was damaged on the right rear corner.**
    - **the Claimant was cited for "Improper Passing."**

- **From page three:**

> **"Unit number two traveling WB SR 16 lane number two of two. Unit number one changing lanes from lane number one**

> **to lane number two. Unit number one collided with unit number two."**

- **Page four of the Report is a diagram of the officer's understanding of the collision.**

- **Page two of the Report indicates that the document was filed on January 22, 2010.**

By letter dated January 28, 2010, the Carrier summoned the Claimant to an Investigation ". . . for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to operate a company vehicle in a careful and safe manner when you collided with another vehicle at approximately 1600 hours, January 19, 2010, on Interstate 5, near Tacoma Washington . . . ."

The Investigation was held on February 24, 2010, and, following that event, the Claimant was issued a Level S 30-day record suspension ". . . for your failure to operate a company vehicle in a careful and safe manner, when you collided with another vehicle at approximately 1600 hours, January 19, 2010, on Interstate 5 near Tacoma Washington . . . ." The letter also stated, "It has been determined through testimony and exhibits brought forth during the Investigation that you were in violation of MOWSR S-12-1.1 – 'Every company driver must: -Know and obey local, state, and federal laws and regulations for operating vehicles, both on and off company property . . . ."

The Organization challenged the Carrier's conclusion on procedural and substantive grounds. On procedure:

> **"The Carrier did not properly 'specify' the charges under Rule 40C of the Agreement, or else did not properly hew to the 'specified' charges contained therein."**

and

> **"The Investigation's Conducting Officer failed to act 'fairly and impartially', as required by the Agreement."**

The substantive challenge:

> **"The Carrier failed to sustain its burden of proof in this discipline case."**

This challenge made the following assertions:

- **"The Carrier failed to present any evidence regarding the incident, as charged."**
- **"The police report evidence, even if accepted as such, is a nullity, owing to its own internal and material inconsistency."**
- **The Carrier cannot validly presume a rule violation has occurred, simply because an accident has been shown."**
- **The only remaining and valid evidence in this case exonerates the Claimant of all alleged wrongdoing."**

The Organization also claims, for the sake of argument, that even if one assumes the Claimant's guilt, the punishment assessed him was excessive.

The Organization points out that Rule 40C requires "specificity:" "The notice must specify the charges for which investigation is being held." It argues that the Carrier's case is based entirely upon the police report concerning a collision that took place on January 19, 2010, involving a Carrier vehicle driven by the Claimant and notes that that report cites an accident on State Route 16 while the notice stated that the accident took place on Interstate 5:

> **". . . Claimant physically could not have been involved in an accident on both roads at the same time. As such . . . these Carrier charges were entirely misleading and thus lacked proper 'specificity,' as required under Rule 40C of the Agreement . . . ."**

The Carrier counters that neither the road name nor the location of the collision was "material to the question of the Claimant's guilt or innocence," and

that the site identification had not "in any way prejudiced the Claimant's ability to prepare his defense." The Carrier notes that the Claimant reported the accident to his Supervisor and showed him the citation and thus was aware of what the Investigation was to address. "Unless he had another collision on that day and time, there could be no confusion in his mind as to what this Investigation was about." Moreover, the Carrier states, the accident took place on the ramp connecting I-5 and SR 16.

The Organization notes that both prior to and after the Investigation, the Carrier consistently referred to the site of the accident as Interstate Route 5. Given the realities shown in the record, this strikes the Board as a distinction without a difference. The record establishes that the accident took place on State Route 16. State Route 16 runs from I-5. It moves north from where it joins the interstate highway and then curves to the west. At the very junction of the two roads, I-5 that had been following a north – south path curves to the east. The police report indicates that the collision took place at milepost 0.11 on SR 16. In other words, it took place at or near the merger of the two roads.

It is unfortunate that the Carrier's communications continually referred to the accident happening on I-5, but that is a slim reed upon which to challenge the charge given that all involved were fully aware of the focus of the Investigation. In the best of worlds, the mistake would have been corrected, but a review of several prior Awards involving these parties indicates that both have perfected the practice of cutting and pasting material throughout the threads of correspondence pertaining to a dispute. What is important in this case is that the record makes clear that both parties were aware of the purpose of the Investigation and of the accident that it addressed.

One must assume that the specificity required by Rule 40C was placed in the Agreement to make sure that an employee who is summoned to an Investigation is sufficiently aware of the charges so that meaningful preparation can be conducted. If a notice does not achieve this end, the cure is not automatic exoneration, but a suspension of the Investigation so as to allow reasonable time for preparation. The Claimant was offered this opportunity but declined it. Both the Claimant and the Organization indicated that they were prepared to proceed with the Investigation.

From How Arbitration Works:

> **"Arbitrators will, in many cases, refuse to uphold management's action, where it failed to fulfill some procedural requirement specified by the agreement. If, however, an arbitrator feels the company has complied with the spirit of the procedural requirement, and the employee was not adversely affected by management's failure to comply, the company's action may be deemed sufficient." (Kenneth May, Editor-in-Chief, Elkouri & Elkouri, How Arbitration Works, 7th ed., Committee on ADR in Labor & Employment Law, American Bar Association Section of Labor and Employment Law; Bloomberg BNA, Arlington, Virginia, 2012 Ch. 15.3.F.ii.)**

As the above discussion indicates, the Board does not conclude that in the instant case the Claimant was adversely affected.

The second procedural objection raised by the Organization is its charge that "The Investigation's Conducting Officer failed to act 'fairly and impartially,' as required by the Agreement." Once again, the Board does not agree. There is no question that this particular Hearing was – to put the matter gently – not smoothly run, but one might surmise from such matters as the presence of an "Assistant Conducting Officer" and the frequent recesses called by the Conducting Officer before he made decisions, that the Conducting Officer might have been relatively inexperienced in the role. Other than the fumbling that took place during the course of the Hearing, the Investigation demonstrated no substantial difference from other Hearings in which the Conducting Officer has the dual role of presiding and ensuring that there is a full presentation of the Carrier's case.

In addition to perceivable insecurity on the part of the Conducting Officer, the Carrier assigned the role of its sole witness to a person who had no direct knowledge of the controversy and displayed a certain lack of certitude about the information he was charged with conveying into the record. In spite of this flaw, the key aspect of this case is the four page police report that provided the investigating police officer's conclusions about the accident.

The Organization contends that the police report, "[d]oes not even contain a typewritten attribution which might tell one reading it just who authored it." The Organization is wrong. Both pages 1 and 2 of the four- page police report bear the electronic signature "R. Durbin" with the further information, "Badge or ID number '450.' Moreover, the document attests that the signature is affixed "under penalty of perjury."

The Organization also contends that the police officer ". . . should have testified at the hearing as to what he had wrote [*sic*], subjecting his account to cross-examination." As the parties are aware, the rules of evidence do not apply in arbitrations, let alone in workplace Investigations; however, the following excerpt from the Federal Rules of Evidence provides a helpful commentary on this Organization argument:

> **"RULE 803. EXCEPTIONS TO THE RULE AGAINST HEARSAY**
>
> **The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:**
>
> *** * ***
>
> **(8) Public Records. A record or statement of a public office if:**
>
> **(A) it sets out:**
>
> **(i) the office's activities;**
>
> **(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or**
>
> **(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and**

> **(B) neither the source of information nor other circumstances indicate a lack of trustworthiness."**

In the view of the Board, the police report is a statement that sets out a matter observed by a law enforcement official and neither the source of information nor other circumstances indicate a lack of trustworthiness.

The Organization next argues that flaws in the police report render it invalid. The Organization notes that an entry on the first page of the police report states the "Charge" as "Improper Passing," but that the diagram on page 4 of the report "plainly depicts no 'passing' action by the Claimant, as it simply shows a collision, in which Claimant's vehicle impacted the other vehicle in the rear." In our view, the diagram cited by the Organization clearly shows the vehicle driven by the Claimant moving (passing?) from the right hand lane into a left hand lane.

The key information in this regard is found on page three of the report in which the investigating officer wrote, in narrative form:

> **"Unit number two traveling WB SR 16 lane number two of two. Unit number one [Claimant] changing lanes from lane number one to lane number two. Unit number one collided with unit number two."**

The Organization asserts that the Claimant's vehicle was in the passing lane. In both diagram and in text, the police report tells that the Claimant's vehicle was attempting to move from the right lane into the left lane. The right lane is not the passing lane. As the Carrier points out, the relevant state traffic law "prohibits changing lanes unless it can be done safely." In his appearance at the Investigation, the Claimant acknowledged:

> **". . . [W]hat I was cited for specifically was RCW 46.61.140. That's what I was cited for and it says improper lane usage . . . ."**

The Organization claims, "The Carrier is left with an accident involving the Claimant, but no evidence providing that the Claimant was responsible for same." The Board disagrees. We concur with the Carrier in its statement:

> **"It is the Company's position that the police citation and accident report from the local police, including a specific description of how the police believed that the Claimant had driven unsafely and violated the law, constituted substantial evidence of the Claimant's violation of BNSF S-12.1.1. At that point, the burden of proof shifted, and the Claimant was obligated to present an affirmative defense with proof sufficient to overcome the Company's evidence. But he did not do so; in fact, the Claimant did not even discuss the details of the collision, other than simply allege – contrary to the physical evidence described in the police report – that the other vehicle had hit him."**

The Claimant acknowledged that he was aware of Maintenance of Way Safety Rule 12.1.1. That Rule states:

"Every company driver must:

- **Know and obey local, state, and federal laws for operating vehicles, both on and off company property.**

*** * ***

- **Operate the motor vehicle in a careful and safe manner."**

The Organization further asserts, "[A]ll state charges that had been pending against the Claimant in connection with his 'improper passing' citation were summarily dropped." While this may be true, it was not the situation faced at the Investigation and by the Carrier Official who assessed what had been presented at that time. It was communicated to the Carrier after the Hearing was closed. Consequently, consideration of this assertion is not a matter for the Board; it is a matter to be handled between the parties.

The Organization contends that even if the Carrier were to prevail in this matter, the assessed penalty was too severe. It argues, "Like offenses have . . . most commonly been subjected to a five (5) day suspension, not a thirty (30) day." The Board has no way of knowing from this record whether this assertion is correct.

Perhaps of more importance, the Board has no way of comparing the disciplinary records of employees who received the referenced penalties. We do note that the disciplinary record of the Claimant in this case contains the following:

- **Record suspension for failure to wear seat/shoulder belt while operating company vehicle;**
- **Conditional suspension concerning first time violation of Rule 1.5 RTW;**
- **Formal reprimand for failure to report for duty at designated start time.**

Given this record, it cannot be said that the penalty that was assessed in this instance was unduly severe.

In summary:

- **The Carrier's reference to the accident having taken place on I-5 was unfortunate. Although it took place on SR 16 as that thoroughfare merged into I-5, there is no doubt that the accident took place and that the Claimant and the Organization were fully aware of what the Investigation was to address.**
- **The Claimant was aware of the Rule he was accused of violating.**
- **The document upon which the Investigation focused was an official police report, properly signed and, as such, provided credible information about the accident and about which driver was at fault.**
- **The 30-day record suspension was imposed on the Claimant who had prior discipline, at least one instance of which was a violation of vehicle safety requirements.**

In view of all of the foregoing, the claim before the Board 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 27th day of February 2014.