

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 41869  
Docket No. MW-41835  
14-3-NRAB-00003-120102**

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 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 and a one (1) year review period] imposed upon Mr. M. Koziara for alleged violation of MOWOR 1.1.2 Alert and Attentive and MOWOR 1.6 Conduct for alleged failure to be alert and attentive and carelessness when he allegedly did not safely remove crossing board at Mile Post 325.7 at approximately 0900 hours on September 9, 2010 when he suffered a personal injury was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File C-11-D040-5/10-11-0060 BNR).
- (2) As a consequence of the violation referred to in Part (1) above, the Carrier shall now remove the aforesaid discipline from Claimant M. Koziara’s personal record.”

**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.

At the time of this dispute, September 9, 2010, the Claimant, an employee with 32 years of railroad service, was working at Mile Post 325.7 in East Winona, Wisconsin. He was serving as Foreman of a crew that was removing concrete crossing planks preparing the area for a tie gang. While leading his fellow workers in this task, the Claimant instructed Gregory Zielke to use a front end loader to remove the planks and, at a point when one plank could not easily be removed, he moved into the work area. As he did so, the plank flew off and hit him in the lower leg. A later x-ray indicated that the Claimant suffered a fracture of the tibia.

The matter before the Board involves disputes about what, if anything, the Claimant communicated to the Front End Loader Operator (Operator) in two instances: whether lags remained or had been removed from the planks before work started and whether a halt order had been given before the Claimant reentered the work area and suffered his injury.

Each party presented several arguments as to why its position should be upheld.

The Carrier points to the following three points of controversy:

- What was said at the pre-work briefing about whether lags remained in the crossing planks. The Carrier contends that the Operator was informed that all of the lags were out when, in fact, one lag remained.
- What instructions the Claimant gave the Operator about the appropriate method for removing the planks. The Carrier contends

that, under the circumstances, the front end loader could not merely lift the plank off.

- Whether the Claimant gave a stop signal before moving into the Operator's work area. The Carrier contends that the Claimant moved into the area without giving sufficient (or any) halt work request to the Operator.

The Organization contends:

- The Carrier failed to consider applying the Safety Incident Analysis Process (SIAP) rather than discipline and by this failure indicated prejudice.
- The only evidence the Carrier presented was testimony from different persons each on a different aspect of the controversy. This testimony was, in each instance, countered by testimony from the Claimant, resulting in a "net wash" that is "insufficient to carry the day for the party with the burden of proof."
- Because resolution of the matter rests on credibility issues and because the Hearing Officer—the only official in a position to weigh such matters—neither made credibility findings on the record nor issued the decision in this matter, "there is no basis for preferring or privileging the Carrier witnesses' testimony over the Claimant's."

#### The Three Areas of Controversy Identified by the Carrier

An initial briefing among the workers took place, but there is dispute as to what was stated about whether a lag remained in the planks targeted for removal.

An excerpt from the pre-hearing written statement from the Front End Loader Operator (Gregory Zielke):

"Koziara [Claimant] requested and briefed for me to remove 10 crossing planks with the cat loader. Koziara said the lags were

removed and told me to use the machine forks to remove the planks.” (Emphasis added.)

**From the Investigation:**

“[Investigating Officer] MICHAEL HEILLE: Did he tell you that all the lags were removed?”

GREGORY ZIELKE: Not all, he said the lags were out, you know, didn’t say anything else.” (Emphasis added.)

**From the Claimant’s Employee Personal Injury Report:**

“We were taking crossing out at East Winona and removed the lags first than [sic] went on to remove the planks [on] the river side of the rail.” (Emphasis added.)

**During his appearance at the Investigation, the Claimant stated:**

“Well we had removed most of the crossing lags . . . . There was one lag down . . . . And I had Greg [Zielke]. He knew about it . . . .”

There is inconsistency in the above-cited assertions by the Claimant. The Claimant’s statement in his Personal Injury Report tends to support Zeilke’s statements both before and at the Investigation. From this we conclude that during the job briefing, the Claimant indicated that all of the lags were out of the planks. We will return to the matter of the inconsistency later.

There is dispute about what instructions the Claimant gave to the Loader Operator as to how the front end loader should be used to remove the planks.

**Input from the Claimant:**

“I told him to lift up not out to remove the lag to pop the lag out.  
\*\*\* I told him to pop it up. I used a hand signal up.”

**Input from the Operator:**

**“GREGORY ZIELKE: You poke down; you kind of poke down at it the best that you can.**

**MICHAEL HEILLE: Then you poke down underneath the crossing boards with a severe angle?**

**GREGORY ZIELKE: Yep.**

**MICHAEL HEILLE: And then you apply pressure backwards that would pop these boards up?**

**GREGORY ZIELKE: You have to kind of lever, or kind of, you know, you know what I mean. Like a hammer . . . .**

\* \* \*

**Yeah, you do it. You get underneath there and you kind of bring it back down to an angle. You drop the angle of the blade to pop it, you know, to get it to come up . . . .”**

**The Claimant’s assertion that “I told him to lift up not out” and the remark he added to give specificity to the assertion, namely, “I used a hand signal up,” raise a question about the adequacy of the Claimant’s communications to the Operator. An “up” hand signal does not equate to “I told him to lift up not out,” especially when compared to the Operator’s description of the maneuvering that was required to remove the plank.**

**There is no real dispute between the assertion of the Operator that no stop signal was given by the Claimant before he moved into the area in which the Operator was working and the Claimant’s position on this matter.**

**From the Front End Load Operator:**

**“MICHAEL HEILLE: ... [D]id Mr. Koziara at any time give you a stop motion, stop indication?**

**GREGORY ZIELKE: No, no, no.”**

**From the Claimant:**

**“MICHAEL HEILLE: Did you give him a stop indication?**

**MICHAEL J KOZIARA: To the best of my knowledge. I was on my way crossing, getting off to the crossing. I don't remember or not.**

**MICHAEL HEILLE: So?**

**MICHAEL J KOZIARA: I believe so. I'm, I'm not sure to the best of my knowledge. I thought he was stopped.**

**MICHAEL HEILLE: But you gave no stop indication.**

**MICHAEL J KOZIARA: Didn't say that. I just said I'm not sure if I did or didn't. I was heading off the crossing. I can't remember if I was, hold my hands up or what I did [be]cause I don't remember.”**

**Three Areas of Controversy Identified by the Organization**

**The Organization argues:**

**“. . . Claimant's case was completely prejudged by the Carrier, in violation of the Carrier's central obligation under Rule 40 of the Agreement to investigate allegations of rule violations only ‘fairly and impartially.’ Herein, it was admitted by the Carrier that it never even paused to consider SIAP handling of Claimant's case, even as Claimant's case unmistakably and quintessentially qualified for such safety conscious diversion away from**

disciplinary treatment altogether. Clearly, the Carrier was intent upon punishing Claimant from the outset and no considerations of safety, established/standing policies, or the Agreement were going to stand in the way.”

We note that the record presented for our review does not alert us to whether the Safety Incident Analysis Process was a matter for employer or joint determination. The case referenced by the Carrier (Public Law Board No. 7439) dealt with this Carrier and a different union. In that setting, it was found “that the SIAP process is implemented at the parties’ discretion, and the Board has no authority to interject itself into the parties’ debate in that regard.”

The record now before us suggests that in the relationship under examination in this dispute, the decision was at the Carrier’s discretion. In a letter dealing with the case now under discussion, the Organization asserted:

“Mr. Heille would not allow safety incident analysis process, (SIAP) under the BNSF PEPA Policy.<sup>1</sup> Objective of a SIAP is to seek out the cause and to identify and eliminate work practice that leads directly to an incident or accident. The SIAP procedure on what happened and why, this would confirm and find the root causes of this accident. Not having a SIAP is proof the BNSF wants to intimidate its workers with investigations and issue discipline.”

In any case, the mere fact that SIAP was not applied does not substantiate the Organization’s conclusion that the matter of the Claimant’s responsibility was determined in advance of the Investigation.

The Organization argues:

“The only evidence the Carrier presented against Claimant regarding the material issues in this case came from solitary accusers, each testifying to different highlighted aspects of Claimant’s alleged behavior. Claimant denied the accusations of

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<sup>1</sup> The Organization erred in this statement; it was not the role of the Investigating Officer (Heille) to decide whether to apply the SIAP. In fact, the Organization’s Submission refers to the Carrier’s activity before any investigation started and argues, “[I]t was admitted by the Carrier that it never even paused to consider SIAP handling of Claimant’s case . . . .”

culpability and countered with his own directly contradictory and exculpatory testimony. With no extrinsic evidence corroborating either of the single accuser's accounts, a 'net wash' resulted between these isolated accounts and Claimant's directly opposing ones. Under the sound arbitral precedent of this Board, a 'net wash' of the evidence is insufficient to carry the day for the party with the burden of proof in discipline cases, always the Carrier."

The conflict between the Claimant's statement on his Personal Injury Report ("We . . . removed the lags first . . .") and his testimony at the Investigation ("There was one lag . . . that was stuck on . . .") undermine his credibility. A contradiction found in statements by the same person is not analogous to the situation in which there is conflict between two witnesses about the same event. In short, the Claimant's inconsistency presents something other than a "net wash."

In the final analysis, the Board concludes that the Carrier established by sufficient evidence that the Claimant, functioning as Foreman of the work crew, failed to be alert and attentive when he did not safely remove a crossing board at Mile Post 325.7 in East Winona, Wisconsin.

**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 16th day of June 2014.