

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41872
Docket No. MW-41879
14-3-NRAB-00003-120185**

The Third Division consisted of the regular members and in addition Referee William R. Miller 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 three (3) year review period] imposed upon Mr. R. Valencia by letter dated November 12, 2010 for alleged violation of MOWOR 1.6 Conduct, MOWSR 7.7 Correct Tool Use and MOWSR 7.8.1 Spike Maul in connection with alleged failure to use proper tool and alleged carelessness and/or negligence when removing an anchor resulting in a personal injury at approximately 1300 hours on July 20, 2010 at about Mile Post 40.2 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File C-11-D040-8/10-11-0116 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. Valencia 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 July 20, 2010, the Claimant was working as a Track Inspector near Milepost 40.2 and at approximately 1:00 P.M. the Claimant was removing anchors as part of a project to straight rail a switch. While working with the assistance of a co-worker and under the watch of a Roadmaster, a piece of metal broke off of the Claimant's spike maul. The metal struck the Claimant in the leg, requiring that the Claimant to be sent to a hospital to have the metal piece removed. Based upon that incident, the Carrier subsequently chose to bring charges against the Claimant.

On July 21, 2010, the Carrier directed the Claimant to report for a formal Investigation on August 3, 2010, which was mutually postponed until October 20, 2010, concerning, in pertinent part, the following charge:

“ . . . for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to use proper tool and your alleged Carelessness and/or Negligence when removing an anchor, resulting in a Personal Injury to yourself at approximately 1300 hours on July 20, 2010 at MP 40.2 while assigned as Track Inspector in Eola, IL.”

On November 12, 2010, the Claimant was notified that he had been found guilty as charged and the Carrier assessed a Level S 30-Day Record Suspension with a three year Review Period.

It is the position of the Organization that the Claimant was denied a "fair and impartial" Hearing for multiple reasons. It asserted that the Carrier prejudged the case, which was shown by the fact that it denied the Claimant the opportunity to handle the matter as a non-disciplinary situation under the Safety Incident Analysis Process (SIAP); and the Hearing Officer asked leading questions of the Carrier's primary witness against the Claimant to secure the answers he was looking for or, simply put, he acted as a prosecutor rather than an impartial trier of the facts. Additionally, it argued that the Carrier "doctored" the key exhibit in dispute. Lastly, it argued that the discipline was improperly rendered by a Carrier Officer who did not attend the Hearing and that it should have been made by the Hearing Officer who was in attendance and could make more accurate credibility decisions than a non-attendee. It asks that based upon those procedural errors the discipline be set aside without reviewing the merits inasmuch as the Hearing was unfair and the transcript was tainted.

Turning to the merits, it argued that the Carrier failed to meet its burden of proof that the Claimant was hurt while working on July 20, 2010, because he allegedly worked in an unsafe manner and used an improper tool. It asserted that the inconsistent testimony of the Claimant's lone accuser was rebutted by the corroborated and consistent evidence on the Claimant's side, born of numerous decades of greater working experience with the precise issue under consideration. Lastly, it argued that if the Carrier had proven its charges, which it did not do, the discipline exercised by the Carrier was excessive for the Claimant who had 35 years of commendable service. It concluded that the Carrier did not meet its burden of proof and it requested that the discipline be set aside and the claim sustained as presented.

It is the Carrier's position that there were no procedural errors in the handling of the Claimant's case. It argued that the Organization's assertion that SIAP would have been a better method for handling the dispute is in error because SIAP is sometimes useful in those incidents that involve multi-cause and where discussion would promote improvement in the work process, and employee Rule

compliance, however, this case involved a singular failure to use the proper tool and work in a safe manner; thus, the calling of a formal Investigation was an appropriate method for addressing the incident. It requested that the case be resolved on the merits of the dispute.

Turning to the record the Carrier asserted that the testimony of multiple witnesses including the Claimant established that the Claimant, an experienced employee who should have known better, acted carelessly when he used a spike maul to remove an anchor. It further argued that after proving the Claimant's violation of various Safety Rules, it appropriately disciplined the Claimant in accordance with its well-advertised progressive discipline policy. It closed by asking that the discipline not be disturbed.

The Board thoroughly reviewed the record evidence and will first address the Organization's procedural arguments. The Organization asserted that the Claimant's Agreement due process rights were violated because the Hearing Officer did not render the discipline. That issue has been dealt with on numerous occasions by various Boards wherein it has repeatedly been determined that there is nothing in the Agreement that specifies which Carrier Officer is required to issue the discipline. The Organization also alleged that the subject incident should have been handled through the Safety Incident Analysis Process (SIAP) instead of as a disciplinary matter. The Carrier's disciplinary policy states that SIAP is an internal Company process that the Carrier may or may not use, at its discretion and is sometimes used in those incidents that involve multi-cause and where discussion might promote improvement in the work process and employee Rule compliance. However, it is not part of the Collective Bargaining Agreement and there is no requirement and/or violation for the Carrier to choose not to use SIAP. The Board examined the other procedural arguments raised by the Organization and found them unpersuasive.

There is no dispute between the parties that the Claimant and his co-worker were using a spike maul and sledgehammer to remove the anchors before helping to install a straight piece of rail when the Claimant was injured. Roadmaster Robinson testified that he told both employees to use the proper tool because they were using a spike maul to remove anchors. According to Robinson, after his comment the Claimant went back to the truck and got a sledgehammer that he used

until he got into a tight spot. The Claimant seeing that he could not knock the anchors off, decided to use the spike maul as a wedge with Adams holding the spike maul and the Claimant striking it with a sledgehammer when a piece of metal broke off the spike maul and lodged in the Claimant's leg. The Carrier asserted that the spike maul was not the proper tool to use for being struck in the removal of anchors because it had no protective covering. The Organization argued that the accident was not foreseeable and it further argued that the two employees, the Claimant and his co-worker, had a combined service record of 62 years and both testified that what they did in the removal of the anchors was the common practice. However, Maintenance of Way Safety Rule S-7.8.1 - Spike Maul states, in pertinent part:

“Do not use a spike maul to remove or replace anchors or drive wedges, or for other purposes.”

The Board does not dispute the argument that the Claimant's action might have been a common practice, but it clear that the practice was contrary to the Carrier's Safety Rules and it was foreseeable that the practice could lead to injuries. Substantial evidence was adduced at the Investigation to warrant the conclusion that the Carrier met its burden of proof that the Claimant was guilty as charged.

The only issue remaining is whether the discipline was appropriate. At the time of the incident, the Claimant had approximately 35 years of service with a good work record with no recent discipline. However, the instant offense was of a serious nature. Therefore, the Board finds and holds that the discipline will not be disturbed because it was neither contrary to the Carrier's Policy for Employee Performance Accountability (PEPA), nor was it arbitrary, excessive or capricious.

AWARD

Claim denied.

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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.