

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41875
Docket No. MW-41903
14-3-NRAB-00003-120109**

The Third Division consisted of the regular members and in addition Referee William R. Miller when award was rendered.

**(Brotherhood of Maintenance of Way Employees 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 [ten (10) day record suspension] imposed upon Mr. B. Steig by letter dated December 17, 2009 for alleged violation of BNSF Maintenance of Way Safety Rule S-1.1 Job Safety Briefing, S-14.2 Working On or About Equipment and Machines and BNSF Engineering Instruction General G.3.1 - Foreman, Track Supervisors, Track Inspectors and Bridge Inspectors for alleged failure to ensure all employees were clear when using a frontend loader to install a track panel subsequently causing injury to an employee at approximately 1715 hours on September 21, 2009 at Mile Post 1191.0 on the Hi Line Subdivision near Whitefish, Montana was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File B-M-2132-M/11-10-0169 BNR).**
- (2) The Agreement was further violated when the Carrier failed to provide a written decision following the investigation held on November 17, 2009, as required by Rule 40(D).**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant B. Steig 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 September 21, 2009, the Claimant was assigned as a Truck Driver with a gang to install a track panel at Mile Post 1191.0 on the Hi Line Subdivision near Whitefish, Montana. At approximately 5:15 P.M. the Claimant was injured when a front end loader struck him, and because of the accident, the Carrier subsequently chose to bring charges against the Claimant.

On October 26, 2009, the Carrier directed the Claimant and three other crew members to report for a formal Investigation that was mutually postponed until November 17, 2009, concerning, in pertinent part, the following charge:

“ . . . for the purpose of ascertaining the facts and determining responsibility in connection with alleged failure to ensure all employees were clear when using a front end loader to install track panel, subsequently causing injury to an employee at approximately 1715 hours, on September 21, 2009, at Mile Post 1191.0 on the Hi Line Subdivision near Whitefish, Montana.”

On December 17, 2009, the Claimant was notified that he had been found guilty as charged and the Carrier assessed a 10-Day Record Suspension.

It is the position of the Organization that the Claimant was denied a “fair and impartial” Investigation because the Hearing Officer allowed telephonic testimony and the transcript had missing testimony. It further asserted that the Claimant was denied his “due process” Agreement rights in the post handling of the case after the

formal Investigation. It asserted that Rule 40 (D) requires the Carrier to issue a decision and copy of the transcript within 30 days after the closing of a formal Investigation. It argued that the record shows that the Carrier failed to provide the Claimant's representative, Vice General Chairman D. L. Maier, a copy of the transcript or a notice of discipline within the mandatory time limits. It asks that based upon those procedural errors, the discipline should be set aside without reviewing the merits because the Carrier violated the Claimant's contractual rights.

Turning to the merits the Organization asserted that the record shows that the Claimant attended all required safety briefings on September 21 and had adequate protection during the time in question and he was in compliance with all Rules and Regulations. It argued that as the Claimant worked, the front left tire of the loader had a sudden and unexpected blowout, resulting in the loader shifting dramatically to the left and dropping in elevation by approximately 16 inches. That shift resulted in the master arm, which connected the bucket to the loader, to radically and quickly drop down and to the left, striking the Claimant's back. It further argued that the accident was unforeseeable inasmuch as no one could have foreseen that the front end loader's tire would blowout after standing still for approximately 15 minutes. Additionally, it argued that simply because an employee is injured does not automatically mean that they violated any Safety Rules, and in this instance, the record proves that the Claimant worked in a safe manner and had no fault in his accidental injury. It concluded that the Carrier did not meet its burden of proof and it requested that the discipline should be set aside and the claim sustained as presented.

It is the Carrier's position that it timely provided the Organization with a copy of the Claimant's transcript and disciplinary letter. It argued that it sent the aforementioned documents by certified mail to Vice General Chairman D. L. Carroll on December 17, 2009, because he was listed as the Claimant's representative in the Notice of Investigation and was the Organization's representative who requested all three postponements prior to the Investigation. It further argued that Carroll accepted delivery of the discipline letter, transcripts and exhibits on December 21, 2009. Thus, there was no substance to the Organization's argument that it did not receive proper notification in a timely manner. Additionally, the Carrier contended that it did nothing that prejudiced the Claimant's contractual rights. It requested that the case be resolved on the merits of the dispute.

Turning to the record, the Carrier asserted that the evidence shows that the Claimant should have been working in such a manner that even an unforeseen event, such as the “blow-out” of a tire on a front-end loader would not have caused an injury to him or others. It argued that the injury verifies that the Claimant worked in a careless manner on September 21, 2009. It closed by asking that the discipline not be disturbed.

The Board thoroughly reviewed the record of evidence and will first address the Organization's procedural argument that the Carrier denied the Claimant a “fair and impartial” Investigation because the Hearing Officer allowed telephonic testimony and the transcript had missing testimony. Countless Boards have determined that telephonic testimony is permissible provided all parties are allowed their full right to question and cross-examine the witness and that right was afforded the Claimant. The Organization is correct that there were several occasions in the Investigation on which testimony was missing, as it was recorded as being inaudible, however, examination of the transcript reveals that the respective parties’ positions and the witnesses testimony was understood. Therefore, the Board is not persuaded that the Claimant’s defense was thereby prejudiced.. Lastly, the Organization argued that the Carrier did not furnish the Claimant's representative a copy of the transcript and notice of discipline within the mandatory time limits. The Board believes that the Carrier's discussion of its handling of the discipline letter and transcript set forth above was a reasonable explanation and is considered by the Board to have been appropriate.

Accordingly, the dispute will be resolved on its merits. On September 21, 2009, the Claimant was assigned as a Truck Driver assisting in the installation of a track panel. The Claimant was working with three other employees and before beginning the task, the Claimant's gang held a safety briefing regarding their assignments for the day, including the installation of a track panel near Mile Post 1191.0. As part of that briefing, the employees reviewed job goals and also examined potential hazards and other safety issues and discussed how to transport and install the panel with the assistance of heavy machinery.

The panel was transported in the customary method with no problems. The Claimant and his co-workers aligned the track panel and worked to attach joint bars to secure the panel. After installing the joint bars, the Claimant's Foreman instructed the loader's Machine Operator to cease all movement of the bucket while the employees finished installing and adjusting the ties, fasteners and other track

components. After the Machine Operator had given the signal that all movement ceased, the Claimant proceeded into the area between the loader's front left tire and the bucket where he worked to secure and tighten rail fasteners. The Claimant's work methodology had been used by the crew and other employees many times before with the Carrier taking no exception to the process. The Claimant was in the accepted safe zone while he was working when the front left tire unexpectedly blew out, resulting in the loader shifting dramatically to the left and dropping in elevation by about 16 inches. That change caused the master arm which connected the bucket to loader, to quickly drop down and to the left striking the Claimant in the back.

The fact that the Claimant was injured does not prove that he worked unsafely or committed any of the allegations set forth in the Notice of Investigation. The "blowout" of the front end loader's tire after standing still for more than 15 minutes was not foreseeable. It is well settled by arbitral precedent that a work-related injury does not necessarily prove negligence or a violation of a Safety Rule. In this instance, the Board is not persuaded by the Carrier's argument. Therefore, we conclude that the Carrier did not meet its burden of proof. The Board finds that the discipline assessed the Claimant must be set aside and his record cleared of any mention of this incident. The claim is sustained in accordance with Rule 40(G).

AWARD

Claim sustained.

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 June 2014.