

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41931
Docket No. MW-41905
14-3-NRAB-00003-120123**

The Third Division consisted of the regular members and in addition Referee M. David Vaughn 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. R. Mattheisen 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-2134-W/11-10-0191 BNR).**
- (2) The discipline [ten (10) day record suspension) imposed upon Mr. A. Fredenberg 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.

- (3) 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).**
- (4) As a consequence of the violations referred to in Parts (1) and/or (3) above, Claimant R. Mattheisen shall now receive the remedy prescribed by the parties in Rule 40(G).**
- (5) As a consequence of the violations referred to in Parts (2) and/or (3) above, Claimant A. Fredenberg 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.

At the outset, the Board notes that the instant claim is a companion to the claims resolved by the Board in Third Division Awards 41875 (Referee William R. Miller) and 41932 (M. David Vaughn).

Claimant R. Mattheisen is a Foreman and Claimant A. Fredenberg is a Sectionman. At the time the dispute arose, they were assigned to work on a gang

along with Machine Operator J. Kilman and Truck Driver B. F. Steig, all of whom were working under the direct supervision of Roadmasters Kawaoka and Van Pelt. They are both covered by the parties' Agreement and have approximately 12 and one-half years and five years of service, respectively, with the MOW Department.

On September 21, 2009, the Claimants were part of a crew assigned to assist in the installation of a track panel – a segment of track structure that is pre-constructed off-site and used for quick installation in lieu of traditional track construction. The crew used a front end loader to transport the track panel and support it while it was aligned and secured. During the installation process, Truck Driver Steig was positioned beneath the front end loader's bucket assembly, applying concrete tie fasteners. While he was performing these duties, the front left tire of the front end loader blew out, causing the loader and load to drop approximately 14 to 16 inches. Steig was injured and required hospital treatment. As a consequence of the Carrier's reenactment of the incident, it was preliminarily determined that the four crew members had allegedly failed to conduct a proper job briefing, which could have potentially prevented the Truck Driver's precarious position (and his consequent injury) under the front end loader bucket. A formal Investigation was conducted at which the above facts were adduced. Based on the record, the Carrier found the Claimants in violation of Maintenance of Way Safety Rules S-1.1 (Job Safety Briefing) and S-14.2 (Working On or About Equipment and Machines) and EI G.3.1 (Foreman, Track Supervisors, Track Inspectors and Bridge Inspectors). It assessed each Claimant a ten-day record suspension.

The Carrier argues that it met its burden to show that the Claimants' violation of the cited Rules and the penalty assessed each Claimant was appropriate. The Carrier contends that it is obligated to provide and maintain a safe workplace and its employees must follow the Rules put in place for their own safety and well-being as well as the safety of others. It asserts that the essential facts are not in dispute and the evidence presented at the Investigation makes clear that the Claimants chose to disregard the Rules by failing to conduct a proper job briefing before commencing installation of the track panel. The Carrier contends that its employees must perform their work and position themselves according to the Rules and that Machine Operator Kilman admitted that the crew – although all of them had experience installing track panels – did not properly conduct a risk assessment for their task and, as a result, one of them was injured.

The Carrier contends that the Organization's arguments – that the Carrier violated Rule 40 because the Notice of Investigation provided to the Claimants was not precise enough and committed other procedural errors – are without merit. As to the former, it asserts that the Notice of Investigation was sufficiently specific so as to identify the particular conduct that was to be investigated and to give the Claimants an opportunity to prepare their defense. It contends that the Organization did not show that the Notice prejudiced the Claimants' ability to prepare their defense and points out that the Organization never asked for a recess of the Hearing in order to further prepare the Claimants' defense. As for the other various procedural arguments, the Carrier contends that the Organization failed to show that any of the Claimants' Agreement due process rights was in any way prejudiced.

Finally, the Carrier argues that the discipline imposed was appropriate to the offense. It asserts that the Conducting Officer issued – in response to the Claimants' misconduct – a non-serious ten-day record suspension, which is the lowest form of a record suspension under PEPA and, in essence, constitutes leniency. It contends that the Board's role is to interpret the Rules and Agreements so as to determine whether a violation has occurred and not to grant pleas for leniency or compassion.

Conversely, the Organization argues that the Carrier violated Rule 40 of the Agreement, which requires that a decision be rendered within 30 days following the Investigation and that written notice thereof be given to the employee(s), "with copy to local organization's representative," and failed to meet its burden of proof. With respect to Rule 40, it contends that (1) the Claimants' duly authorized representative, Vice General Chairman Mark J. Weyrauch, was not provided with the Notice of Discipline or transcript within the contractually required time frame, (2) he made repeated requests for the Carrier to provide such documentation and (3) the Carrier admitted to its failure but attempted to excuse it by arguing that it was unintentional. It asserts that the Carrier's failure to deliver the decision or transcript – a fact expressly admitted by the Carrier – was a clear violation of the parties' Agreement.

As to the burden of proof applicable, the Organization argues that the Carrier failed to produce sufficient evidence to prove that either Claimant violated the Rules. It maintains that the Claimants were in full compliance with all implicit and explicit Carrier Rules, procedures and regulations. The Organization contends that Claimant Fredenberg (1) had no responsibility to conduct a job briefing or to operate any machine, (2) was not working in the vicinity of any machine (and was 100 feet from the machine in question) and (3) was not responsible as a Foreman, Track Inspector or Bridge Inspector. As for Claimant Mattheisen, the Organization

asserts that (1) job briefings were conducted, both at the commencement of the project and throughout the day, (2) he was not assigned and did not work under a suspended load and, (3) nor did he allow any worker under his supervision to perform work under a suspended load. It protests that the Conducting Officer offered no insight as to how he determined that EI G.3.1 was violated. The Organization maintains that, just because an injury occurred does not mean that there was a rule violation.

Finally, the Organization argues that, even accepting the Carrier's position, the discipline assessed each Claimant was arbitrary, capricious and unwarranted and, therefore, in violation of the parties' Agreement. It contends that there is no evidence to justify the Claimants' ten-day record suspension.

The Board finds that it was the Carrier's burden to prove the Claimants' violation of the cited Rules and to establish that the penalty imposed on each Claimant was not arbitrary and excessive. It was the burden of the Organization to establish that the Carrier failed its obligation to provide the Claimants with Agreement due process and a fair and impartial Hearing.

For the reasons which follow, the Board concludes that the Claimants were not deprived of a fair and impartial Hearing; nor do the Organization's claimed procedural violations warrant overturning the discipline.

With respect to the merits, the Board acknowledges that job briefings are required. However, we are not persuaded that no such briefing took place. The record evidence indicates that a job briefing was conducted. The fact that an accident occurred as a result of an unexpected equipment failure is not a basis from which to conclude that the Claimants failed their responsibilities. The Board notes that neither Claimant had specific responsibilities with respect to the content of job briefings or the supervision of the involved employees. We further note that although two Roadmasters were present at the job site, neither appears to have taken any action with respect to the situation.

Because the Carrier did not meet its burden of proof, the assessed discipline assessed each Claimant shall be rescinded and their personnel records amended so to reflect.

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 31st day of July 2014.