

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41932
Docket No. MW-41906
14-3-NRAB-00003-120128**

The Third Division consisted of the regular members and in addition Referee M. David Vaughn 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 [ten (10) day record suspension] imposed upon Mr. K. Kilman 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-2140-C/11-10-0180 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 K. Kilman 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 41931 (M. David Vaughn).

When the dispute arose, Claimant K. Kilman was assigned to a four-person gang as a Relief Machine Operator, along with Foreman R. J. Mattheisen, Sectionman A. D. Fredenberg and Truck Driver B. F. Steig, all of whom were working under the direct supervision of Roadmasters Kawaoka and Van Pelt. The Claimant is covered by the parties' Agreement and has 21 and one-half years of service with the MOW Department.

On September 21, 2009, the Claimant was 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 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 determined that the four crew members had 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 Claimant in violation of MOWOR 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 the Claimant a ten-day record suspension.

The Carrier argues that it met its burden to show that the Claimant's violation of the cited Rules and the penalty assessed 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 Claimant 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 Claimant an opportunity to prepare his defense. It contends that the Organization did not show that the Notice prejudiced the Claimant's ability to prepare his defense and points out that the Organization never asked for a recess of the Hearing in order to further prepare the Claimant's defense. As for the other various procedural arguments, the Carrier contends that the Organization failed to show that any of the Claimant's 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 Claimant's 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 Claimant’s 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 applicable burden of proof, the Organization argues that the Carrier failed to produce sufficient evidence to prove that the Claimant violated the cited Rules. It maintains that the Claimant was in full compliance with all implicit and explicit Carrier Rules, procedures and regulations. The Organization contends that the Claimant, along with the other crew members, not only attended a morning job briefing at which they discussed safety and job assignments, they also conducted job briefings as needed throughout the day. It asserts, in addition, that there is no evidence that the Claimant failed to secure proper protection, or that he failed to be alert and attentive. It points out that the Claimant (1) followed all applicable Rules regarding machine operation, (2) observed the directions of his Foreman, (3) ceased operation while employees were working around the loader and (4) believed that the employees could safely work there. Although the Organization concedes that the Claimant was the Machine Operator on the date in question, it maintains that (1) he performed a morning walk around observation, (2) properly hooked up and moved the panel, (3) was vigilant about the location of the crew members as they worked and (4) had not operated or moved the loader for approximately 15 minutes prior to the blowout. Additionally, it contends 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 was arbitrary, capricious and unwarranted and, therefore, in violation of the parties’ Agreement. It contends that there is no evidence to justify the Claimant’s ten-day record suspension.

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

For the reasons which follow, the Board concludes that the Claimant was 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 Claimant failed his responsibilities. The Board notes that the Claimant had no 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 shall be rescinded and his 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.