

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 41933  
Docket No. MW-41926  
14-3-NRAB-00003-120208**

**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 [Level S thirty (30) day record suspension and a three (3) year review period commencing November 4, 2010] imposed upon Mr. J. Bailey for alleged violation of MOWOR 6.50.3 for alleged failure to pin up Machine #BNX01-00631 and ensuring all equipment components were clear on October 8, 2010 at approximately 1630 at Mile Post 25.15 on the Wichita Falls Subdivision, Rhome, Texas was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File C-11-D040-11/10-11-0144 BNR).**
- (2) The discipline [Level S thirty (30) day record suspension and a three (3) year review period commencing November 4, 2010] imposed upon Mr. V. Parkinson for alleged violation of MOWOR 6.50.3 for alleged failure to pin up Machine #BNX01-00631 and ensuring all equipment components were clear on October 8, 2010 at approximately 1630 at Mile Post 25.15 on the Wichita Falls Subdivision, Rhome, Texas was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File C-11-D040-11/10-11-0144).**

- (3) As a consequence of the violation referred to in Part (1) above, Claimant J. Bailey shall now receive the remedy prescribed by the parties in Rule 40G.
- (4) As a consequence of the violation referred to in Part (2) above, Claimant V. Parkinson shall now receive the remedy prescribed by the parties in Rule 40G.”

**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.

Claimants V. Parkinson and J. Bailey are Machine Operators with approximately 3½ years of service with the MOW Department. On the date in question, the Claimants were the joint operators of Machine BNX01-00631, which is also known as a “lagger” – a mobile production machine that is used to install and remove lag bolts. The Claimants’ lagger featured a side-by-side operator setup, whereby each Machine Operator was responsible for working on either the left or right side of the track structure.

On October 8, 2010, at the end of the work day, the gang – consisting of five machines, including a ballast regulator, a speed swing, a scrap crane, two ladders and a pup tamper that pushed a cart – was preparing to clear the track and head into a siding. To do so, all of the machines were to go down the main line past the switch and then to back up into the siding. All of the machines crossed the switch and Assistant Foreman C. Gentry opened the switch to allow the machines to enter

the siding. The ballast regulator, followed by the scrap crane, went into the siding; they were to be followed by the Claimants' lagger. However, as the first two machines entered the siding, Claimant Bailey ran up to Gentry and said that something had happened to one of the workheads and that it looked bent. While Claimant Bailey was telling this to Gentry, Claimant Parkinson started to move the lagger and, as he did so, hydraulic oil started to spray out from the machine. Gentry then yelled for Claimant Parkinson to shut the machine down.

Initially Gentry concluded that the spraying oil was due to a fitting that had broken off. A Mechanic, who was sent to get the machine back into the siding without any further damage to the machine, track or switch, immediately concluded that the lagger had sustained significant damage from an impact that it did not sustain during its normal operation. It is not disputed that the machine had been operating properly during the time period prior to the Claimants moving it back to the siding. Additionally, the Mechanic noticed that not only was the damaged workhead not locked and in the down position, the retaining pin was also sticking out. He surveyed the area and concluded that the only thing that could have come in contact with the lagger during that short timeframe and distance was the switch that the machine had crossed before starting to back up to enter the siding.

A formal Investigation was conducted at which the above facts were adduced. Based on the record evidence, the Carrier found the Claimants in violation of MOWOR 6.50.3 (Equipment Components Clear). It assessed the Claimants a 30-day Level S record suspension coupled with a three-year review period.

The Carrier argues that it met its burden to show the Claimants' violation of the cited Rule and the penalty assessed was appropriate. The Carrier contends that it is obligated to provide and maintain a safe workplace and that its employees must follow the Rules put in place for their own safety and well-being. It asserts that, prior to making their move, the Claimants' machine was not damaged; however, immediately after crossing over the switch, Claimant Bailey checked workhead No. 2 and noticed that it was "messed up." The Carrier further contends that, although both Claimants stated that they had checked to see if the workheads were locked before they began traveling their machine, neither got off of the machine to conduct an inspection; rather, they merely stood up in the machine where they were and looked at them. The Carrier further points out that the Mechanic, upon inspection,

discovered that the workhead was not up and locked as the Claimants stated but was, instead, down and the retaining pin was sticking out.

As concerns the Organization's arguments, the Carrier first argues that the Organization does not deny the essential facts but, instead, attempts to dismiss the Claimants' culpability by saying that the Carrier's witnesses did not conclusively and irrefutably prove that the damage was sustained by striking the switch. The Carrier counters that the Conducting Officer is responsible for assessing conflicting positions and making credibility decisions and that arbitral Boards must defer to the on-property credibility decisions of Conducting Officers. In addition, the Carrier asserts that the Organization has no contractual support for its various procedural arguments and, in any case, it failed to show that the Investigation was in any way prejudiced.

Finally, the Carrier argues that the discipline imposed was appropriate to the offense. It asserts that the Claimants' misconduct constituted a "serious" offense under PEPA. It contends that, essentially, the Organization is asking for leniency for the Claimants but that, in discipline cases, the Board is not authorized to substitute its judgment for that of the Carrier. As to the Organization's contention that the Safety Incident Analysis Process (SIAP) process, instead of discipline, should have been used, the Carrier contends that SIAP is an internal process that it may, or may not, use at its discretion. It points out that SIAP is not part of the parties' Agreement and contends that its determination not to use the SIAP process cannot be the cause of a violation of the agreement.

The Organization argues that the Carrier failed to meet its burden of proof and, by failing to introduce the Rule which the Claimant allegedly violated into the record, deprived the Claimant and the Organization of the opportunity to prepare a proper defense. It contends, as well, that while it had no idea of the specific charge in the matter, the Organization – not the Carrier – discussed a purported version of MOWOR 6.50.3 so that it could respond to the Carrier's unjust discipline within the time limits of the parties' Agreement.

Even assuming that MOWOR 6.50.3 had been introduced into the record, the Organization argues that there is no evidence that either Claimant violated that Rule. It asserts that (1) both Claimants testified that their machine was properly

placed in transit mode prior to moving toward the tie down siding, (2) Claimant Parkinson, who was acting as the driver, confirmed that the transit button was engaged per the practice of the gang, and (3) both Claimants then checked their respective workheads and determined that they were properly locked. It points out that Claimant Bailey, after traveling to their tie down location, determined the lagger had been damaged and immediately informed his Supervisor. The Organization argues that the fact that only one workhead sustained damage shows that the workhead must have been in transit mode. It points out that it was only after Claimant Parkinson attempted to move the machine that oil leaked out and that Gentry and the gang's Mechanic were unable to determine when, where or how the lagger was damaged and, finally, the Carrier failed to prove how either Claimants' act or omission caused the reported damage to the lagger.

The Organization maintains that General Manager Jackson's statement in the Carrier's February 23, 2011 declination letter – that he “find[s] it very difficult to believe that neither employee had any knowledge as to how or when the equipment was damaged” – makes clear that the only basis the Carrier had for finding the Claimants guilty was that they were the Operators of the machine, the machine sustained damage and, thus, they must have been in violation of MOWOR 6.50.3 (even though it was never entered into the record).

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 the Claimants were hard-working employees who both had clean disciplinary records and that they promptly reported the damage as soon as it was observed, without attempting to conceal the damage. It asserts that there is no evidence to justify a 30-day record suspension coupled with a three-year review period.

It was the burden of the Carrier to prove, by substantial evidence considered on the record as a whole, that the Claimants violated the Rules with which they were charged and that the penalty invoked was neither arbitrary nor excessive. For the reasons which follow, the Board is persuaded that the Claimants were guilty of the charges against them and that the 30-day record suspension assessed each Claimant was within the range of reasonableness.

The Board is not persuaded that the status of the Rule with which the Claimants were charged was either a procedural defect in the proceeding or that the claimed lack of citation to the Rule deprived the Claimants of the ability to defend against the charges. Indeed, the Organization possessed the relevant text of the Rule; and there is no proof that any confusion as to the terms of the Rule interfered with its ability or the ability of the Claimants to understand and defend against the charges.

The record evidence establishes that (1) the lagger was operating properly during the work day, (2) the Claimants were moving the machine to the siding to tie up, (3) in order for the lagger to back into the trailing point turnout, the lagger had to pass over the switch and (4) after it did so, the workhead was damaged. If the workhead was fully raised in the travel position as alleged by the Claimants, it would have been above the height of the rail and would not have been damaged. The record also establishes that the Claimants failed to dismount and visually inspect the position of the workheads prior to moving the machine.

The most logical conclusion to be drawn from the evidence is that the Claimants failed to secure the lagger in transit mode, leaving the workhead below the height of the rail and that the workhead struck the diverging rails of the trailing point switch as the Claimants drove the lagger through the switch, causing the damage described. The record provides substantial evidence of that sequence of events. There is no other likely explanation for the damage that resulted.

As to the penalty imposed, the record evidence persuades the Board that the violation, which resulted in material damage to the machine and potential injury to the Claimants or others, was serious under PEPA. The Board does not find the assessment of a 30-day record suspension coupled with three years' probation to have been arbitrary or excessive.

Because the Carrier carried its burden to prove that the Claimants were guilty of the violation and that the penalty assessed each of them was not arbitrary or excessive, the claim must be denied.

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**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 31st day of July 2014.