

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 41934  
Docket No. MW-41927  
14-3-NRAB-00003-120209**

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] imposed upon Mr. D. Easley by letter dated January 12, 2011 for alleged violation of MOWOR 1.2.5 Reporting and MOWOR 1.6 Conduct for alleged failure to comply with instructions and alleged failure to properly report an incident and alleged negligence and or carelessness with regard to his involvement with a personal injury incident that occurred on December 13, 2010 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File C-11-D040-14/10-11-0202 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant D. Easley 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.

The Claimant in this dispute is a Section Foreman. He is covered by the parties' Agreement and has five years of seniority with the MOW Department.

On December 13, 2010, the Claimant and Foreman M. Haffner were assigned to change a piece of rail. During this process, the Claimant operated a boom to set the rail into place; Haffner was on the ground inserting bolts into the joint bars to hold the rail ends together. Near the end of their shift, when the Claimant was preparing to stow the boom in its holster on top of the truck, he decided to "test" it to see which way the boom was going to move. It was cold that evening and, initially, the boom was unresponsive to his "test." After the Claimant upped the pressure that he applied to the toggle switch, the boom swung significantly and one of the rail tongs attached to the boom swung in the opposite direction and struck Foreman Haffner in the head, knocking him to the ground.

The Claimant went to Haffner but, other than asking for water, Haffner said that he was fine. They finished out the day's work without further incident and without reporting the incident to a Supervisor. The next day, Roadmaster Jason Dye found out about the incident and called Haffner into his office. Haffner promised to complete a personal injury report after he saw a doctor. He then went to the hospital where doctors found nothing wrong with him and imposed no restrictions on his immediate return to work.

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 1.2.5 (Reporting) and 1.6 (Conduct). It assessed the Claimant a Level S 30-day record suspension coupled with a three-year review period.

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 that its employees must follow the Rules put in place for their own safety and well-being. It asserts that the essential facts are not in dispute and the record evidence presented at the Investigation makes clear that the Claimant negligently and carelessly moved

his boom when he was unsure which direction it would move – a fact the Claimant freely and repeatedly admitted.

As to the Organization's several procedural arguments, the Carrier asserts that none absolve the Claimant from his offenses and, citing numerous Awards, it contends that the Claimant's admitted guilt renders all procedural arguments moot. It further contends that, in any event, the Organization's procedural arguments are without merit. The Carrier contends that the meeting that the Claimant and Foreman Haffner had with Division Engineer Nathan Waller was not an "investigation," because (1) it has a right to interview any of its employees at any time, (2) accident assessments are routine following incidents and (3) the Claimant never asked for, and was not denied, an Organization representative to be present with him at the meeting. It asserts, in addition, that the transcription errors (i.e., the misspelling of Waller's name) did not impact the Claimant's right to a fair and impartial Hearing. It asserts, again citing numerous Awards, that the Claimant's Agreement due process rights were not violated simply because the Conducting Officer was not the one who signed the discipline letter.

Finally, the Carrier argues that the discipline imposed was appropriate to the offense. It contends that the Claimant's misconduct was a "serious" offense under PEPA. The Carrier asserts that, when an employee neglects to complete the proper paperwork or report an injury, it is unable to immediately identify and rectify any hazardous condition, thereby creating the potential for additional liability. The Carrier contends that failure to report an injury, as the Claimant failed to do in the instant case, is a dismissible offense. It contends that, essentially, the Organization is asking for leniency for the Claimant but that, in discipline cases, the Board is not empowered 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 its decision not to use the SIAP process cannot be the basis for a violation of the parties' Agreement.

The Organization argues that (1) the Carrier failed to meet its burden of proof, (2) failed to afford the Claimant a fair and impartial Investigation and (3) imposed an unwarranted, harsh and excessive penalty. As to the alleged Agreement due process violations, the Organization contends that the Carrier allowed the same official (Waller) – who initially interviewed the Claimant and was motivated then to

charge him as well – to deny the Claimant’s SIAP request and ultimately make the disciplinary determination of the Claimant’s “guilt” without the Carrier official in question ever sitting in on any portion of the Investigation. It asserts, as well, that the Carrier selectively used evidence to “convict” the Claimant, when the Carrier was charged with bringing out all relevant facts and continuing to be completely fair and impartial throughout. It maintains, in addition, that the Carrier’s denial of the Claimant’s SIAP request was unfounded and pre-textual.

With regard to the charges themselves, the Organization argues that (1) the Claimant was as careful as he could have been under the circumstances, (2) a mechanical failure beyond his control accounted for the incident and (3) even if the Claimant was obligated to report anything on the facts of this case, he was excused from doing so given that the time period calling for the same had yet to expire when Foreman Haffner timely reported the incident.

Finally, the Organization argues that, even accepting the Carrier’s position, the discipline assessed was excessive in light of the recognized and proper rehabilitative aims of discipline. It maintains that the instant discipline places the Claimant on the cusp of immediate dismissal for the slightest alleged Rule violation for an extraordinarily lengthy probationary period. It contends that such discipline affords the Claimant little or no opportunity to learn or be guided by the Carrier toward being a long-term, productive employee.

It was the burden of the Carrier to establish the Claimant’s guilt of the charges by substantial evidence, considered on the record as a whole and to prove that the penalty assessed was not arbitrary or excessive. It was the burden of the Organization to establish any claims of violation of the Carrier’s obligation to provide Agreement due process and a fair and impartial Hearing.

The Board is not convinced that any of the Organization’s procedural arguments have merit. There is no proof that SIAP is a form of alternative handling, substituting for discipline, or that the Claimant was entitled, as a matter of right, to access to SIAP, or was treated improperly when he was not afforded access. An Investigation is a formal procedure; the disputed meeting did not constitute an “investigation” and was not prohibited. There is insufficient evidence that the Claimant requested Union representation at that meeting. None of the minor transcript errors were material to the fairness of the proceeding, and there was no showing of prejudice to the Organization’s case from the cited errors.

Of greater concern, however, is the use of the same Carrier Official (Waller) to conduct the non-investigation interviews with the Claimant and other witnesses and then to make the disciplinary determination. That determination is to be based on and limited to the record evidence adduced at the Investigation. Here, Waller initiated interviews with several employees, including the Claimant (who lacked Union representation) and other employees, some of whom were not called as witnesses at the Hearing. It is not explained how Waller could (or did) limit his knowledge of the case to the Investigation, or ignore his opinions about the Claimant garnered outside the Hearing. The Organization could hardly respond to what was not in the record of the Investigation. The Claimant was entitled to a fair and impartial Hearing and to Agreement due process in the handling of his case. Waller's multiple roles irretrievably denied him those rights.

Accordingly, the Board has no choice but to conclude that the Carrier violated the Claimant's right to Agreement due process and a fair and impartial Hearing. As a consequence, the assessed discipline shall be rescinded and expunged from the Claimant's records.

### **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.