

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41935
Docket No. MW-41940
14-3-NRAB-00003-120261**

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 [Level S thirty (30) day record suspension and a one (1) year review period commencing on April 25, 2011] imposed by letter dated April 25, 2011 upon Mr. J. Hartig for alleged violation of MOWOR 1.1.2, MOWOR 1.6, MOWOR 6.50 and MOWOR 6.51 in connection with alleged failure to be alert and attentive, careless of his safety and the safety of others and alleged failure to maintain a safe braking distance while operating the Pac-Tec X63-00213, resulting in damage to the rear of Ballast Regulator X06-00456 on October 29, 2010 at/or near Mile Post 195.59 on the Sandhills Subdivision while assigned as a machine operator on Gang UC01 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File C-11-D040-20/10-11-0374 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, the Carrier shall now “*** remove the Level S 30 Day Record Suspension with One (1) Year Review Period from Mr. Hartig’s record.””**

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 is a Machine Operator in the Track Sub-department. When the instant dispute arose, he was assigned to operate the Pac-Tec X63-00213 machine on a surfacing gang working under the supervision of Roadmaster J. Wegner. He is covered by the parties' Agreement and has five and one-half years of seniority with the MOW Department.

On October 29, 2010, the Claimant was operating the Pac-Tec as part of an Undercutting Gang, which was also working with two Surfacing Gangs. All nine machines of these gangs were stationed on the backtrack at Anselmo, where they had tied up the previous night. Prior to any work being performed, the Claimant participated in the daily morning job briefing involving all employees present at the work location. Various issues were discussed at the job briefing, including daily work activities, on-track protection, and safety hazards. The Organization contends that at the conclusion of the morning job briefing, the Claimant and some other employees (Strucker, Stephens and Assistant Foreman Boulder) conducted another job briefing during which it was determined that it would be necessary for the Claimant, Strucker and Stephens to move their assigned on-track equipment toward a derail that was in place on the track so that Stephens could be closer to his personal car to access it. Gang members, including the Claimant, went to their assigned machines on the Anselmo backtrack, where they performed their usual maintenance check of the machines and started them in preparation for the day's work. The gang members waited for Foreman H. Kerr to obtain track and time authority from the Train Dispatcher so that they could move their machines in convoy onto the mainline.

While waiting for Foreman Kerr to obtain the required track and time authority, the Claimant, Strucker and Stephens – without asking or obtaining permission from Foreman Kerr – moved their three machines westward down the backtrack a distance of approximately 1,000 feet so that Stephens could move his personal car, which was parked near the backtrack. When they did so, the Claimant's machine passed over a set of

insulated joints, which caused the crossing gates to activate, stopping automobile traffic. When Foreman Kerr saw what was happening, he got on the radio and instructed the three Machine Operators to immediately stop their westward movement and to move their machines back (eastward) into the backtrack clear of the insulated joints, so that the street traffic could resume. The three machines returned eastward down the backtrack. The two lead machines cleared the insulated joints a sufficient distance and stopped on the backtrack. The Claimant, while operating his Pac-Tec machine, stared backward, instead of paying attention to the machine in front of him, which had stopped. When Foreman Kerr noticed the Claimant's inattention, he called the Claimant on the radio and instructed him to stop. Nevertheless, the Claimant struck and damaged the stopped machine. No one was injured.

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 1.1.2 (Alert and Attentive), 1.6 (Conduct), 6.50 (Movement of On-Track Equipment) and 6.51 (Maintaining a Safe Braking Distance). It assessed the Claimant a Level S 30-day record suspension coupled with a one-year review period.

The Carrier argues that it met its burden to show the Claimant's violation of the cited Rules and the penalty was appropriate. The Carrier contends that the Claimant – by failing to maintain a safe braking distance and being careless and failing to be alert and attentive – was solely responsible for the collision and resulting damage and there was, therefore, no disparate treatment. It asserts that (1) there were no unusual conditions – the weather was clear and there were no curves or obstructions – that contributed to the collision and (2) the Pac-Tec machine was functioning properly and, thus, there was nothing that would have prevented the Claimant from stopping had he been moving at the proper rate of speed and watching what he was doing to maintain a safe distance from the machine in front of him.

As to the Organization's procedural arguments, the Carrier urges that they are without merit. As an initial matter, it contends that there was ample room on the backtrack for the Claimant to have safely parked his machine and it makes no difference whether the other machines were stopped or moving. It contends, in addition, that just because there were no injuries does not mean that the Claimant was not careless; rather, he was just lucky. Contrary to the Organization's contention, the Carrier asserts, citing numerous Awards, that there is no Rule requiring the Conducting Officer and the Officer issuing the disciplinary decision to be one and the same. It further contends that even if the Organization's procedural arguments had merit – which it argues they do not – they

did not deprive the Claimant of a fair and impartial Hearing. Nevertheless, the Carrier notes that the Claimant tacitly admitted his guilt during the Investigation and cited numerous Awards that have upheld the principle that a claimant's admission of guilt negates any alleged procedural defects.

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, which could have been treated as dismissible. It asserts 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.

Conversely, 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) subjected the Claimant to disparate treatment. As to the manner in which the Investigation was conducted, the Organization contends that the Conducting Official attempted to add an additional alleged Rule violation – Rule 1.6 (Conduct) – which was not cited in the Carrier's Notice of Investigation. It asserts that the Carrier must notify the Organization of the specific charges it intends to proffer during the Investigation and may not amend said charges without proper notification to the Organization. It maintains that the Carrier's attempt to belatedly charge the Claimant with a Rule not cited in the Investigation notice was improper and in direct violation of the parties' Agreement.

With respect to the charges themselves, the Organization argues that the Claimant participated in an additional job briefing with the Assistant Foreman and that he followed Foreman Kerr's instructions to return his machine to its original parked position on the backtrack. It contends that, although Machine Operator Stephens returned his machine to its original position – just as the Claimant was in the process of doing – Machine Operator Strucker parked his machine far short of where it was originally located and failed to inform the Claimant that he had done so. The Organization asserts that the Claimant operated his machine in a slow, safe and efficient manner but, although he applied the brakes on his machine so as to avoid contact with Strucker's machine, his (the Claimant's) machine was unable to come to a complete stop and slid into the other machine, causing minimal damage. It maintains that the record does not contain evidence to completely support all charges leveled against the Claimant and, citing prior Awards, argues that modification of the imposed discipline is required.

Finally, the Organization argues that the Carrier's decision to only subject the Claimant to a disciplinary Investigation constitutes disparate treatment. It contends that

all three employees – the Claimant, Stephens and Strucker – were involved in and contributed to the incident and the Carrier failed to explain the obvious disparate treatment toward the Claimant.

It was the burden of the Carrier to establish by substantial evidence, considered on the record as a whole, both the Claimant's violation of the Rules with which he was charged and the appropriateness of the penalty. It was the burden of the Organization to establish that the Carrier's conduct violated its obligation to afford the Claimant Agreement due process and a fair and impartial Hearing. For the reasons that follow, the Board is not convinced that the Carrier's procedural handling of the Investigation and subsequent claim require overturning the discipline. The Board concludes that the Carrier proved that the Claimant violated the Rules with which he was charged (except for the Rule which the Carrier improperly attempted to belatedly add at Hearing) and that the penalty imposed was neither arbitrary nor excessive.

The Conducting Officers attempt to add an additional alleged Rule violation at the Investigation was improper and cannot stand. It is simply treated as a nullity. Stated differently, the Board is not persuaded that the Conducting Officer's belated effort requires overturning the discipline assessed for the other Rules violations. With regard to the fact that the Conducting Officer did not actually impose the discipline, the Board was pointed to no requirement that the two tasks must be carried out by the same individual. As concerns the Organization's complaint that the Claimant was subject to disparate treatment because his co-workers were not disciplined, the Board concludes that the record evidence makes clear that the Claimant – and only the Claimant – operated his machine carelessly and, thusly caused the collision. There is no proof of disparate treatment.

As to the merits of the charges, the Claimant had a clear duty to pay attention to the operation of his vehicle and, in particular, to operate it in such a manner so as to not only maintain a safe distance between his machine and the machine in front of him, but also to stop short of the machine in front of him. It is clear to the Board that the Claimant failed to do that. He was, therefore, properly found to have been in violation of the Rules with which he was properly charged.

As to the penalty imposed, the record evidence establishes that this was a serious offense as recognized under the Carrier's PEPA policy. For such an offense, the penalty of a 30-day record suspension coupled with a proportionate probationary

**Form 1
Page 6**

**Award No. 41935
Docket No. MW-41940
14-3-NRAB-00003-120261**

period is consistent with PEPA and is not shown to have been arbitrary or excessive. Consequently, the Board will not disturb the Carrier's disciplinary assessment.

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.