

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42018
Docket No. MW-41955
14-3-NRAB-00003-120274**

The Third Division consisted of the regular members and in addition Referee David M. 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 one (1) year review period] imposed upon Mr. R. Smith for alleged violation of MOWOR 1.1.2 Alert and Attentive and MOWOR 1.6 Conduct in connection with charges of alleged failure to be alert and attentive and alleged failure to identify pinch points while stowing cart on the front end of the Jackson 6700 resulting in a personal injury at approximately 1330 hours on March 26, 2010 at Mile Post 32.5 in Lockport, IL was arbitrary, capricious, unwarranted and in violation of the Agreement (System File C-11-D040-28/10-11-0456 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. Smith 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 is a Machine Operator in the Track Subdepartment. He was assigned to operate a Jackson 6700 tamper on the day in question. The Claimant's Supervisor was Roadmaster Matthew Heinbaugh.

On March 26, 2010, the Claimant was connecting a buggy cart to his assigned tamper, as he had previously done. He was working alone because no other employees were available to assist him. He did not ask for help. To make the connection between the cart and the tamper, the Claimant placed one foot on the ballast between the rails and his other foot outside the rails. As he was making the connection, he lost his balance; the light cart ran up on the tamper and derailed, pinching his leg between the buggy cart and the forks of the tamper, causing an injury. The Claimant was transported to a medical facility where he was treated.

A preliminary investigation was conducted, which included a reenactment and resulted in a report describing the circumstances. The Carrier subsequently changed its process for connecting the buggy cart so as to require two employees to conduct the operation.

The Claimant was directed to report for a formal Investigation at which the foregoing facts were adduced. Based on the record therein, the Carrier found the Claimant to have violated the Rules with which he was charged and assessed a Level S 30-day record suspension and a one-year review period.

The Carrier argues that it met its burden to prove the Claimant's violations by substantial evidence considered on the record as a whole and that the penalty assessed

was appropriate. It asserts that the evidence establishes that the Claimant violated his basic obligation to follow procedures to protect employees from injury while working around equipment, thereby committing a serious offense under PEPA, for which a 30-day record suspension, probation and training is the designated penalty.

The Carrier argues that the procedural challenges made by the Organization are spurious. It asserts, in the first instance, that the Organization failed to meet its burden to prove any of the challenges made. Moreover, contends the Carrier, none of the errors alleged actually impaired the Claimant's Agreement due process rights or prejudiced the Organization in the presentation of its case.

As to the Organization's assertion that the Carrier Officials prejudged the case, the Carrier asserts that, had the Organization been serious, it could have raised the objection at the Investigation and requested a postponement, neither of which it did, thereby waiving the objection. Moreover, asserts the Carrier, the Conducting Officer did not restrict the Organization from presenting its case, fully and fairly.

As to the Organization's protest that there were factual discrepancies in the testimony of Roadmaster Hainbaug and in photographs relied on by him, the Carrier rejects the assertions and points out that witness credibility determinations are for the Carrier to make. It contends that the Organization's credibility objection is not supported by evidence.

As to the Organization's complaint that the transcript notations of inaudibility constituted a violation of Rule 40 E, the Carrier asserts that most of the inaudible comments were inside conversations and that none of the inaudible portions involved material testimony impacting on the issues of the case.

The Carrier rejects the Organization's argument that the Claimant should have been offered alternative handling under Safety Incident Analysis Process (SIAP) in lieu of discipline. It asserts that SIAP is a procedure to identify and eliminate dangerous work practices – not alternative handling of disciplinary matters – and is not available as a matter of right or to address serious violations such as the Claimant's.

In conclusion, the Carrier urges the Board to reject the Organization's procedural challenges and to deny the claim for lack of merit.

Conversely, the Organization argues, as an initial matter, that the Claimant should have been afforded alternative handling through SIAP, rather than being disciplined. It protests the Carrier's refusal to allow alternative handling as constituting bad faith.

The Organization further argues that the Carrier failed, in any event, to afford the Claimant a fair and impartial Investigation, pointing to the behavior of the Hearing Officer. It asserts that he badgered the Claimant to provide the answer the Hearing Officer wanted and asked Roadmaster Heinbaugh prior to the conclusion of the Investigation what Rules the Claimant had violated, thereby indicating prejudgment of the Claimant's guilt. It maintains that the misconduct of the Hearing Officer requires a sustaining award.

The Organization argues, in addition, that the Carrier failed to prove the charges against the Claimant. It asserts that the evidence establishes no more than that the Claimant connected the buggy cart in the manner he had been instructed and that his foot accidentally gave way during the operation. It maintains that the mere fact that an accident occurred is not sufficient to establish a Rules violation. The Organization contends that, although pinch points were marked, the particular space in which the Claimant placed his foot and leg was not a pinch point.

The Organization denies that the record evidence establishes the Claimant's carelessness or lack of attention. It urges that the Carrier's conclusion in that regard is simply speculation and assumptions, which are not sufficient proof. It points out that the mere fact that the Claimant was injured has been held to be insufficient evidence to establish a Rule violation.

In conclusion, the Organization argues that the procedural deficiencies and lack of proof of a Rule violation warrant a sustaining award.

It was the responsibility of the Carrier not only to afford the Claimant a fair and impartial Investigation, but also to establish the Claimant's guilt of the charges against him by substantial evidence considered on the record as a whole. For the

reasons which follow, the Board concludes that the Carrier did not violate the Claimant's right to a fair and impartial Hearing and that it met its burden to prove his guilt by substantial evidence.

As an initial matter, the Board is not persuaded that the Claimant was entitled to alternative handling as a matter of right, because SIAP is not established to constitute alternative handling and because no alternative handling attaches to "Major Violations." Neither is the Board convinced that the Carrier abused its discretion in denying the referral request.

The Board carefully considered the Organization's procedural challenges to the Investigation as lacking fairness and impartiality, but finds the examples cited to be insufficient so as to constitute reversible error by the Hearing Officer.

As to the claimed insufficiency of the record evidence to prove the Claimant's guilt, the Board notes the obligation of employees to carry out their duties in ways that avoid placing themselves in unsafe positions. By placing his foot inside the rail while connecting the buggy cart to the tamper, the Claimant placed himself in a position so that, when the cart slipped, his leg was pinned – "pinched" – causing him injury. The Claimant placed himself within a pinch point in violation of the cited Rule. His violation is not negated because the pinch point was not marked.

The fact that the Claimant had apparently been instructed and performed the job in an unsafe manner in the past is not sufficient to relieve him of the obligation not to do so in the instant situation. There were ways to avoid placing himself in danger, including requesting assistance and waiting until another employee would be available to assist, but the Claimant did not do so. Neither did he bring the situation to the attention of his Supervisor. The Claimant's action was in violation of the Rules with which he was charged. The penalty assessed was not arbitrary or excessive. Accordingly, the claim must be denied.

AWARD

Claim denied.

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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 28th day of August 2014.