

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42019
Docket No. MW-41956
14-3-NRAB-00003-120284**

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 actual suspension from April 7, 2011 through May 6, 2011 and the relinquishing of her rights as foreman for thirty-six (36) months and a three (3) year review period commencing on May 5, 2011] imposed upon Ms. L. Teniente by letter dated May 5, 2011 for alleged violation of MOWOR 6.3.2 Protection on Other Than Main Track in connection with alleged failure to properly establish protection for TP06 tie gang after the gang completed work on April 5 as allegedly discovered at approximately 1815 hours on the Marceline Sub at West End Sibley coal plant was arbitrary, capricious, unwarranted and in violation of the Agreement (System File C-11-D040-22/10-11-0383 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant L. Teniente 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 was employed by the Carrier as a Foreman in the Track SubDepartment. In April 2011, she was assigned to Gang TP06, which used various production machines to accomplish its work. Between work times, the machines were to be tied down. Her Supervisor was Assistant Roadmaster Dan Parish.

On April 5, 2011, the Claimant's Assistant Foreman Swain directed the Machine Operators of the Gang's lead machines into West Siding Track. The Claimant rode one of the last machines into the siding and, after tie down was completed, flagged, tagged and locked out the switch at the west (rear) end of the siding, after which Supervisor Parish directed the Claimant and her Gang to attend a debriefing session. At that time, she was designated by her Supervisor as Employee-In-Charge (EIC) of the Gang, which required her to drive eight miles away to make contact with incoming trains and provide authority to enter her Gang's protected limits. The Claimant complied with the instruction and left immediately to perform her EIC duties.

In her haste to conduct the debriefing and assume her duties as EIC, the Claimant failed to flag, line and lock the switch and set the derail on the front of the siding on which the Gang's equipment was tied down. That oversight left the equipment and employees unprotected.

Parish noticed the unprotected switch, directed that protection be installed and reported the failure to his superiors. Carrier Officials questioned the Claimant and Assistant Foreman Swain about the failure. Both stated that there had been no discussion about placing the required protection.

Management concluded that the Claimant's failure, as the employee ultimately responsible for placement of the protection, constituted a "Critical Decisions Failure" under PEPA and scheduled and held a formal Investigation at

which the above facts were adduced. Based on the Hearing record, the Carrier determined the Claimant to have violated MOWOR 6.3.2, which requires employees to properly protect men and machines on other than a main track, using proper methods. It assessed the Claimant a 30-day actual suspension coupled with a three-year relinquishment of her Foreman rights and a three-year review period.

The Carrier argues that it met its burden to prove the Claimant's violation of the Rule cited and that she received the appropriate punishment. It asserts that the Organization failed to prove that the discipline was unwarranted and in violation of the parties' Agreement.

The Carrier argues that it is obligated to provide a safe workplace. It asserts that employees are obligated to follow established Safety Rules. The Carrier contends that the record evidence is clear that the Claimant failed to meet her obligations. The essential facts are, in the Carrier's view, clear and uncontested and are more than sufficient to constitute substantial evidence of the Claimant's violation of the Rule charged: while serving as the person responsible for the safety of her Gang and its equipment, she left the work site without ensuring that the front end of the siding on which the equipment was tied up was protected. The Carrier asserts that the Claimant's failure constituted negligence, placing the employees and equipment of her Gang at risk.

The Carrier argues that the Claimant's negligence created a direct threat to safety and thereby constituted a "Serious Violation" within the meaning of PEPA. It points out that the penalty assessed the Claimant based on her misconduct is that prescribed by PEPA. In conclusion, it urges that the penalty is appropriate and requests that the claim be denied.

Conversely, the Organization argues that the Carrier failed to prove the Claimant's violation of the Rule with which she was charged. It points out that the Claimant was given a direct order to assume EIC responsibilities, which required her to leave the area immediately. It also points out that the evidence establishes that the Carrier never briefed or otherwise informed her of the layout of West Siding Track. It asserts, on that basis, that the Claimant cannot be held responsible for failing to flag, tag, lock out and put in place derail protection at the switch on the front end of the Gang's equipment. The Organization challenges the statement by Roadmaster Parish that he had no responsibility for the failure to provide

protection, pointing out that neither he nor any other Carrier Official questioned whether protection was required and whether it had been provided.

The Organization also objects to the severity of the penalty, constituting as it does an actual suspension and a three-year disqualification and review period as baseless, heavy handed, unwarranted, unprecedented and punitive. It urges that the Carrier failed to take into account the Claimant's long service and clean record and the several mitigating circumstances, including her good faith belief that she was acting appropriately, the admitted failure to inform the Claimant of the layout of West Siding Track and the immediate designation of the Claimant as EIC, with the responsibilities that designation involved. Those factors rendered the penalty assessed excessive, not progressive, punitive and irrational, warranting in the Organization's view a significant reduction in the penalty, even if guilt is found.

It was the burden of the Carrier to prove the Claimant's violation of the Rule cited by substantial evidence considered on the record as a whole; and, in addition, when challenged, to prove that the penalty was not arbitrary and excessive. The Board is persuaded that the Carrier proved the Claimant's violation of the Rule, but that the penalty assessed was arbitrary and excessive in light of the circumstances which led to the violation and the level of discipline provided by PEPA for her offense. Accordingly, the claim will be denied in part and sustained in part.

It is not disputed that the front end of West Siding Track was not protected, as required by the Rule. That failure compromised the safety of Gang employees and risked damage to equipment, as well as to trains that might enter the side track. It is also undisputed that the Claimant was the Foreman of the Gang and that she was responsible to ensure that the Gang's employees and equipment were protected. Those uncontested facts clearly place the Claimant's conduct in violation of the Rule.

Rule 40 of the governing Agreement references the consequences of unjust discipline. The clear implication is that discipline must be just, that is, for just cause. The Carrier's implementation of PEPA provides clear notice to employees of the level of conduct required of them and the disciplinary consequences of failures to meet the standards. It sets predictable and consistent levels of discipline based on the severity of conduct and the number of violations. However, PEPA does not replace a requirement that penalties assessed be proportional to the offense and take

into account the employee's record and the mitigating and aggravating circumstances surrounding the violation.

PEPA establishes specified penalties for specified types of offenses. It makes non-compliance with Rules established to ensure safety to be "Major Violations." For such violations, PEPA provides as penalties for a first violation a 30-day record suspension and a 36-month review period. It makes no provision for a more serious penalty (e.g., an actual rather than a record suspension) or an additional penalty (e.g., disqualification from a Foreman position).

It is not disputed that this was the Claimant's first violation on an otherwise clean record of almost 15 years. It is also not contested that she was not briefed on the layout of West Siding Track (including the fact that it was a two-ended siding, rather than single-ended) and that she was given an immediate assignment that required her to leave almost as soon as she left the track. Clearly, these circumstances created a difficult situation for her.

However, the Board notes that it was the Claimant's responsibility to be familiar with the track arrangement and, if in doubt, to ascertain the arrangement and take appropriate action to provide protection to the Gang and equipment on the siding, or to ensure that someone else did so, before departing. The fact that others, including Carrier Officers, may have failed to carry out their responsibilities does not excuse the Claimant from her obligations. Moreover, the fact that the Claimant was directed to undertake another job does not excuse the Claimant from ensuring that her preexisting obligations were carried out before she departed. She failed that responsibility.

The circumstances surrounding the Claimant's violation and the elements of her record do not excuse, but do mitigate her offense and would appropriately reduce the penalty to be assessed. However, the penalty assessed was substantially harsher than the level provided for a first "Serious Violation:" an actual versus a record suspension and a three-year disqualification from the Claimant's Foreman position in addition to the 36-month review period. While the Board recognizes the principle that the Claimant had a special responsibility in her Foreman position, PEPA does not provide for such disqualification as a penalty for a first violation.

At the least, the Claimant is entitled to the benefit of PEPA and to the cap on penalties which is contained therein. The evidence is clear that the penalties

assessed against her exceed those levels. She is also entitled to the benefit of her record and of the mitigating circumstances which surround her case and to the 12-month review period to which the Claimant appears to have been entitled. The penalties exceed even the unmitigated levels provided by PEPA and cannot stand.

PEPA provides for the review of discipline which involves an actual suspension or deviation from the Policy by the PEPA Review Board. There is no indication in the record that the Carrier followed its own procedure in the assessment of the discipline against the Claimant. Indeed, there is no indication of the rationale by which the Carrier justified its assessment of the more severe penalties.

The discipline must be based on PEPA's own penalty levels and procedures and reduced to reflect the Claimant's record and the mitigating circumstances.

Thus, the claim is sustained in part and denied in part. The Carrier proved that the Claimant was guilty of the Rules violations with which she was charged. However, for reasons stated above, the assessed penalty is arbitrary, excessive and inconsistent with PEPA. Therefore, the penalty is hereby reduced from a 30-day actual suspension to a 30-day record suspension. The three-year period of disqualification as a Foreman shall be eliminated. The Claimant shall be deemed to have been eligible for assignment to a Foreman's position without interruption. The Claimant also qualifies under PEPA for a reduced review period. Her review period will be 12 months. The Claimant's penalties shall be revised as set forth above, her record shall be amended so as to reflect the reductions; and she shall be made whole for wages and benefits lost, both retroactively to the date she was disqualified and prospectively, to the date she is made eligible for Foreman assignments.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the 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 28th day of August 2014.