

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 42020  
Docket No. MW-41967  
14-3-NRAB-00003-120278**

**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] imposed upon Ms. L. Teniente by letter dated May 5, 2011 for alleged violation of MOWOR 1.13 Reporting and Complying with Instructions in connection with alleged failure to comply with instructions with regards to spacing of on track equipment when she allegedly failed to place the fifty (50) foot cones for machine spacing as instructed on March 29, 2011 at approximately 0850 hours near Cement City on the Marceline Sub while assigned as Foreman TP06 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File C-11-D040-21/10-11-0382 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 is employed by the Carrier as a Foreman in the Track Subdepartment. In March 2011, she was assigned to Gang TP06, which used various production machines to accomplish its work. Her Supervisor was Assistant Roadmaster Dan Parish.**

**On March 17, the Carrier trained the Claimant and her Assistant Foreman regarding the use of spacing cones, instructing them that cones were to be placed at set distances prior to the start of each day's work so that the Gang's Machine Operators would have a visual cue as to the proper separation between machines. That morning, Carrier Officers observed that the cones were not in place. The Claimant explained that they were using a "human cone" method to provide the visual cues. Carrier Officers instructed her that such method was not proper and instructed her specifically regarding her obligation to place cones each day or delegate the assignment to her Assistant Foreman, which she did.**

**Cones were properly placed each day thereafter until March 29. However, on March 29, according to Carrier witnesses, the cones were not in place. Assistant Roadmaster Parish asked her why they were not in place, to which she responded that she had previously instructed her Assistant Foreman to place them each day and that she did not know why he had not complied.**

**The Carrier directed the Claimant to report for a formal Investigation in connection with her alleged failure to comply with the instructions. At the Hearing, the above referenced evidence was presented. Based on the record, the Carrier found the Claimant guilty of failing to comply with instructions and assessed a 30-day record suspension and a one year review period.**

**The Carrier argues that it met its burden to prove the Claimant's violation of the Rule cited, by failing to place the cones herself, or by ensuring that they were placed by another employee. The Carrier argues that the cone placement was important in order to aid in establishing safe working distances between the on-track machines and thereby avoid collisions and prevent injuries to employees working on and behind the machines. It points out that the Claimant acknowledged that she understood her obligation to ensure that the cones were placed and the importance of doing so.**

The Carrier also argues that the Claimant received appropriate discipline in consequence of her violation. It points out that the purpose of the instruction was to protect employees from unsafe acts, thereby constituting a "Serious Offense" under PEPA, for which the penalty assessed is the penalty prescribed. It asserts that the penalty assessed is reasonable, indeed lenient, based on the importance of the cone placement and the fact that the violation was the Claimant's second in the same month. It points out that she had been counseled for the first failure to comply.

The Carrier rejects the testimony of the Claimant and Assistant Foreman Robert Swain, both of whom testified that Swain placed the cones, as vague and lacking credibility. It points out that Swain testified that the Claimant had not instructed him to place the cones on either date, and that he rejected her status (and apparently her authority) as his Supervisor. Moreover, points out the Carrier, the two witnesses testifying against the Claimant said they had both personally seen that the cones had not been placed; and Assistant Roadmaster Parish testified that he placed the cones himself. The Carrier contends that there is no reason that the Carrier Officers would have falsified their testimony.

The Carrier does not dispute that the Conducting Officer had pre-investigation discussions with Carrier witnesses, as the Organization contends, but asserts that reasonable communications are allowed. It denies that such communications interfered with the Claimant's right to a fair and impartial Hearing.

The Carrier acknowledges the assertion that the Claimant's failure to place the cones was not intentional, but argues that does not ameliorate the seriousness of the failure, which was her second. As to discussion during the Hearing of the earlier, March 17 incident, the Carrier argues that the reference was for the appropriate purpose of ensuring that the Claimant had been counseled with respect to her responsibilities and that there were, therefore, no mitigating circumstances that might warrant reduction in the penalty.

Conversely, the Organization argues that the Carrier denied the Claimant a fair and impartial Hearing, based on numerous examples of misconduct on the part of the Hearing Officer and the Carrier generally. It points out that the Hearing Officer met in advance of the Hearing with all Carrier witnesses and reviewed their testimony and exhibits and formulated questions, thereby negating any claim to neutrality. Indeed, it points out that the Carrier acknowledged that course of conduct by the Hearing Officer in denying the claim. The Organization contends that the conduct of the Hearing

reflects that collusion between the Hearing Officer and witnesses. It maintains that the conduct of the Hearing Officer also evidences prejudgment of the Claimant's guilt.

The Organization also argues that the Carrier failed to meet its burden of proof, because the evidence is that the Claimant was told that she could delegate the task of placing the cones, she did delegate the function and her subordinates understood the delegation and assumed the duty. Thus, contends the Organization, there is no basis to conclude, as the Carrier does, that the Claimant failed to comply with her instructions.

Moreover, maintains the Organization, the penalty is out of proportion to any violation, because the Claimant has a long, clean record and was acting in good faith.

In conclusion, the Organization urges that its claim be sustained, the discipline assessed against the Claimant rescinded and expunged from her record and that she be made whole for wages and benefits lost.

It was the obligation of the Carrier to provide the Claimant with a fair and impartial Hearing. Where the Hearing is conducted by an Officer of the Carrier, that Officer must be scrupulous in maintaining neutrality and avoid prejudgment. The conduct of the Hearing Officer in the instant case was grossly inconsistent with those obligations. In essence, he collaborated with the Carrier witnesses to script the entire Hearing, reducing it to a sham. The Carrier admitted the collusion; the transcript confirms it. The inappropriateness of the conduct denied the Claimant the fair and impartial Hearing to which she was entitled.

Moreover, the conduct of the Hearing Officer calls into question the credibility judgments he made in favor of the Carrier witnesses. In particular, where Assistant Foreman Swain essentially denied the Claimant's supervisory authority. That calls into question testimony he gave concerning the instructions she did or did not give and his understanding of his obligations. He denied that the Claimant gave him any instruction; and the Hearing Officer apparently accepted that. Swain's credibility with respect to the Claimant is highly suspect, based on his rejection of her authority; and the implicit acceptance that she was obligated to give her direction anew each day is not warranted.

The Hearing Officer, through his misconduct in advance of and at the Hearing, undercut the credibility of the determination he made.

**The Board concludes that the Carrier acted improperly and its Hearing Officer engaged in misconduct. The conduct of the Carrier's Hearing Officer and witnesses deprived the Claimant of the fair and impartial Hearing to which she was entitled and contaminated the factual determinations made and the penalty assessed by the Carrier. Therefore, the assessed discipline shall be rescinded and expunged from the Claimant's record and she shall be made whole for wages and benefits lost.**

**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 28th day of August 2014.**