

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42358
Docket No. MW-42337
16-3-NRAB-00003-130335**

The Third Division consisted of the regular members and in addition Referee Patricia T. Bittel 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 commencing on May 24, 2012] imposed upon Mr. J. Pearce for alleged violation of MOWOR 6.3.1 Main Track Authorization in regard to alleged failure to properly clear the main track for train movement which resulted in a near collision with a train on April 20, 2012 at approximately 1047 hours, near Mile Post 217 on the Chillicothe Sub was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File C-12-D040-15/10-12-0490 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Pearce 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.

On April 20, 2012, the Claimant was working as a machine operator with truck driver Wolfe. They were protected on Main Track 2 with track and time as well as Form B authority. Claimant's foreman asked when he could give up the track and time authority and Claimant Pearce responded "We'll be setting off here probably in about 10 minutes," and "We'll call you as soon as we're off." Wolfe called shortly after and said "We are off the track and in the clear." At that point, the Claimant and Wolfe only had Form B authority. A train contacted the foreman seeking authority to travel through the limits of the Form B on Main Track 2. The foreman contacted the Claimant who said "We're in the clear," However, the Claimant and Wolfe were not clear of Main Track 2 when BNSF 6681 came through. The Claimant and Wolfe were able to get off the track in time as the train came to an emergency stop.

The Carrier points out that the Claimant admitted the track was fouled when he told his foreman it was clear. Wolfe plainly stated that they were off the track and in the clear when this was not the case, resulting in a near accident. The Claimant said he was confused then admitted to violating Rule 6.3.1, a serious rules violation. The Conducting Officer did not issue the disciplinary letter, but this is an administrative function and the Conducting Officer would have made any pertinent credibility decision. Other crafts argue it is unfair to have the same person be judge, jury and executioner. The Carrier avers there is no provision for discovery in the parties' Agreement, though other BNSF Agreements do have such a provision. Arbitrators have consistently upheld that the parties' Agreement does not require discovery. The Carrier maintains the Organization can always request a recess. The handling of the evidence resulted in no prejudice since the Claimant admitted violating the rule.

The Organization argues the Conducting Officer cannot have made the credibility decision when he did not write the disciplinary letter. The Organization repeatedly asked for the tapes and transcripts of dispatcher calls it needed to prepare the Claimant's case, and all requests were denied. Without a fair and impartial hearing the discipline must be voided. If the Carrier enters only part of a transcript into the record, the Organization has a right to the full transcript. The prejudice argument is nonsensical because it is impossible to defend with

unavailable evidence. A Hearing Officer is supposed to be impartial, meaning all relevant facts come out. Emergency Board 243 said Carriers who deny Organization requests for information prior to the hearing do so at their own peril. There is no fair and impartial explanation for denial of information. The Organization contends postponement is not the answer, because once you have everyone together, there is an interest in going forward. The Organization notes employees may be out of service and continue to lose money during postponements.

Rule 40A states: "An employee in service sixty (60) days or more will not be disciplined or dismissed until after a fair and impartial investigation has been held." During the investigation here concerned, the Carrier read excerpts from a transcript without putting the entirety of that transcript in to the record. In addition, it withheld from the Organization tapes and information about dispatcher calls. It relies on the fact that the Claimant admitted he breached the applicable rule, arguing that there was no prejudice, hence no violation of Rule 40A can be found.

This argument misinterprets Rule 40. The Carrier is prohibited from reaching the question of employee guilt until after a fair and impartial hearing has been held. It is fundamentally unfair to read selected excerpts from a transcript into the record without providing the entire transcript to the Organization. Further, in a case where the focus of inquiry is clarity of communication, it is also unfair to ignore the Organization's request for information about pertinent communications. Context and circumstances surrounding an event can be quite revealing in terms of establishing mitigating or aggravating circumstances and in identifying shared responsibility. Denial to the Organization of an opportunity to fully explore the facts of the case during the investigation constituted denial of a fair and impartial hearing.

The claim is sustained in full. The Carrier shall immediately remove the discipline from the Claimant's record, with seniority, vacation and all other rights unimpaired and make him whole for all time lost as a result of this incident.

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made. The Carrier is to comply with the award on or before 30 days following the date the award is adopted.

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 30th day of August 2016.