

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42707
Docket No. MW-43219
17-3-NRAB-00003-150471**

The Third Division consisted of the regular members and in addition Referee I. B. Helburn when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division –
IBT Rail Conference**

PARTIES TO DISPUTE: (

**(BNSF Railway Company (Former Burlington Northern
Railway Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [Level S thirty (30) day record suspension with a three (3) year review period] imposed upon Machine Operator W. Frank by letter dated May 6, 2014 for alleged violation of ‘... MWOR 6.50.3 Equipment Components Clear.’ in connection with charges of alleged failure to lock up and pin-up the nippers on Machine X4400421 on March 12, 2014 at Mile Post 352.2 on the Red Rock Subdivision was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File T-D-4386-M/11-14-0223 BNR).**
- (2) The discipline [Level S thirty (30) day record suspension with a three (3) year review period] imposed upon Machine Operator S. Paskewitz by letter dated May 6, 2014 for alleged violation of ‘... MWOR 6.50.3 Equipment Components Clear.’ in connection with charges of alleged failure to lock up and pin-up the nippers on Machine X4400421 on March 12, 2014 at Mile Post 352.2 on the Red Rock Subdivision was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File T-D-4387-M/11-14-0222 BNR).**
- (3) As a consequence of the violation referred to in Part (1) above, Claimant W. Frank ‘... must be immediately paid for his lost**

time and day to attend investigation, including any and all overtime paid to the position he was assigned to work, any expenses lost, and we also request that Mr. Frank be made whole for any and all benefits, and his record cleared of any reference to any of the discipline set forth in the letter received by the Organization on May 6, 2014 letter from James Matthews.'

- (4) As a consequence of the violation referred to in Part (2) above, Claimant S. Paskewitz '... must be immediately paid for his lost time and day to attend investigation, including any and all overtime paid to the position he was assigned to work, any expenses lost, difference in pay, bonus for not being allowed to bid a spiker on an RSG Gang and we also request that Mr. Paskewitz be made whole for any and all benefits, and his record cleared of any reference to any of the discipline set forth in the letter received by the Organization on May 6, 2014 letter from James Matthews.'"

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 Carrier asserts that the admission of Claimant Paskewitz constitutes substantial proof of the violation. Should the claim be sustained, the Claimants are due only lost seniority and wages, less outside earnings.

The Organization insists that substantial evidence is absent. There is un rebutted evidence that nippers can bleed down and the incident occurred only after the machine had traveled about a mile over two switches and three crossings without incident. Proper procedures were followed, making the incident one of a mechanical failure.

There is no question that an accident occurred when the nippers on one side of Machine X4400421 failed to clear a switch and sustained over \$8,000 damage. And, there is no question that neither Claimant locked and tagged out the machine and crawled on top to perform a visual inspection to ensure that the nippers were secured for travel. The Carrier appears to have concluded that these facts alone combine to support a finding that MOWOR 6.50.3 Equipment Components Clear was violated. However, there are additional, salient facts. The Claimants testified without contradiction that they performed the usual actions to raise work heads and components on the spiking machine into travel position and flipped three switches to lock up components, including the nippers. Satisfied that nothing was amiss, they then proceeded to travel.

Damage to the nippers occurred after the spiker had traveled almost a mile, passing through three crossings and over two switches without incident. There has been no explanation advanced to show why, if the Claimants neglected to secure the nippers on one side but not the other, the damage to the nippers had not occurred earlier. The lack of an explanation becomes more critical when statements from the Organization are considered, because these statements indicate that in the past these machines have been problematic, with nippers bleeding down while the machine was traveling. In short, the evidence adduced during the investigation is at least as consistent with a “bleeding down” theory as it is with a “Rule 6.50.3 was violated theory.” The Carrier has not presented sufficient evidence to convince a reasonable mind to accept only the Carrier’s conclusion that discipline is deserved.

Because both Claimants received record suspensions, neither lost pay or opportunities for overtime. The Board is not in a position to know if Claimant Paskowitz lost money because he was not allowed to bid a spiker on an RSG Gang. If he did lose money, the Carrier and Organization must decide in good faith the amount of compensation due. Discipline is to be expunged from the records of both Claimants.

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 31st day of August 2017.