Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
THIRD DIVISION

Award No. 42832
Docket No. MW-43416
17-3-NRAB-00003-160113

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

(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Springfield Terminal Railway Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The discipline (dismissal) imposed upon C. Brunelle by latter March 12, 2015 for alleged violation of '. . . Roadway Worker On-Track Protection Policy Step 1A and NORAC Rule 4 relating to receiving a proper job briefing from the "Employee Responsible for On-Track Protection"; NORAC and RWP rules relating to Foul Time on adjacent tracks for performing "'work; and General Safety Rules PGR-A, PGR-D, PGR-J and PGR-K.' in connection with his alleged close call involving the Jimbo boom fouling an unprotected track was on the basis of unproven charges, arbitrary, excessive and in violation of the agreement (Carrier's File MW-15-05 STR).

(2) As a consequence of the violation referred to in Part (1) above, Claimant C. Brunelle shall be reinstated to service with seniority and all other rights and benefits unimpaired, his record cleared of the charges leveled against him and he shall be compensated for all lost wages and benefits as a result of the Carrier's improper discipline."

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 had approximately six years' tenure when terminated. On November 4, 2014, he was operating a Jimbo boom on a work train, unloading ties from a gondola on track 2, when train 205 approached around a curve on track 1. The Claimant managed to get the boom, which was over track 1, back over track 2 so that contact was avoided. However, the oncoming train crew, believing contact was unavoidable, put the train into emergency and contacted the Dispatcher. No property damage or injuries resulted. The incident brought a November 11, 2014 hearing notice and ultimately a February 11, 2015 hearing, followed by a March 12, 2015 letter dismissing the Claimant. A timely claim was filed.

The Carrier noted that there was no protection for track 1 but the Claimant positioned the Jimbo boom over that track rather than operating on the other side of the gondola car or not operating the boom until the proper authority was obtained. Consequently, westbound train 205, with no reason to believe that track 1 would be fouled, proceeded at proper speed and was put into emergency, narrowly averting a collision with the boom. Train 205 was operating with a clear signal and no obstructions expected. Permission to foul track 1 had not been requested and the Claimant knew he was not authorized to foul that track. He acknowledged not having a briefing with Assistant Foreman Sanderson, who owned the track, but rather briefed with Foreman Carnett, who Foreman Sanderson had briefed. The Claimant knew not to foul the track and knew or should have known that the boom was foul of track 1. The Claimant was familiar with the Jimbo boom and knew of the possibility of drift and that at some point a train would be coming through on track 1. The mechanical issues with the boom do not mitigate. There were no procedural errors that should affect the imposed dismissal. The complaint that the Claimant was accused of violating rules not made a part of the hearing is baseless and the absence of allegedly violated rules in the hearing notice is irrelevant. The Carrier is not contractually required to list rules in the hearing notice or to engage in discovery. The Claimant knew not to foul the track without proper authority. Rules were applied to the record adduced at the hearing. Train 2005 operated in accordance with their operating procedure. There is no mention of snowy conditions and while the incident happened at night, that does not excuse fouling the track. The dismissal was appropriate in light of the nature of the

incident, the Claimant's lack of acknowledgement of his responsibility and his prior disciplinary record. The Claimant was responsible for knowing and complying with the relevant rules.

The Organization has stated that the incident occurred due to a lack of Carrier communication and is not by itself evidence of a rule violation. The Claimant's actions actually averted an accident. The Carrier must prove unsafe operation of the Jimbo boom. The Claimant's explanation of what happened was not an admission of guilt. He followed accepted and condoned practice and was not reckless, believing that he would be told of approaching trains, and that a prior problem with the boom had been fixed. The discipline was arbitrary, capricious, and unwarranted. The Claimant had received a job briefing from someone who did not have track authority, but had no reason to question the briefing. He noticed the oncoming train when he had not been so notified and was working in darkness. The train crew had not been notified that it was approaching a work train. Operation of the Jimbo boom was not among the Claimant's regular duties. He had not operated the boom in over a year and was unaware of the drifting issue. The dismissal was punitive, not corrective and followed a hearing that was unfair because rules allegedly violated were neither discussed nor introduced at the time.

This claim must be sustained without consideration of the incident itself because the Claimant did not receive the fair hearing mandated in Article 26.1. In the April 5, 2015 appeal of the dismissal, the Organization stated:

> **"In fact, the Carrier did not provide any advance notice to the organization, whatsoever, that Ms. Sheehan (sic) (VP Engineering) would be utilizing and considering a whole host of rules that had not been incorporated to the investigation/hearing process as a basis for her personal findings in rendering a decision to assess discipline. It was only after being in receipt of Ms. Sheehan's (sic) (VP Engineering) decision letter, dated March 12, 2015 and after discipline had been assessed, that we had first knowledge of the Carrier's intent to utilize and consider Ms. Sheehan's (sic) mentioned rules as being part of the investigation/hearing process to assess discipline (Employe's Exhibit A-2)."**

The Carrier's failure to make known and introduce copies of the rules it believed the Claimant had violated created an unfair hearing and deprived the Claimant of due process and therefore violated Article 26.1. A fair hearing must not involve a guessing game in which the Claimant and/or the Organization must anticipate which rules the Carrier is likely to rely on and which must be addressed in the hearing. Article 26.1

does require that relevant rules be included in the hearing notice but fairness requires inclusion at the hearing. In Third Division Award 42699 the Board stated that "The investigation cannot be considered 'fair and impartial' when the claimant and his Organization have not had an opportunity to address the rules that might thereafter form the bases for discipline or dismissal." The Award further referred to Third Division Award 39919 in which that Board found that the Carrier could not prove a violation of drug and alcohol rules because the results of the Claimant's drug and alcohol test were not made a part of the evidentiary record. In the case now under review, the Carrier cannot prove a violation of rules that are not a part of the record. See also Public Law Board, Case No. 5. In First Division Award 26295 that Board found that rules relied on by the Carrier were neither quoted during the hearing nor attached to the transcript so that "Without the Rules before us, we are unable to make such a determination" of a violation.

This Board concurs with the approach taken and the ample precedent contained in the above-noted Awards. The claim as set forth above is sustained, with back pay to be calculated in accordance with Articles 26.5 and 26.7. Back pay is to include overtime that in the judgment of the parties, the Claimant would likely have worked but for the dismissal.

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 12th day of December 2017.

CARRIER MEMBERS' DISSENT
to
THIRD DIVISION AWARD 42832 - DOCKET NO. MW-43416

(Referee I.B. Helburn)

The Board has improperly determined that the Claimant was not afforded a fair hearing in this case. In PLB 5606, Award No. 2, involving a prior dispute on the property, the Carrier did not cite any specific rules in either the notice of hearing or during the hearing investigation itself. Nonetheless, the Board properly concluded, "*The Board also finds no reason to hold that the Carrier did not have the right, following the investigation, to set forth in the notice of discipline the specific rules which it found the hearing record to support as having been violated by the Claimant in the performance of his duties. Although safety and other rules believed to have been violated are often cited in a notice or at an investigation, it is nevertheless to be recognized that awards of numerous past boards have held that an accused employee, upon trial, may be disciplined for any rule violations that are disclosed by the company investigation. After all, the purpose of the investigation is not to prove the correctness of the charge, but for the purpose of determining all facts material to the charge, both those against and those favorable to the employee.*" [**Award No.2**]

In the instant dispute, just like in Award No. 2, the Carrier did not cite a specific rule at the hearing investigation, nor did it determine at the hearing that there was reason to believe that the actions of the Claimant constituted a violation of but one specific rule. Accordingly, the procedural handling of the present case was consistent with the procedural handling in Award No. 2 and thus, the Board should have determined that the Carrier had the right *"following the investigation, to set forth in the notice of discipline the specific rules which it found the hearing record to support as having been violated by the Claimant in the performance of his duties. […] After all, the purpose of the investigation is not to prove the correctness of the charge, but for the purpose of determining all facts material to the charge, both those against and those favorable to the employee."* [**Award No. 2**]

In addition, the record of the case confirmed that the Claimant was a NORAC rules qualified employee, he was not permitted to foul the adjacent track, he knew that he was fouling the adjacent track, he was required to have a direct job briefing with the Foreman before fouling the adjacent track and he admitted that he did not do so. On top of his own statements against interest, the Conductor and Engineer each provided compelling testimony that confirmed that the Claimant was improperly fouling the adjacent track, thereby corroborating the essential facts pertaining to the Claimant's responsibility in the matter. Consequently, it is inconceivable that the Board would conclude it to be improper for the Carrier to follow the holding in PLB 5606, Award No. 2 by *"set[ting]*

forth in the notice of discipline the specific rules which it found the hearing record to support as having been violated by the Claimant in the performance of his duties. […] After all, the purpose of the investigation is not to prove the correctness of the charge, but for the purpose of determining all facts material to the charge, both those against and those favorable to the employee." [**Award No. 2**] This is especially troubling in a matter involving the on-track protection of employees.

The incident at issue in this case involved a close call that the Claimant himself described as "scary" [**Transcript p. 68**], adding also that after the incident he was "shaken up." [**Transcript p. 71**] He further testified that had he not been the person operating the equipment and had it "*...happened to anybody else that wasn't prepared, they wouldn't of lived that night.*" [**Transcript p. 72**] The Conductor was asked, "*Would you have struck it if it hadn't swung out of the way?*", and he responded, "*Absolutely. I would probably not be here to tell you about it.*" [**Transcript p. 22**] The Conductor also testified that when he spoke to the Claimant he told the Claimant that "*I was glad that he was okay and I was, you know, I said hey, you know, glad that you're okay. You know, because that was a close call for everybody because I could have been killed as well as he could have too so.*" [**Transcript p.24**] The Conductor added, *"...all I know is there was a boom in our way and we slammed and we put the brakes on. That's all. And glad nobody died.*" [**Transcript p.29**] The Engineer testified that *"...the boom of the Jimbo and the, and it was 90 degrees to the track that I was on and the claw right in front of my window. I mean it was straight ahead of me.*" [**Transcript p.33**] He also stated, "*I laid on the whistle and I put it in emergency.*" [**Transcript p.33**] The Engineer additionally recounted that, "*I told the conductor that we are going to hit that, you better get on the floor. And just as I started to dive on the floor myself I started I saw the boom starting to move. And I didn't know if we hit it or not until the conductor got out and checked. I didn't keep my head up long enough.*" [**Transcript p.33**] He also commented, "*Oh, we would have clobbered it. Here was no question.*" [**Transcript p.33**]

Furthermore, during the on-property handling of the instant case, the Carrier stated for the record [at **Carrier's Exhibit E, p.4**] that:

> "*...Article 26 of the ST/BMWE Agreement does not require that notice of hearing list rules. Consequently, the lack thereof is a non-issue. Similarly, Article 26 of the ST/BMWE Agreement does not require advance exchange of "discovery" of any kind. The hearing notice issued to the Claimant in this particular matter properly lists sufficient information to apprise the Complainant of the act or occurrence to be investigated. And the Claimant, like all employees, is responsible for knowing and abiding by the rules that govern his condition of employment, which includes the Carrier's Safety Rules, as well as the NORAC and Roadway Worker rules. It is evident from any objective review of the record that the Claimant knew and understood that he is not permitted to foul a track adjacent to the one he is working on if he has not been given permission to do so. It is also*

clear that relative to this particular incident, he knew that he was not supposed to foul track one while working on track two with the Jimbo, but he did. In fact, he testified to the alleged efforts and thought process that he supposedly engaged in to actually refrain from committing such a serious violation. Job briefings and foul time on adjacent tracks were the central issues of the hearing and were explored at length and in detail. Thus, it should come as no surprise that the applicable rules were applied to the facts on record and the Claimant was held responsible for not complying with said rules. This does not constitute unfair, deceptive or prejudicial conduct. It does not violate the ST/BMWE Agreement or industry standards and serves as no basis for overturning the discipline issued in this case."

The Organization did not subsequently contest the foregoing or make request for copies of said rules, which the Claimant had (or reasonably should have had) in his possession at all times during the handling of this matter. The application of the Carrier's rules to the facts established on the record of this case cannot reasonably be deemed as having deprived the Claimant of a fair hearing.

Please also see Third Division Award No. 42839, which was rendered concurrently with the present Award. In that case, this same Board held, with respect to this Carrier's Safety Rule PGR-N, that the Claimant in that dispute *"...was responsible for knowing and complying with the rule.*" The Board should have applied the same principle in the instant dispute, with regard to the applicable rules at issue in this case.

As for the Board's reference to Third Division Award 42699, Third Division Award 39919, PLB 6993, Award No. 5 and First Division Award 26295, those Awards do not involve disputes on this property, the facts of those cases are distinguishable from the instant dispute and the holding of the Awards run contrary to the sound principle set forth in Public Law Board 5606, Award No. 2, which is consistent with "*...awards of numerous past boards..."* [**Award No. 2**] It is for these reasons that the Carrier does not concur with the Board's opinion that the Claimant did not receive a fair hearing and must dissent.

Anthony Lomanto
Carrier Member

Matthew R. Holt
Carrier Member

December 12, 2017