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

Award No. 42833
Docket No. MW-43613
17-3-NRAB-00003-160375

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 [three (3) calendar day suspension] imposed upon Mr. C. Rice by letter dated March 27, 2015 for alleged violation of Safety Rules PGR-A, PGR-D and PGR-J in "connection with a vehicle incident that occurred on Monday, February 9, 2015 was arbitrary, capricious, without just cause and in violation of the Agreement (Carrier's File MW-15-12 STR).

(2) As a consequence of the violation referred to in Part (1) above, Claimant C. Rice shall have his record cleared of the charges and be compensated for any loss incurred."

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, with 20 years' seniority, was working as an Equipment Operator on February 9, 2015, a day with snowy and icy conditions, driving Carrier truck 1622 4-5 car lengths at 15 MPH behind a loader. In order to clean accumulated ice from the windshield, the loader driver activated his turn signal, pulled to the shoulder of the road and applied the brakes. The Claimant attempted to stop but "lightly tapped" the loader, resulting in minor damage and no injuries. A March 12, 2015 hearing followed leading to a decision to impose a three (3) day suspension for violation of safety rules. A timely claim followed.

The Carrier contends that the Claimant was at fault for the accident. Rather than mitigating, the foul weather conditions should have led to extra caution. The Carrier was not required to state rules allegedly violated in the hearing notice or to engage in discovery. The hearing notice met contractual requirements for detail. The Claimant was expected to know and comply with safety rules PGR-A, PGR-D and PGR-J, with the rules applied to the record created at the hearing. The suspension was reasonable and appropriate.

The Organization insists that the Claimant did not receive a fair hearing because no specific rules were mentioned in the charge letter, made a part of the hearing or attached to the hearing transcript. The Carrier has not met its burden of proof because an accident by itself does not equate to guilt. The weather was miserable on February 9, 2015, including the existence of black ice. The Claimant did all that he could by maintaining a safe distance behind the loader and traveling at a safe speed.

The Claimant was suspended for a violation of the above-noted Safety Rules. In its April 23, 2015 appeal of the suspension, the Organization wrote, "Here the involved Notice failed to neither (sic) advise the Organization or the accused of any alleged Rules Violations with the intent to be considered as part of Ms. Sheehan's (sic) (VP Engineering) process in issuing discipline. In fact, the only notice we received regarding any alleged Rules violations were being considered, was only after the issuance of Ms. Sheehan's (sic) discipline letter, dated March 27, 2015". The Board finds that the hearing notice in this case complied with Article 26.1. The notice, sufficiently detailed, left no doubt about the Carrier's concerns and the focus of the hearing. The so-called Achilles heel or fatal flaw in the Carrier's case is the absence of a copy of the Safety Rules from the hearing record. Article 26.1 requires that the Claimant receive a fair hearing. One element of a fair hearing involves making known to the Claimant the rules allegedly violated. Reference to the rules, without production of the rules themselves, is not sufficient to meet the test of a fair hearing. The Claimant and/or the Organization should not have to speculate about which rules the Carrier ultimately might find germane to the incident under review. The Carrier bears the burden of proof in this discipline case and therefore it is the Carrier's responsibility to

place the rules themselves in the hearing record. Public Law Board No. 5606, Award No. 9, the most recent relevant on-property Award in the record, concerned a case wherein the Carrier introduced Safety Rule GR-D at the hearing and then cited three additional Safety Rules, GR-A, GR-B and GR-J in the subsequent disciplinary notice. The Board in that case responded as follows: "In the opinion of the Board, since the Carrier determined at the hearing that there was reason to believe that the actions of the Claimant constituted a violation of but one specific rule it thereby foreclosed a right to subsequently determine if support of record existed to conclude that there was a violation of other rules." The principle applies herein. Without the actual rules themselves in the record, the Carrier has foreclosed the right to determine if the rules have been violated.

Moreover, in First Division Award No. 26295 that Board decided a dismissal case in which the rules found to have been violated were not made a part of the original transcript. The Board stated, "Without the Rules before us, we are unable to make such a determination" [of a violation]. The current Board finds that the hearing has not been fair and the absence of the rules themselves means that the Carrier cannot meet its burden of proof. The Claim must be sustained on procedural grounds without consideration of the incident. The Claimant is to be made whole in accordance with Articles 26.5 and 26.7. Compensation is to include pay for any overtime that the parties find that the Claimant would likely have worked but for the suspension.

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 42833 - DOCKET NO. MW-43613

(Referee I.B. Helburn)

The Carrier must dissent from this Award for the following reasons. First, the Board has misapplied PLB 5606, Award 9 to the instant dispute. As the Board explained in Award No. 9, based on the fact that the Carrier "*determined at the hearing that there was reason to believe that the actions of the Claimant constituted a violation of but one specific rule it thereby foreclosed a right to subsequently determine if support of record existed to conclude that there was a violation of other rules.*" [**Award No. 9**] In contrast, in a dispute involved in PLB 5606, Award No. 2, this 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 y 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 PLB 5606, 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. Consequently, this Board should have determined that the Carrier did not *"foreclos[e] a right to subsequently determine if support of record existed to conclude that there was a violation of other rules."* [**Award No. 9**] Instead, the procedural handling of the present case was consistent with the procedural handling in Award No. 2 and thus, this Board should have also recognized 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**]
(It should also be noted here that PLB 5606, Award No. 9 does not even indicate that the Claimant's discipline in that case was overturned because of this procedural issue, but rather, the Claimant's discipline was set aside on account of his twenty-seven (27) years

of an unblemished "*...past record, the demeanor displayed at the hearing, and the relative minor nature of the incident...*" [**Award No. 9**])

Next, by agreement, this Carrier is required to provide the Claimant with *"...information sufficient to apprise the employee of the act or occurrence to be investigated."* [**Article 26, at Carrier's Exhibit H, p.1**] During the on-property handling of the case, the Carrier stated:

> "*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 complying with the rules that govern his condition of employment. This obviously includes the Carrier's Safety Rules PGR-A, PGR-D and PGR-J. Furthermore, the Organization acknowledges that the Carrier provided notice that it was investigating a motor vehicle accident that the Claimant was involved in. The details of that incident 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*." **[Carrier's Exhibit E, p.2**]

The Organization did not subsequently contest the foregoing or make request for copies of the applicable rules, which the Claimant had (or reasonably should have had) in his possession at all times during the course of his employment, let alone during the handling of this matter. It is also not insignificant that this dispute involved a basic rear-end collision, whereby a Carrier loader was rear-ended by the truck that the Claimant was driving. It is axiomatic that the driver of a vehicle that strikes another vehicle from behind is responsible for the accident. Thus, the application of the Carrier's rules (which the Claimant had or reasonably should have had in his possession) to this very basic fact pattern 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 aforementioned Carrier Safety Rules at issue in this case. Instead, this Board isolated the first line of Article 26.1 and utilized a non-contractual standard in applying that isolated portion of the agreement to the facts of this case, thereby causing it to arrive at the erroneous conclusion that the Claimant was not afforded a fair hearing.

As for the Board's reference to First Division Award 26295, that Award does not involve a dispute on this property and its holding on this procedural issue runs contrary to the sound principle set forth in Public Law Board 5606, Award No. 2, which is entirely 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 from this Award.

Anthony Lomanto
Carrier Member

Matthew R. Holt
Carrier Member

December 12, 2017