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

Award No. 42834
Docket No. MW-43614
17-3-NRAB-00003-160376

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

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

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The discipline (official letter of reprimand) imposed upon Mr. M. Finck by letter dated March 19, 2015 for alleged violation of Safety Rule PGR-D in connection with sustaining an injury to his lower left arm while repairing the plow frame for Loader 32816 on Tuesday, February 10, 2015 was arbitrary, capricious, without just cause and in violation of the Agreement (Carrier's File MW-15-11 STR).

(2) As a consequence of the violation referred to in Part (1) above, Claimant M. Finck shall have his record cleared of the charges and be compensated for all losses."

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 seniority in the Maintenance of Way Department, fractured his forearm on February 10, 2015 when the plow frame for a loader he was repairing fell forward. This was immediately reported. The Carrier alleged a violation of Safety Rule PGR-D. A hearing was conducted on March 13, 2015 followed by a March 19, 2015 Letter of Reprimand. A timely claim followed.

The Carrier asserts that the plow and frame were held together only by a chain when the accident occurred. The repair was being done in a safe location, with repairs in the yard not unusual. The back part of the frame was independent and able to roll forward. Had the back part been blocked up or chained, the accident could have been prevented. The rule allegedly violated was stated in the hearing notice, which was sufficiently detailed. Discovery is not contractually required. The Claimant's responsibility has been established and the discipline is reasonable and appropriate.

According to the Organization when he was assigned to fix the plow frame, the Claimant requested help to ensure a safe operation. The Claimant and Mr. J. Stetson believed that the plow was stable, but it became less so and the accident occurred. This was a new repair for the Claimant and Mr. Stetson. They had not been trained to do this and had no reason to raise safety challenges. It would have been better to transport the plow to the shop rather than repair it in the field, but transport was unavailable. Although there was no emergency, the immediacy of repair outweighed safety considerations. The rule violation has not been proven. The Organization has never received a copy of the Safety Rule allegedly violated.

The Board finds that the hearing notice in this case complied with Article 26.1. Not only was the notice sufficiently detailed, leaving no doubt about the Carrier's concerns and the focus of the hearing, but also the notice included reference to the Safety Rule allegedly violated. The so-called Achilles heel or fatal flaw in the Carrier's case is the absence of a copy of the Safety Rule 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 rule itself, not simply a reference to the rule. While the Claimant or the Organization surely could have accessed the rule from the reference provided in the hearing notice, the Carrier bears the burden of proof in this discipline case and therefore it is the Carrier's responsibility to place the rule itself 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 rule itself in the record, the Carrier has foreclosed the right to determine if the rule has 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 rule itself means that the Carrier cannot meet its burden of proof. The Claim must be sustained on procedural grounds without consideration of the incident.

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 42834 - DOCKET NO. MW-43614

(Referee I.B. Helburn)

The Carrier must dissent from this Award for the following reasons. First, the Board erroneously states, "*One element of a fair hearing involves making known to the Claimant the rule itself, not simply a reference to the rule. While the Claimant or the Organization surely could have accessed the rule from the reference provided in the hearing notice, the Carrier bears the burden of proof in this discipline case and therefore it is the Carrier's responsibility to place the rule itself in the hearing record.*" During the on-property handling of this case, the Carrier stated [at **Carrier's Exhibit E, p.2**]:

> *"... Article 26 of the ST/BMWE Agreement does not require that notice of hearing list rules, yet, in this particular instance, one was included. (Please refer to Article 26, as well as various prior PLB Awards issued on this property, which address this very issue.) Also, Article 26 of the ST/BMWE Agreement does not require advance exchange of "discovery" of any kind. Moreover, 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 Rule PGR-D. The Claimant was found responsible for violating PGR-D, based on the "testimony and facts contained" on the record. This 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 contest the foregoing or make request for a copy of Carrier Safety Rule PGR-D, 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. Thus, the application of Safety Rule PGR-D to the facts on record in the case cannot reasonably be deemed as having deprived the Claimant of a fair hearing, regardless of the fact that the rule itself was not placed in the hearing record.

Next, the Board has misapplied PLB 5606, Award 9 relative 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 the instant dispute, the Carrier cited one specific rule in the notice of investigation (Carrier's Safety Rule PGR-D), it applied that one particular rule to the case

at hand and it ultimately held the Claimant responsible for violating that exact rule. Consequently, the procedural issue involved in PLB 5606, Award 9 is not present in the instant case and that Award is therefore not relevant to this dispute. (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**])

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.*" [**Award No. 42839**] The Board should have applied the same principle in the instant dispute with regard to Carrier Safety Rule PGR-D.

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**] 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, that 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, the Carrier not only *"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"* [**Award No. 2**], it even went so far as to cite Safety Rule PGR-D in the notice of investigation. And again, "*…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 Rule PGR-D."* [**Carrier's Exhibit E, p.2**] This Board, as it did in aforementioned Award No. 42839, should have held that the Claimant *"...was responsible for knowing and complying with the rule.*" [**Award No. 42839**]

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