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

**Award No. 42836**
**Docket No. MW-43616**
**17-3-NRAB-00003-160381**

**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 [seven (7) calendar day suspension] imposed upon Mr. L. Sanderson by letter dated Marh (sic) 12, 2015 in connection with his alleged '. . . violation of the Pan Am Railways, Roadway Worker On-Track Protection Policy, Step 1B. Responsibilities of 'Employee Responsible for On-Track protection.' As the 'Employee Responsible for On-Track Protection,' it was your responsibility to personally have a job briefing with every employee under your protection. Based on your testimony you did not have this required briefing with the Jimbo operator Mr. Brunelle.' Was unwarranted, on the basis of unproven charges and in violation of the Agreement (Carrier's File MW-15-08 STR).**

**(2) As a consequence of the violation referred to in Part (1) above, Claimant L. Sanderson's record shall be cleared of the charges leveled against him and he shall be made whole 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 worked as an Assistant Foreman in the Maintenance of Way Department on November 14, 2014, when he was in charge of a large tie crew, including Mr. C. Brunelle, who was operating a Jimbo boom on track 2 within the Claimant's track authority near Athol, MA. After seeing the headlights and hearing the horn of westbound train 205 on track 1, Mr. Brunnelle took action to move the boom, which had drifted toward track 1, back over track 2, thus averting contact. Nevertheless, the 205 train crew, believing contact was inevitable, placed the train in emergency and notified the dispatcher, who then notified the Claimant. No property damage or injuries occurred and it was determined that the 205 train crew was unaware of the work train on track 2 and Mr. Brunelle was unaware of train 205 heading west on track 1. Following a hearing on February 26, 2015, the Claimant was given a seven day suspension for failing to brief Mr. Brunelle. A timely claim followed.**

**The Carrier noted that Mr. Brunelle had had a job briefing with Foreman Carnett, but not with the Claimant, who had track 2 authority and therefore was required to personally brief the work crew. The Claimant acknowledged that he was responsible for telling all concerned that he did not have authority for track 1, but he relied on Foreman Carnett's assurance that he had briefed Mr. Brunelle. The facts establish the Claimant's responsibility. The Carrier was not contractually required to state rules allegedly violated in the hearing notice or to engage in discovery. The hearing notice was sufficiently detailed. The Claimant understood what was at issue and should not have been surprised when the relevant rule was applied to the facts. The Claimant was not prejudged. The suspension was not arbitrary and capricious discipline in view of the nature and seriousness of the incident.**

**The Organization contends that the Claimant did not receive a fair and impartial hearing because neither the hearing notice nor the hearing itself referred to rules allegedly violated. The close call is not by itself proof of the Claimant's**

**guilt, particularly when the lack of communication was the Carrier's fault and not the Claimant's. The Claimant had proper authority on track 2 and relayed the information to the relevant employees as best he could using his own vehicle and a hand-held radio over nine miles of track. The incident does not equal a rules violation. The Claimant's explanation of what occurred, including the lack of a direct job briefing with Mr. Brunelle, was not an admission. The Claimant accepted Foreman Carnett's word that Mr. Brunelle had been briefed and thus had no reason to believe that Mr. Brunelle did not have the relevant information. There is no evidence that the Claimant used bad judgment or was reckless. Mr. Brunelle had not operated the Jimbo boom in 2014 and believed that the drifting issue, which he had previously experienced, had been fixed. The suspension was arbitrary, capricious, and unwarranted, levied only because of the near miss, which was not the Claimant's fault and not due to any rule violation.**

**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 7, 2015 appeal of the dismissal, the Organization stated that Ms. Sheehan (sic) (VP Engineering):**

> **". . . accuses Mr. Sanderson for having been in violation of the mentioned Pan Am Railways, Roadway On-Track protection (sic) Policy, Step 1B, for which were never incorporated in the original Hearing/Investigative Notice, nor was any documentation exhibited to the record and the Organization was never afforded a copy for our review and opportunity to address."**

**The Carrier was not obligated to include rules allegedly violated in the hearing notice, nor was the Carrier obligated to engage in discovery. However, the Carrier's failure during the hearing to make known and introduce copies of the rule it believed the Claimant 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 during 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 basis for discipline or dismissal." The Award further referred to Third Division Award 39919 in which that Board found that rules relied on by 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 record. In the case now under review, the Carrier cannot prove a violation of a rule that is not a part of the record. See Public Law Board, Award 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.**

**Two on-property awards provided by the Carrier are relevant. Public Law Board No. 5606, Award No. 2 stated the following: "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 . . . 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." The Carrier has relied on this Award to support the discipline assessed against Claimant Sanderson but the reliance is misplaced. Public Law Board 5606, Award No. 9, which obviously came after the earlier Award, seemly abandoned Award No. 2, although the rationale for doing so is unknown. The more recent language follows:**

> **"It does however concern the Board that after having only introduced at the hearing that Safety Rule GR-D had allegedly been violated, that in its subsequent notice of discipline the Carrier would additionally cite Safety Rules GR-A, GR-B and GR-J as having likewise been violated. 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."**

**This Board finds the approach taken in Award No. 9 more consistent with the mandate to provide a fair hearing than the approach taken in Award No. 2. Moreover, the more recent on-property approach finds support in Awards involving other parties as well. 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 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 42836 - DOCKET NO. MW-43616**

**(Referee I.B. Helburn)**

The Board has improperly determined that the Claimant was not afforded a fair hearing in this case. More specifically, the Board inaccurately concluded that "*Public Law Board 5606, Award No. 9, which obviously came after the earlier Award, seemingly abandoned Award No. 2, although the rationale for doing so is unknown.*" PLB 5606, Award No. 9 did not "*abandon*" PLB 5606, Award No. 2. The two cases are clearly distinguishable.

In the dispute involved in PLB 5606, Award No. 9, the Carrier cited a specific rule at the hearing investigation. 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**] (It should 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**])

PLB 5606, Award No. 2 is distinguishable from PLB 5606, Award No. 9, in that the Carrier in that case did not cite any specific rule(s) 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 any specific rules 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**] Rather, the procedural handling of the present case was consistent with the procedural handling in Award No. 2 and thus, in the instant dispute, the 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**]

In addition, the record of this case confirmed that the Claimant was a qualified foreman, he had the track authority at issue, he was required to have a direct job briefing with all of the affected employees relative to his track authority and he admitted that he did not do so with respect to Mr. Brunelle. In particular, the Claimant was asked, "*By accepting the authority of the line four you are now responsible for any and all movements that happen in that territory, is that correct?*" He answered, "*That is correct.*" [**Transcript p. 53**] He was asked, "*Are you, you were also responsible to inform anyone who is working in there with you that you don't have foul time on an adjacent track, correct.*" He again answered, "*That is correct.*" [**Transcript p. 53**] He was then asked, "*And the only one that you, you say that you did not have that direct conversation with is Mr. Brunelle?*" And he answered, "*I believe so, yes*." [**Transcript p. 53**] The Hearing Officer also directly asked the Claimant, "*So you did not directly talk with Mr. Brunelle.*" He replied, "*No, I did not.*" [**Transcript p. 51**] In addition to his own statements against interest, two (2) of the Claimant's co-workers corroborated 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 of PLB 5606, Award No. 2 and *"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**] This is especially troubling in a matter such as this, which involved the on-track protection of employees.

In further dissent, during the on-property handling of the instant case, the Carrier stated for the record that:

> "*...the Claimant, like all employees, is responsible for knowing and abiding by the rules that govern his condition of employment. It is evident from any objective review of the record that the Claimant knew and understood that he was the employee in charge in the territory in question. He "owned" the territory and he knew he was responsible for all movement within the limits of his authority. He knew he was also responsible to inform anyone who is working in the work limits that he did not have foul time on the adjacent track. And he knew that he did not have a direct job briefing with Mr. Brunelle. Furthermore, job briefings and foul*

*time on adjacent tracks were central issues of the hearing and were explored at length and in detail. Thus, it should come as no surprise that the applicable rule was applied to the facts on record and the Claimant was held responsible for not complying with the applicable rule. 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. 4]**

The Organization did not subsequently contest the foregoing.

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 rule at issue in this case.

As for the Boards 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, are distinguishable from the instant dispute and the holding of the Awards runs contrary to the sound principle set forth in Public Law Board 5606, Award No. 2, which was not "*abandoned*" in Award No. 9 and is also 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**