

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42838
Docket No. MW-43668
17-3-NRAB-00003-160442**

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: (
(Springfield Terminal Railway Company**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed upon Mr. R. Gilliland by letter dated September 23, 2015 for alleged violation of FRA CFR 214.319, NORAC Rule 4, NORAC Rule 133 Part F, Pan Am Railways On-Track Protection Manual 1B all areas relating to the employe (sic) responsible for On-Track Protection and Safety Rules PGR-A, PGR-D and PGR-J and for allegedly being negligent in his duties when he purposely cancelled a Form D Line 4 without making sure all employes were clear of the Form D's limits on August 12, 2015 was without just and sufficient cause and in violation of the Agreement (Carrier's File MW-15-33 STR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. Gilliland must be reinstated to service and compensated for all losses incurred 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 seven years' seniority with no previous discipline within the Maintenance of Way Department and on August 12, 2015 was a Foreman responsible for on-track protection (EROP) for employees in the Maintenance of Way and Signal Departments clearing brush along the right-of-way. Signal employees worked immediately under Signal Foreman Normandin. That afternoon, having directly alerted some employees, the Claimant cancelled the track protection after visually determining that no machines or employees were foul of the track. He also alerted an oncoming train that Signal employees had been working but were not foul of the track. Foreman Normandin's complaint that he had not been informed of the cancelled protection resulted in a charge against the Claimant and a September 9, 2015 hearing. A September 23, 2015 letter found the Claimant guilty of several charges, not all of which were introduced or discussed during the hearing. The Claimant was dismissed and a timely claim was filed.

The Carrier contends that the Claimant had been properly trained and the evidence shows that he had Equipment Operator (EO) Lawrence brief employees and tell them to get in the clear before the Claimant gave up the Form D that afternoon. E.O. Lawrence testified that he was not asked to inform the Signal crew, but did so as a courtesy. The Claimant admitted that he was required to personally brief the entire crew and that he did not. The Organization's violation of Article 26.8 does not justify modifying the discipline. When discipline was not agreed to off the record, discipline was assessed based on the results of the hearing. Claimant's failure to follow the applicable rules, which he knew or should have known, was a dismissible offense and resulted in discipline that was not arbitrary or capricious. The Carrier has the sole prerogative to dispense leniency. The dismissal was not an abuse of discretion.

The Organization asserts that the discipline cannot stand because failure to introduce rules during the hearing made the process unfair. The Claimant was prejudged because he was charged based on his accuser's words and without being

interviewed. His accusers, guilty of similar violations, were not disciplined. The Claimant acted in accordance with multi-craft practices acknowledged by Foreman Normandin. These practices “prevailed and governed” and became “the real rules that applied.” The Claimant was disparately punished because Foreman Normandin allowed signal employees Mr. McGlone and Mr. Stevens to work foul of the tracks, even if only incidentally, and to leave and return within track protection limits without being disciplined.

Two preliminary matters merit attention before the substance of this dispute is considered. First, the Claimant did not receive the fair hearing required by Article 26.1 insofar as charges related to Safety Rules PGR-A, PGR-D and PGR-J are concerned. Fairness and due process require that the Claimant and the Organization be informed during the hearing of the charges being considered so that there is a reasonable opportunity to respond. The Claimant and the Organization should not have to guess or speculate about what the ultimate charges might be. The failure to make all alleged violations known during the hearing constitutes a form of trial by ambush. It is not enough to state in the hearing notice that violations of unnamed safety rules will be reviewed. Moreover, the inability of the parties to resolve the claim during the on-property progression of this matter leaves resolution to this Board. Without the actual rules being appended to the transcript, the Board has no standard against which to judge the Claimant’s actions. The Board finds the negligence charge irrelevant and superfluous. Assuming, arguendo, that the Carrier can prove violations of the above-noted rules attached to the transcript, the proven violations in and of themselves indicate negligence.

The second preliminary matter involves the Organization’s reliance on the off-the-record discussions about the measure of discipline to be assessed. Such reliance violates Article 26.8(b). The Board has not factored these discussions into its consideration of the Claimant’s appeal. The Board agrees wholeheartedly with the statement in the Carrier’s November 15, 2015 denial letter that “it is an elementary concept that violations of that provision would tend to have a ‘chilling effect’ on future use of said provisions.”

The essential charge against the Claimant is that he “allegedly cancelled his Form D Line 4 and returned the track to the control of the Train Operations Manager without making certain that all employees working within the Form D’s limits were in the clear for the safe passage of trains.” Certain relevant facts are undisputed. The Claimant was the Employee Responsible for On-Track Protection

(EROP) on August 12, 2015. As EROP, the Claimant was required to brief all protected employees prior to surrendering the Form D Line 4, but he did not because he assumed Equipment Operator (EO) Lawrence had done so. However, the rules appended to the hearing transcript do not allow the Claimant to rely on EO Lawrence for the job briefing. The Claimant did not confirm that no members of the Signal crew were foul of the track when the Form D was cancelled.

The Board notes that during the hearing, EO Lawrence testified that the Claimant did not tell him to brief others before the Form D was surrendered, and that this conflicts with the Claimant's testimony that he had instructed EO Lawrence to brief others. The Board credits the Claimant's testimony that he did not follow the rules that have been appended to the hearing transcript because the Board believes that the Claimant would not have made an untruthful admission against interests—an admission that he violated rules when he did not. In essence, the Claimant admitted that he was negligent in discharging his EROP responsibilities. The Board acknowledges that the Claimant had agreed to work in another employee's place on August 12, 2015 and could be viewed as having done the Carrier a favor. However, particularly in an industry that is inherently dangerous, doing the Carrier a favor does not justify a failure to explicitly follow rules designed to protect property and, more importantly, lives. Fortunately, there was no property damage or injuries on August 12, 2017, but written statements and the testimony of Signal crew member McGlone establish that the bucket truck used by the Signal crew was foul of the track at the time the Form D was given up.

This leaves the question of appropriate discipline. For two reasons the dismissal is modified. First, the claimant is a seven year employee with no previous discipline. His tenure and record do not indicate to the Board that he is a troublesome employee who is unlikely to learn from progressive or corrective discipline. Moreover, the Claimant was forthright during the hearing about the violations and showed a willingness to take responsibility for his actions. Such a willingness is viewed as a necessary precursor to learning from the experience. Second, to an extent, the Claimant followed what was an inappropriate but common practice when he asked EO Lawrence to relay word of the cancelled Form D. However, if this was going to be done, surely it would have been better to directly brief the leader of the Signal crew, Foreman Normandin.

While close supervision and extensive knowledge of what practices take shape in the field may be difficult to achieve with crews spread over a distance along the tracks, the Carrier must assure that rules are followed as set forth rather than

replaced by informal variations that decrease protection. That is what happened on August 12, 2015. The Claimant's violations are viewed as very serious because of his EROP responsibility for the entire brush-cutting and Signal crew. His violations thus eclipse those of the Signal crew.

The claim is sustained in part and denied in part. Claimant is to be reinstated, but without compensation for lost earnings in light of the very serious nature of the violations. The period of time that the Claimant was off shall be considered a lengthy disciplinary suspension.

AWARD

Claim sustained in accordance with the Findings.

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 42838 - DOCKET NO. MW-43668

(Referee I.B. Helburn)

The Carrier must dissent in part from this Award for the following reasons. First, the Board has isolated the first line of Article 26.1 and utilized a non-contractual standard in applying that isolated language. As a result, the Board erroneously concludes that “...*the Claimant did not receive the fair hearing required by Article 26.1 insofar as the charges related to Safety Rules PGR-A, PGR-D and PGR-J are concerned. Fairness and due process require that the Claimant and Organization be informed during the hearing of the charges being considered so that there is a reasonable opportunity to respond.*” By agreement, this Carrier must provide the Claimant with “...*information sufficient to apprise the employee of the act or occurrence to be investigated.*” [**Article 26, at Carrier’s Exhibit A, p.148**] Such is the manner in which the Carrier is contractually required to inform the Claimant and Organization “...*during the hearing of the charges being considered so that there is a reasonable opportunity to respond.*”

Next, in Public Law Board 5606, Award No. 2, which involved a prior dispute on this property, the Carrier did not cite any specific rules in either the notice of hearing or during the hearing investigation itself, just like in the instant case. 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**] The procedural handling of the present case was consistent with the procedural handling in Award No. 2 and thus, this 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**]

Additionally, during the handling of the case on the property, the Carrier stated for the record that “*Based on the evidence, it is undeniable that the Claimant negligently*

performed his duties in violation of CFR 214.319, NORAC Rule 4, NORAC 133E and F and the roadway worker protection manual (and by extension, rules A, D and J.) He was trained and required to follow the rules.” [Carrier’s Exhibit E, p.5] The Organization did not contest this statement or request copies of the Carrier’s Safety 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 particular case. 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.

It is for the foregoing reasons that the Carrier must dissent in part from this Award. The Carrier does concur, however, with the Board’s sentiment that “...*the Carrier must assure that rules are followed as set forth rather than replaced by informal variations that decrease protection. That is what happened on August 12, 2015. The Claimant’s violations are viewed as very serious because of his EROP responsibility for the entire brush-cutting and Signal crew. His violations thus eclipse those of the Signal crew.*” Accordingly, this Board should not have made the subsequent error of substituting the Carrier’s judgment with its own, in order to set aside the Claimant’s dismissal.

Anthony Lomanto
Carrier Member

Matthew R. Holt
Carrier Member

December 12, 2017