

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 44955  
Docket No. MW-46696  
23-3-NRAB-00003-210693**

**The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens when award was rendered.**

**(Brotherhood of Maintenance of Way Employees Division -  
(IBT Rail Conference**

**PARTIES TO DISPUTE: (  
(Montana Rail Link, Inc.**

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The discipline (letter of censure) imposed upon Mr. R. Buswell, by letter dated August 27, 2020, for alleged violation of Montana Rail Link General Code of Operating Rules 1.1 and 10.3.2 in connection with a failure to hold a sufficient job briefing with his crew clearing track and time without equipment being in the clear at Mile Post 43.32 on July 29, 2020 was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File MRL-305-Z MRL).**
- (2) As a consequence of the violation referred to in Part (1) above, ‘... we are requesting that Mr. Buswell have his service record cleared of the charges and proceedings of this fact-finding session.’”**

**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 been employed by the Carrier in its Maintenance of Way department for approximately five and a half years at the time of the incident herein. On March 19, 2020, the Claimant was working as a Track Laborer on a M&W crew assigned to tamp the cross ties at a public road crossing near Elliston, Montana.**

**Shortly before 1:00 PM, when the crew was roughly five minutes over the time provided for in the work authority, the Foreman notified the crew that they were probably holding up a train and instructed his crew to clear the tracks in preparation for train movement. The Claimant and the Foreman removed tools from the tracks and went to sit in the cab of the boom truck. The Boom Truck Driver notified his Foreman that he was clear of the tracks. The Foreman released the work authority and the crew ate their lunch sitting in the cab of the boom truck.**

**A passing locomotive struck the boom of the crew's truck that had not been cleared and was still fouling the tracks. Both the boom truck and the locomotive were damaged. The crew members were bounced around in the boom truck but were not injured.**

**On March 20, 2020, the Claimant was given notice of an investigation in connection with the following charge:**

**Arrange to attend a fact finding hearing...for the purpose of determining your responsibility, if any, when you allegedly failed to hold a job briefing with your crew prior to fouling the track, and allegedly left the boom out over the main line at milepost 43.34, on March 19, 2020.**

**The above charge may be a violation of General Code of Operating Rules 1.1 and 10.3.2, which govern Montana Rail Link employees per Item 11 in the All Subdivision Special Instructions of Timetable #19. Your past discipline record will be taken into account in assessing discipline, if any.**

**After a formal investigation on July 29, 2020, the Claimant was found in violation of Montana Rail Link General Code of Operating Rules 1.1 and 10.3.2 and was issued a Letter of Censure because he "failed to hold a sufficient job briefing with [his] crew clearing track and time without equipment being in the clear and left the boom out over the main line at milepost 43.32."**

In a letter dated October 23, 2020, the Organization appealed the Carrier's discipline. The Carrier responded to and denied the appeal in a letter dated December 16, 2020. Following discussion of this dispute in conference, the positions of the parties remained unchanged, and this dispute is now properly before the Board for adjudication.

The Carrier contends that it has presented substantial evidence of the Claimant's violation of its rules. The Carrier contends that the Claimant violated two critical operating rules when he failed to observe that the boom on the Boom Truck was fouling the track when the Foreman released the work authority. The Carrier contends that the Claimant and the other crew members were equally responsible for complying with the rules. The Carrier contends that the Claimant admitted that he shared responsibility to assure that the tracks were clear of equipment before the authority was released and that he did not look himself to see if the boom was clear.

The Carrier contends that the Claimant was afforded a fair and impartial hearing. The Carrier contends that it timely provided the transcript of the proceedings to the Organization. The Carrier contends that the roles of the Carrier's officers did not wrongly overlap in the disciplinary process. The Carrier contends that the Organization failed to show any evidence that the Claimant's due process rights were prejudiced in any way.

The Carrier concedes that the discipline letter included a reference to a failure to conduct a job briefing before clearing the track, although the Notice of Investigation charged the Claimant with failing to hold a job briefing before fouling the track. The Carrier acknowledges that an employee cannot be found guilty of something he was not charged with. However, the Carrier contends that there is no question that the Claimant failed to visually confirm that the boom on the truck was in the clear of the track, thereby violating GCOR 1.1 and 10.3.2. The Carrier contends that the error should not cause this Board to overturn the discipline.

The Carrier contends that the letter of censure was not excessive, especially as other crew members involved in the same incident were dismissed.

The Organization contends that the Carrier failed to provide the Claimant with a fair and impartial investigation. First, the Organization contends that it did not timely receive the transcript from the investigation, as required by Article 13, hindering the Organization's defense of its member. Second, the discipline was rendered by an individual who was not present at the fact finding and who served as the charging officer.

**The Organization contends that the Carrier attempted to alter and expand the charges against the Claimant after failing to prove the initial charges. The Organization contends that in the on-property handling the Carrier conceded, "...the Fact Finding did not establish that Claimant failed to job brief."**

**The Organization contends that the Carrier has failed to demonstrate with substantial evidence that the Claimant engaged in any wrongdoing. The Organization contends that the Claimant was merely present at the site of the incident but has not been proven guilty of any infraction of the Carrier's rules. The Claimant did not have responsibility to hold a job briefing or for the boom truck.**

**The Organization contends that the discipline imposed was arbitrary, excessive, and unwarranted. The Organization contends that the Carrier has failed to justify the imposition of discipline against the Claimant.**

**The Organization has pointed out that the discipline was meted against the Claimant for a different reason than was contained in the charges against him. The Carrier has conceded as much in its on-property handling. The Notice of Investigation indicated that the investigation would be for the purpose of ascertaining whether the Claimant had failed hold a job briefing with his crew prior to fouling the track but this was not the reason given for imposing discipline. Holding the Claimant responsible for misconduct different than what he was charged with in the Notice of Investigation deprived the Claimant of an opportunity to prepare and present his defense. Third Division Award 16740.**

**The Notice of the Charges is a fundamental aspect of due process, guaranteed by the parties' Agreement. Here, the Carrier found that the Fact Finding did not establish that the Claimant failed to job brief prior to fouling the track as he had been charged. The Carrier then based the discipline on a different allegation of failure to job brief, which the Claimant never had an opportunity to answer. For this reason, the discipline cannot stand. The Board has no choice but to sustain the claim.**

**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 24<sup>th</sup> day of May 2023.