

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 45327  
Docket No. MW-48077  
25-3-NRAB-00003-230405**

**The Third Division consisted of the regular members and in addition Referee Bradley Areheart when award was rendered.**

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

**PARTIES TO DISPUTE: (**  
**(BNSF Railway Company**

**STATEMENT OF CLAIM:**

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

**(1) The discipline (dismissal) imposed upon Mr. C. Birkle, by letter dated November 10, 2021, for alleged violation of MWOR 1.3.3 Circulars, Instructions and Notices, MWSR 1.2.5 Safety Rules, Mandates, Instructions, Training Practices and Policies and El 1.4.16 Scaffold Guidelines for failure to follow fall protection and scaffolding requirements when changing out a bridge cap at bridge located at Mile Post 1039.76 on the Hettinger Subdivision at approximately 10:00 A.M. on August 11, 2021 was inappropriate, on the basis of unproven charges and in violation of the Agreement (System File B-M-3627-Z/11-22-0167 BNR).**

**(2) As a consequence of the violation referred to in Part (1) above, Claimant C. Birkle shall now:**

**‘... be reinstated to service with all seniority rights restored and all entitlement to, and credit for, benefits restored, including vacation and health insurance benefits. The claimant shall be made whole for all financial losses as a result of the violation, including compensation for:**

**1) straight time for each regular workday lost and holiday pay for each holiday lost, to be paid at the rate of the position assigned to the claimant at the time of removal from service (this amount is not reduced by earnings from alternate employment obtained by the claimant while wrongfully removed from service);**

- 2) any general lump sum payment or retroactive general wage increase provided in any applicable agreement that became effective while the claimant was out of service;
- 3) overtime pay for lost overtime opportunities based on overtime for any position claimant could have held during the time claimant was removed from service, or on overtime paid to any junior employee for work the claimant could have bid on and performed had the claimant not been removed from service;
- 4) health, dental and vision care insurance premiums, deductibles and co-pays than he would not have paid had he not been unjustly removed from service. All notations of the dismissal should be removed from all carrier records.”

**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.

**Factual Background**

On August 11, 2021, Claimant Birkle was a B&B Foreman on a mobile structures maintenance gang. He was performing bridge maintenance activities when a member of the gang fell off scaffolding and was fatally injured. Following the incident, Supervisor Cory Knutson arrived at the job site and interviewed the Claimant. During this conversation, the Claimant admitted that they did not perform a job safety briefing that morning before starting work because they had talked about it the previous night.

On April 19, 2021, the Carrier directed the Claimant to report for a formal investigation. The investigation was originally scheduled for August 25, 2021 but

postponed and later held on October 13, 2021. Tom Zerr was the Conducting Officer. On November 10, 2021, the Claimant was informed that he was found guilty of violating MWOR 1.3.3 Circulars, Instructions and Notices; MSWR 1.2.5 Safety Rules, Mandates, Instructions, Training Practices and Policies; and EI 1.4.16 Scaffold Guidelines. He was immediately dismissed.

The Organization appealed the decision on January 4, 2022. A claims conference was held on August 16, 2022, but the parties could not reconcile their position. The claim is thus now before the Panel.

**Position of Organization**

There are multiple procedural infractions in this case. First, the “safety briefing” press (dated August 13, 2021) that followed this incident (but was two months before the hearing) indicated that the Carrier had prejudged the case before the matter went to hearing. The organization noted there were too many details that suggested fact finding had already taken place. As such, the Organization argues that the actual hearing was just a formality for what had been predetermined. Second, the carrier’s hearing officer did not properly conduct a hearing. Specifically, he indicated he would not be the one making a decision regarding the case—even though he was the only one who could assess credibility. The organization says the hearing officer is the person in the best position to ensure due process by making a fair and impartial decision.

Further, that hearing officer kept out prior decisions which were relevant to the outcome here. The organization argues this was done to keep the record slanted in one direction. Third, certain critical witnesses were not present for the hearing. According to the organization, the carrier had a responsibility to present all witnesses who were knowledgeable of facts that bore on the matter. As such, the prior determination was “fruit of the poisonous tree.”

Additionally, the employees testified that a job safety briefing did take place the morning of the incident. By saying the briefing did not occur that morning, the carrier is seeking to exonerate a manager and instead put blame on the foreman and other employees. The organization also claims that the foreman did not have training on this particular work.

Finally, the Organization argues that the quantum of discipline was too great. It was arbitrary, excessive, and in violation of the Agreement. The Claimant was a 7-year veteran and the ultimate goal of any discipline policy should generally be

rehabilitation—not to punish. The discipline was thus too great to satisfy ordinary principles of just cause.

### *Carrier's Position*

The Carrier's position is that the discipline was appropriate given all of the circumstances. The Claimant did not comply with all of the rules, mandates, instructions, training practices, and policies that were applicable to this assignment. It also argues that the standards are clear that if you are working on scaffolding, there must be fall protection if the distance between the scaffolding and the ground is over six feet. Further, connecting scaffolding to a bridge does not transform scaffolding into something else. The Carrier contends that the six-foot standard remains.

The carrier also argues that the foreman failed to ensure safety. He failed to hold a job safety briefing the morning of the accident. The foreman failed to ensure the employees in this group wore fall protection while working on the scaffolding. The carrier further argues dismissal is appropriate because the foreman had already had a previous safety violation relating to alcohol and drugs within the same review period. The rules state that if a serious violation occurs while still in review period, dismissal is appropriate.

The carrier notes that the job safety briefing should have been in writing. And employees have a vested interest to testify that it did in fact take place.

Regarding alleged procedural infractions, the carrier argued that the safety briefing was to draw attention to a dangerous incident; it did not indicate it had prejudged the event and noted the investigation was ongoing. Regarding the actual hearing, it says there are no rules that require the hearing officer to be the one to render the decision in a matter. Ultimately, they note, the hearing officer is always only making a recommendation, subject to an executive board's determination. Finally, the carrier notes that board awards should not be entered into the record. They would be appropriate for review on appeal.

### *Analysis*

The Board finds the Carrier should not have dismissed the Claimant.

There are many argumentative appeals advanced by the Organization (and they are outlined in broad form above), but the Panel finds that this case hinges on Rule 40:

**“RULE 40. INVESTIGATIONS AND APPEALS**

- A. An employee in service sixty (60) days or more will not be disciplined or dismissed until after a fair and impartial investigation has been held. Such investigation shall be set promptly to be held not later than fifteen (15) days from the date of the occurrence, except that personal conduct cases will be subject to the fifteen (15) day limit from the date information is obtained by an officer of the Company (excluding employees of the Security Department) and except as provided in Section B of this rule.**
- B. In the case of an employee who may be held out of service pending investigation in cases involving serious infraction of rules the investigation shall be “held within ten (10) days after date withheld from service. He will be notified at the time removed from service of the reason therefor.**
- C. At least five (5) days advance written notice of the investigation shall be given the employee and the appropriate local organization representative, in order that the employee may arrange for representation by a duly authorized representative or an employee of his choice, and for presence of necessary witnesses he may desire. The notice must specify the charges for which investigation is being held. Investigation shall be held, as far as practicable, at the headquarters of the employee involved.**
- D. A decision shall be rendered within thirty (30) days following the investigation, and written notice thereof will be given the employee, with copy to local organization’s representative. If decision results in suspension or dismissal, it shall become effective as promptly as necessary relief can be furnished, but in no case more than five (5) calendar days after notice of such decision to the employee. If not effected within five (5) calendar days, or if employee is called back to service prior to completion of suspension period, any unserved portion of the suspension period shall be canceled.**

E. The employee and the duly authorized representative shall be furnished a copy of the transcript of investigation, including all statements, reports, and information made a matter of record.

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G. If it is found that an employee has been unjustly disciplined or dismissed, such discipline shall be set aside and removed from record. He shall be reinstated with his seniority rights unimpaired, and be compensated for wage loss, if any, suffered by him, resulting from such discipline or suspension.

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J. If investigation is not held or decision rendered within the time limits herein specified, or as extended by agreed-to postponement, the charges against the employee shall be considered as having been dismissed.”

The Organization has detailed by on-property awards the critical role that Rule 40 plays in ensuring procedural and substantive fairness. Because the Carrier maintains control over the investigation, it is critical that the Claimant is afforded to a hearing that is thoroughly fair and impartial. However, the Panel is persuaded that the Investigation was not fair and impartial. There are at least two reasons for this conclusion.

First, the hearing officer made it clear that he would not be the ultimate arbiter of his recommendation. He was going to proffer an opinion and “push it up the ladder for other individuals” to make the ultimate recommendation. This offends ordinary principles of due process. As the one present to make credibility determinations and piece together the factual record, he was in the single best position to make a recommendation. But he was not present to make a final recommendation, but rather only to give input. (“I don’t make the final [decision]. I do have some input into it.”)

Second, the panel is concerned by several of the statements the hearing officer made on the record which indicate a bias regarding how the matter should come out. In several places, Mr. Zerr did not ask a question, but instead made a comment or seemed to tell a witness how to view certain evidence. The post-conference letter dated January 18, 2023 chronicles several of these interjections/argumentative questions on pages 22-23. Cumulatively, these occurrences indicate that Mr. Zerr was not only acting as a neutral; to some extent, he was acting as an advocate. This conclusion is not a matter of holding the hearing officer to the standard of an “experienced jurist.” Rather, it is a simple matter of ensuring the Claimant received a fair investigation.

These two dynamics are concerning to the Panel. Taken together, they are enough to overturn the dismissal and reinstate the Claimant. There are many more arguments and positions that were advanced by the parties. Some are outlined above; others were included in the lengthy submissions and discussed during oral arguments. The panel considered each of them, but it is not necessary to resolve all of them to reach the panel's ultimate determination: that Mr. Birkle was wrongly dismissed.

Finally, there is a question of remedy. This Board is guided by the well accepted principle of rendering a "make whole" remedy in a labor contract dispute such as the one here. The goal of such a remedy is to place the parties in the position they would have been in had there been no violation. Under this analysis, the Claimant would have received medical benefits, regular compensation, overtime, and all the other benefits of an employee working under the parties' collective bargaining agreement. But that would naturally be offset or mitigated by any benefits received during the same timeframe.

The Organization contends that any wages earned by the Claimant during his period away from BNSF are properly his and should not be deducted from his awarded compensation. This Board agrees, but only to the extent those earnings were being received prior to the dismissal. If they were not being received prior to the dismissal, that indicates the new earnings are in replacement of the wages lost from BNSF. Any earnings from replacement employment shall be deducted from the total recovery.

The claim is sustained. The Carrier shall immediately remove the discipline from the Claimant's record and reinstate the Claimant, subject to its policies on return to work, with seniority, vacation, and all other rights unimpaired and make him whole for all time lost as a result of this incident. Lost overtime shall be compensated at the overtime rate. His compensation shall be reduced by any interim earnings from replacement employment. There shall be no offset from earnings that existed prior to the discipline. The Claimant shall be reimbursed for medical benefits to the extent that he provides the Carrier and the Organization with receipts of medical expenditures that would have been covered but for the lapse in his Health and Welfare Benefits. The Parties shall then jointly determine what co-pays, premiums and other medical costs would otherwise have been covered by his insurance had he continued in the Carrier's employ uninterrupted by dismissal. Any other claims to compensation not specifically granted in this award are hereby denied.

**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 31<sup>st</sup> day of October 2024.**