

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 45328  
Docket No. MW-48078  
25-3-NRAB-00003-230406**

**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 [Level S thirty (30) day record suspension with a three (3) year review period] imposed upon Mr. T. Keller, 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-3628-Z/11-22-0168 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant T. Keller shall now ‘... be made whole for any and all benefits, and his record cleared of any reference to any of the discipline set forth in the letter from Tom Zerr Assistant Roadmaster dated November 10, 2021.’”**

**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, the Claimant Keller was a B&B First Class Mechanic/Carpenter 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 foreman 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 assessed a Level S 30 Day Record suspension with a three (3) year review period.

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.”

Substantively, 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 10-year veteran with a relatively clean disciplinary record. Further, the ultimate goal of any discipline policy should generally be rehabilitation—not to punish. Further, Mr. Keller was not the foreman or in charge of the crew. 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.

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 discipline. 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. Keller was wrongly disciplined.

The claim is sustained. The Carrier shall immediately remove the discipline from the Claimant’s record and make him whole for the 30 days 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 discipline. 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.