

PUBLIC LAW BOARD NO. 7564

Case No.: 20/Award No.: 20
Carrier File No.: 10-12-0284
Organization File No.: C-12-D040-10
Claimants: Jesse S. Cardona
Scott A. Stengel

BNSF RAILWAY COMPANY)
)
-and-)
)
BROTHERHOOD OF MAINTENANCE)
OF WAY EMPLOYEES DIVISION - IBT)

Statement of Claim:

The Carrier violated the Agreement when on February 14, 2012 Claimant Jesse S. Cardona and Claimant Scott A. Stengel were issued a Level S thirty-six (36) day actual suspension and a one (1) year review period for violating 2.1.2 Track Welding Rules & Procedures, Gas Cylinders; 2.6 Track Welding Rules & Procedures, Testing the Oxy-Fuel Gas Equipment; MOWOR 1.1 Safety, Job Safety Briefing; MOWOR.1 Maintaining a Safe Course; and MOWOR 1.6 Conduct.

As a consequence of the violation, the Carrier should expunge the discipline from the Claimants' personnel records and make the Claimants whole for lost wages.

Facts:

By letter dated January 10, 2012 the Claimants were directed to attend an investigation on January 16, 2012 "for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to follow proper shut-down & start-up procedures for handling oxy-fuel equipment at approximately 1020 hours, on January 6, 2012 at/or near MP 112.1 on the Angora Subdivision, which resulted in an explosion, serious injuries to employees and extensive damage to company property while assigned as a Welder & Grinder assigned on mobile gang TRWX0270. Both Claimants were withheld from service pending the results of the investigation.

Carrier Position:

The Claimants received a fair and impartial hearing. There was no prejudging as the Engineering Letter was merely a safety briefing to other employees. Rule 40B contemplates the possibility that an employee will be withheld from service and there is

decisional support for so doing. The Carrier may call only the witnesses necessary to meet the required substantial burden of proof. The Organization could have called others as witnesses. The Carrier has met the burden of proving the charges with substantial evidence, as the Conducting Officer has made credibility determinations that, in accordance with strong industry precedent, should not be disturbed by the Board. The evidence includes Claimant Stengel's admission that proper procedures were not followed as valves were opened but not closed thereafter and there was no job-site briefing that covered shut-down and start-up procedures. This admission requires no further proof of guilt. Claimant Cardona, who had been a welding supervisor, should have been familiar with the rules, but did not take responsibility for the explosion. Dismissal was warranted under the Policy for Employee Performance and Accountability (PEPA), but leniency was provided by the Carrier and is not within the Board's province. There can be no substitution of the Board's judgment for that of the Carrier unless there is an abuse of discretion. If the claim were to be sustained, Rule 40G requires that the Board nullify the dismissal and reinstate the Claimants with a make-whole remedy. There is decisional support for the principle that a make-whole remedy should include a set aside for other wages earned.

Organization Position:

The investigation was not fair and impartial as the Claimants were questioned first in violation of an implied right. Foreman Hughes' statement, about which he could not be questioned, was unfair and impartial and Welding Supervisor Taylor, the first on the scene after the explosion, was not called as a witness. The Engineering Newsletter, which identified causes of the explosion, showed that the Carrier had prejudged the matter, as did the decision to withhold the Claimants from service, depriving them of wages akin to dismissal. The Claimants had not been trained and educated about all the rules they were expected to follow and the placard with procedures listed was not in their truck. Welding Supervisor Young's testimony contained discrepancies; therefore none of that testimony should be considered credible. Claimant Stengel testified that he had attached the gauges but had not pressurized the system. Claimant Cardona was in the process of removing the torch unaware that the gauges had been attached. The exact cause of the explosion cannot be pinpointed, as no experts were called to investigate, leaving the investigation to Welding Supervisor Young and Division Engineer Boyer, neither of whom had training in such investigations. The Carrier has relied on the Claimants' personnel records in making the decision to discipline, but these records were not introduced during the investigation, thereby depriving the Organization of an opportunity to review the records for accuracy. The Carrier did not meet the burden of proving that the Claimants violated any of the named rules; therefore the discipline should be expunged from their records and they should be made whole for all wages lost, with no set aside for wages earned in other employment because there is substantial decisional support for interpreting Rule 40G to mean all Carrier wages lost.

Findings:

The investigation was fair and impartial. The Organization cannot negotiate and agree to a Rule 40B that allows the Carrier to withhold an employee from service following a serious rules infraction and then successfully argue that the Carrier's invocation of Rule 40B constitutes prejudgment that, standing alone, would require nullification of the discipline. In essence, the Organization's argument would make meaningless the language of Rule 40B. This Board does not believe that the parties intended to negotiate meaningless contract language.

The Board views the calling of the Claimants first with a distinct lack of enthusiasm because the Carrier has the burden of making a *prima facie* case. If the Carrier cannot meet that burden with its own witnesses, there should be serious second thoughts about proceeding to an investigation. Nevertheless, the Organization, in arguing that questioning the Claimants first violated an implied right, has acknowledged that there is no explicit contractual prohibition against doing so. While not the best practice, calling the Claimants first did not violate Rule 40.

The Claimants were not prejudiced when the Organization was unable to question Foreman Hughes about his written statement. The Organization could have asked for Foreman Hughes as a witness, as it could have asked for Welding Supervisor Taylor, but Foreman Hughes' statement contains nothing that sheds light on the cause of the explosion or even advances the Carrier's case.

The Engineering Newsletter, which indeed identified improper oxy-fuel shutdown and startup procedures as one of the causes of the explosion, does not constitute the kind of prejudgment that requires this Board to cast aside the discipline. The Newsletter is viewed by the Board as a prudent measure in the ongoing attempt to minimize the hazards of an inherently dangerous work place. The burden on the Carrier is to prove the charges based on the investigation and not some preliminary assessment. The Board notes that Claimant Cardona's testimony that he properly shut down on January 5, 2012 was not contradicted by the investigation and thus improper shutdown cannot be considered a cause of the explosion.

Regarding the explosion itself, the Carrier has established that both Claimants were experienced and trained in the safety procedures attendant to oxy-fuel gas welding. With one exception, the startup procedures have been in place for many years and have been covered in training provided to the Claimants. The exception involves the January 1, 2012 revision to the Engineering Instructions and specifically to Figure 11-6a BNSF Oxy-Fuel Gas Equipment Safety in which there is the following additional Note: "Make sure torch handle is removed from compartment before pressurizing system" (EX-12a). This note was not in the 2002 version of Figure 11-6a. The revision was issued five days before the explosion occurred. While neither Claimant testified that they were unaware of the new requirement, it is the Carrier's burden to show that the Claimants were briefed on the revision. Nor can the Carrier establish the presence in the welding truck of the

placard that contained Figure 11-6a, although it is unlikely that such placards were up-to-date at the time.

The above failings do not exonerate the Claimants because there is unrefuted evidence of two major failures on their part. The first was the failure to hold a true job-site briefing. While the absence of such a briefing surely stemmed from familiarity with the work and from ongoing discussions between the Claimants about the work, the failure to hold the required briefing underscores the critical need to do things "by the book" so that laxness does not lead to accidents. Conducting Officer Smith asked Claimant Stengel if he and Claimant Cardona went "over who was gonna start the procedure for the oxy gas fuel system, who was gonna turn on the bottles, who was gonna do the." Claimant Stengel answered, "No, no" (TR-135). A moment later, when asked by Conducting Officer Smith if there had been a thorough on-site job briefing, Claimant Stengel responded, "Well, we talked on the way from Sidney to Sterling several times, verbally, and, you know, we talk every day about what we're gonna do. So we figured, you know, we didn't have a thorough shutdown and startup briefing" (TR-136). This was essentially confirmed by Claimant Cardona, who, in response to Conducting Officer Smith's question about a safety briefing said, "Yeah, we did have a verbal job safety briefing which, you know, the oxy-fuel setup and shutdown procedure we didn't cover to a certain extent, but it's something we do every day" (TR-153).

The second major failing involved the startup procedure itself. After Claimant Stengel acknowledged his familiarity with the startup procedure and noted that Foreman Hughes would have had the welding manual if there were questions, Conducting Officer Smith asked if he had inspected "all the cylinders, hoses, fittings and regulators. . . at the beginning of your assignment for the day?" Claimant Stengel responded, "Um, no" (TR-135). Claimant Stengel also acknowledged not removing the torch from the compartment before activating the system and said nothing that indicated that he was unaware of that requirement. In addition, Claimant Stengel did not follow the instructions "to charge the line being used with fifty (50) psi of oxygen and ten (10) psi of fuel gas, close the valves, and then monitor the regulators" (TR-138). Had this been done, presumably he would have discovered that the torch, still in the compartment, was on and corrective action preventing the explosion could have been taken. Symptomatic of the lack of careful and safety-driven coordination on the morning of January 6, 2012 was Claimant Cardona's testimony that he did not inspect the lines and did not know that Claimant Stengel had engaged the system before he (Claimant Cardona) raised the back door of the welding truck.

Despite the Claimants' avowed belief that they complied with all relevant rules on the morning of January 6, 2012, a review of their own testimony, independent of the investigation that followed the explosion, requires the Board to conclude otherwise. While the Board has no evidence that the Claimants are inherently a safety risk, the Board must also conclude that the explosion resulted from a failure to follow long-established safety practices concerning safety briefings and startup procedures. It follows that there is no basis for the Board to substitute its judgment for that of the Carrier

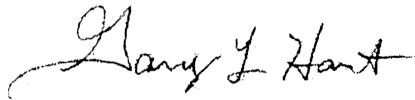
regarding the discipline imposed or to question the Carrier's decision to withhold the Claimants from service pending the investigation.

Award:

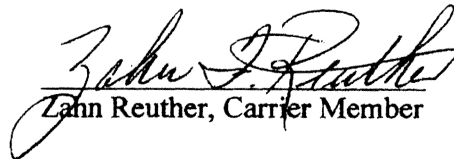
Claims denied.

Order:

This Board, after consideration of the dispute identified above, hereby orders that no award favorable to the Claimants be entered



Gary Hart, Organization Member



Zahn Reuther, Carrier Member



I. B. Helburn, Neutral Referee

Austin, Texas
June 28, 2013