

In the Matter of the Arbitration Between:
BURLINGTON NORTHERN SANTA FE

and

Case No. 8
Claim of K. L. Kinsey
Level S 30-Day Record
Suspension - Failure
to Follow Hot Work
Procedures

BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES DIVISION

STATEMENT OF CLAIM: Claim on behalf of Welder A K. L. Kinsey requesting removal of the Level S 30-day record suspension and three-year review period from his record with seniority, vacation and all other rights unimpaired, and that he be made whole for all time lost.

FINDINGS OF THE BOARD: The Board finds that the Carrier and Organization are, respectively, Carrier and Organization, and Claimant an employee, within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted and has jurisdiction over the parties, claim and subject matter herein.

The Carrier and Organization are Parties to a collective bargaining agreement which has been in effect at all times relevant to this dispute, covering the Carrier's employees in the Maintenance of Way craft. The Board makes the following additional findings.

Claimant has been employed by the Carrier since August 14, 2006. On July 14, 2011, at approximately 9:30 a.m., Claimant, as part of gang TRWX 0419, was welding on a timber bridge at MP 716 on the Chickasha Subdivision, accompanied by six other Carrier employees who served as Fire Watchers. Claimant and his welding partner did not use a Wilson 3000 insulating blanket on top of the packing sand and against the side of the ties each side of the weld and did not place two sheets of 1/2-inch plywood painted with a sanded coating between the rails. Claimant and his partner waited one hour and forty minutes to watch for indications of fire. At approximately 5:00 p.m., there was a fire on or under the bridge, possibly resulting from welding sparks.

The Carrier convened an investigation at which the above evidence was adduced. Based on the record, the Carrier found Claimant in violation of Engineering Instruction 11.15.20 (Thermite Welding on Timber Bridges) and assessed him a 30-day record suspension.

The Organization protested the discipline, which the Carrier denied on appeal. The Claim was progressed on the property on an

expedited basis, up to and including the highest designated official, but without resolution. The Organization invoked arbitration, and the dispute was presented to this Board for resolution.

POSITIONS OF THE PARTIES: **The Carrier** argues that it met its burdens to prove Claimant's violations of the Rules and the appropriateness of the penalty. It asserts that the facts and testimony presented at the investigation make it clear that Claimant did not use the insulating blanket or plywood during the welding process, as required by the rule. Claimant admitted at hearing that he had not complied with Steps 5 and 6 of the Rule. BNSF contends that, when an employee admits guilt, there is no need for further proof.

With respect to the penalty, BNSF maintains that the discipline imposed is appropriate and that leniency is not in the Board's discretion.

The Carrier urges that the claim be denied as without merit.

The Organization argues that Claimant and his partner did not use the Wilson Welding Blanket because it had a foreign material on it that Claimant believed was flammable. It contends, however, that, even if Claimant is guilty of violating the rule as charged, the Carrier has failed to prove how it was a "serious" rule violation according to PEPA. BMWE points out that neither Claimant, his partner, nor the six additional Fire Watchers saw any indication of fire for hours after Claimant performed the welding operation. It asserts, therefore, that the Carrier completely dismissed its alternate theory of why the fire occurred - that an errant cigarette or hot exhaust from an off-road vehicle ignited grass or brush below the bridge.

BMWE further argues that, when addressing performance issues, it is more appropriate to correct the employee through non-disciplinary actions, such as coaching, counseling and training. BMWE contends that such an approach gives the employee the opportunity to improve. It contends that, even if the Carrier could prove its charges, the discipline is excessive. The Organization argues, therefore, that the discipline is extreme, unwarranted and unjustified and a flagrant abuse of PEPE procedures.


The Organization urges that the Claim be sustained, that the Level S 30-day record suspension and three-year review period be removed from his record with seniority, vacation and all other rights unimpaired, and that he be made whole for all time lost.

DISCUSSION AND ANALYSIS: Steps 5 and 6 of EI 11.15.20 require that employees "[p]lace a 'Wilson 3000 insulating blanket' on top of the packing sand and against the side of the ties each side of the weld" and "[o]n open-deck bridges, place two sheets of 1/2-inch plywood painted with a sanded coating between the rails to serve as a work platform." The purpose of these, and similar, rules, is to prevent sparks that might give rise to a fire and their violation is serious. It is undisputed that Claimant failed to follow these procedures - he admitting not following the procedures - and that a fire subsequently occurred on, or underneath, the bridge. The Board concedes that there is no conclusive evidence that Claimant caused the fire. However, by failing to follow the steps set out in EI 11.15.20, he is responsible for setting up the circumstances whereby a fire could occur.

Given the nature and circumstances of Claimant's violation, the Board concludes that the penalty of a Level S 30-day record suspension and a three-year review period was within the range of reasonableness. The Award so reflects.

AWARD: The claim is denied. The Carrier met its burdens to prove Claimant guilty of the charges and to prove his Level S 30-day record suspension and three-year review period to have been an appropriate penalty.

Dated this 18 day of March, 2013.


M. David Vaughn,
Neutral Member


Carrier Member
Ms. Samantha Rogers


Employee Member
Mr. David Tanner