

PUBLIC LAW BOARD NO. 7564

Case No. 92/Award No. 92
Carrier File No. 11-18-0096
Organization File No. T-D-5399-M
Claimant: Joseph C. Hinch

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

Statement of Claim:

By letter dated October 16, 2017, Gang Trackman Joseph C. Hinch was assessed a Level S 30 Day Record Suspension and a One (1) Year Review Period for having allegedly violated EI 1.10 Lockout/Tagout and specifically 1.10.2. By letter dated December 13, 2017, the Organization John A. Mozinski, Jr., Vice Chairman/Secretary-Treasurer, appealed the Record Suspension on the Claimant's behalf. The claim set forth in the final paragraph of the appeal is that:

due to this excessive and prejudged discipline, Mr. Hinch must be immediately paid for his lost time for the day he attended the investigation, including any and all overtime paid to the position he was assigned to work, any expenses lost, difference in pay, and we also request that Mr. Hinch 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 received by the Organization on September 19, 2017 letter from Steve Lyne.

Facts:

By letter dated August 15, 2017 the Claimant was notified that:

An investigation has been scheduled at 0900 hours, Tuesday, August 22, 2017, at the BNSF Grand Forks Terminal, 1796 Demers Avenue, Building 2, Grand Forks, ND, 57201, for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to comply with lockout/tagout requirements while operating spiker X4400439 on TTPX 0043 on August 7, 2017.

By mutual agreement, the investigation was postponed on August 21, August 28 and September 8, 2017 and was held on September 26, 2017 at 0900 hours at the Holiday Inn Express and Suites, 300 37th Ave., SW, Minot, ND, 58701.

Carrier Position:

The Carrier contends that the investigation was fair and impartial as Conducting Officer Jason Randash carried out his duties properly and there was no obligation for the Carrier to list the witnesses it intended to call. Substantial evidence was obtained as the Claimant admitted the violation by placing his hand in an area of operational danger without first following the lockout/tagout procedure required by EI 1.10.2. If he needed additional spikes, the Claimant could have remained facing forward and could have pulled the level, bringing more spikes into the bin/hopper, rather than leaning backward. Had the Claimant's behavior been observed, an investigation would have ensued even if the Claimant had not lacerated a finger as a result. If there is to be leniency, it is at the Carrier's discretion, not the Board's.

Organization Position:

The investigation was not fair and impartial in part because of the actions of Conducting Officer Randash and in part because the Carrier did not indicate who its witnesses would be. EI 1.10.2 is intended to apply the lockout/tagout procedure to maintenance and servicing, but not to the operation of the spiker. Organization witnesses and the many written statements entered into the record by the Organization prove that for at least the past twenty-five (25) years, there has been no practice of applying lockout/tagout to the operation of the spiker when spikes are being fed. No such specific instructions have been given. No such training has been given. There are no warning signs in the spiker. If the Claimant had not been injured, there would have been no investigation or discipline. His guilt was prejudged when Division Engineer Steve Lyne, who was at the reenactment, later issued the notice of discipline. The rubber mat that the Claimant reached behind is not a safety device, but rather a means of keeping dust and debris out of the cabin of the spiker.

Findings:

Briefly, while working with Mr. Terry Crowley on spiker X4400439, the Claimant reached into the bin for spikes and accidentally hit a lever that activated a ram, pushing spikes into the bin or hopper. The Claimant had placed his hand an inch or so into the space behind a rubber mat separating the bin from the area that included the ram, but his hand was still about a foot from the ram. Nevertheless, the additional spikes pinched the Claimant's hand against an upper cross frame, resulting in cuts and a torn ligament to one finger. Five stitches on the bottom of the finger and six stitches on the top of the finger were needed. A reenactment of the incident occurred the following day, attended, among others, by Division Engineer Steve Lyne, who later issued the discipline letter after an investigation presided over by Conducting Officer Jason Randash. The ram was not activated during the reenactment.

Two elements of this case, one procedural and one substantive, dictate the Board's decision to sustain the claim. Rule 40.A requires a fair and impartial investigation. The Organization contends for several reasons that the rule was violated. The Board does not find a violation in the conduct of the investigation by Mr. Randash or the Carrier's supposed failure to inform the Claimant of the Carrier's witnesses prior to the investigation. In fact, witnesses Berger and Christianson were listed as copied on the notice of investigation.

The Carrier itself is on record in writing that the best practice is to have the same individual who conducts the investigation also issue the discipline, if discipline is to be assessed. This Board, in numerous Awards, has voiced its approval of and preference for the stated best practice. The Board also has noted that there can be situations in which separation of the Conducting Officer and disciplinarian roles may create a violation of the Rule 40.A requirement that the investigation be fair and impartial. This is such a case. Division Engineer Lyne attended the August 8, 2017 reenactment of the incident that resulted in the Claimant's injury. Despite the ram not being activated, he possessed more information about the incident than he would have had had he not been at the reenactment. Alternatively, had he testified at the investigation about the reenactment, but left the decision on discipline to Conducting Officer Randash, it is highly likely that this Board would not be concerned with a Rule 40.A violation. However, as matters stand, the Board cannot eliminate the possibility that Division Engineer's observation of the reenactment led him to a conclusion that precluded careful consideration of the Organization's defense on the Claimant's behalf. It is important to note that the Board has not reached a firm conclusion that this occurred, but only that it cannot eliminate that possibility. Because the possibility remains, the Board cannot confidently find that the investigation was fair and impartial.

The substantive weakness in the Carrier's case involves EI 1.10.2 General Requirements and the long-standing practice regarding spikers. EI 1.10.2 states in relevant part:

1. Normal equipment operation requires lockout/tagout when:

- A guard or safety device is removed or by-passed.
- Any part of an employee's body is placed in a point-of-operation.
- Any part of an employee's body is placed in an associated danger zone during a machine operating cycle.

There is room within EI 1.10.2 for interpretation, with the interpretation best considered in light of ongoing practices. Roadmaster Christianson testified that he has never operated a spiker such as X4400439, he has never locked out a spiker and has never in nine (9) years seen anybody lockout/tagout when grabbing spikes from the bin. Supervisor Roadway Equipment Berger, the Claimant and Machine Operators Hogan and Hill all testified that they had never heard of a lockout/tagout procedure used during the operation of the spiker. The testimonial evidence is supplemented by statements from approximately fifty (50) Organization members that are consistent with the testimonial evidence about the use of lockout/tagout. In addition, there is uncontested testimony that the Carrier has never trained or provided other instructions applying lockout/tagout to the operation of the spiker. Moreover, there are no warning signs in the spiker itself. The inescapable conclusion is that EI 1.10.2 has not in any way been associated with the operation of the spiker at a time the machine is engaged in maintaining the rails. In view of the findings, if the Carrier expects to apply EI 1.10.2 after as many as twenty-five (25) years when the EI has not been applied, it must make its intentions known so that employees are clear on the need to comply and the consequences of non-compliance.

Other contentions made by either the Carrier or the organization are moot. The Board finds no basis for including in the Award lost wages associated with the time the Claimant spent at the investigation.

Award:

Claim sustained.

Order:

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant be made in accordance with Rule 40.G. The Carrier is ordered to make the Award effective no later than thirty (30) days after the Award becomes final.


Zachary Voegel, Organization Member


Zahn Reuther, Carrier Member



I. B. Helburn Neutral Referee

Austin, Texas
April 29, 2019