

PUBLIC LAW BOARD NO. 7585

**Case No. /Award No. 103
Carrier File No.: 11-20-0340
Organization File No.: B-M-3394-S
Claimant: C. Bashale**

BNSF RAILWAY COMPANY)
(former Burlington Northern Railroad Company))
)
-and-)
)
BROTHERHOOD OF MAINTENANCE)
OF WAY EMPLOYEES DIVISION - IBT)

STATEMENT OF CLAIM:

The Organization claims that BNSF Railway (BNSF) wrongfully assessed excessive discipline (Level S, 30-day record suspension, 1-year review period) to Claimant for violating Engineering Instruction 1.10 Lockout/Tagout, when Claimant failed to lockout/tagout exhaust fan 5 in the East Maintenance Room on February 10, 2020 while assigned as the Water Service Mechanic in the Mandan Car Shop.

The applicable rule states as follows in pertinent part:

1.10.2 General Requirements

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.

CARRIER POSITION:

On the day in question, Claimant noticed a squeak coming from air handling unit #5 and initially applied grease to the unit, thinking that would solve the issue. When the squeak continued, he inspected the belts and determined that they

were the source of the squeak. He turned off the power and, assuming the belts had stopped, opened the protective cover. At that point, his glove got caught in the spinning belt, causing injuries to his hand.

Claimant's supervisor, Structure Supervisor S. O'Keefe, first went to the hospital to check on Claimant, then inspected Exhaust Fan #5 and found the power off but the fan was not properly locked out or tagged out. He determined that Claimant could have visually inspected the unit to see if the belts were still turning without removing the safety cover.

The Carrier asserts Claimant was trained in lock out/tag out procedures and had been provided with a LOTO kit. It denies any procedural violations, and takes the position that the failure to lock out/tag out the exhaust fan constituted a violation of Engineering Rule 1.10 which requires compliance with lock out/tag out procedures.

ORGANIZATION POSITION:

The Organization cites multiple violations of procedural due process in this case. First, it claims the Carrier failed to call eye witnesses to the accident and relied on O'Keefe who had no first-hand knowledge of the case. Further, O'Keefe conceded evidence of Claimant's LOTO training on March 19, 2019 was provided to him by his boss. The Organization objected to the document and Claimant Bashale testified that he simply could not recall having received the Lock-out/Tag-out Training as portrayed in the contested exhibit.

The Organization protests the Carrier's attempt to add to the record after the investigation and disciplinary determination; it notes both Claimant's employment transcript and the PEPA policy were attached to an October 2, 2020 letter from the Carrier regarding the case.

In addition, the Organization points out that the Carrier's March 23, 2020 letter assessing discipline is unsigned. It argues that as a result, it is impossible for the Carrier to assert the decision was not made by Charging Officer Knutson.

In the Organization's view, the failure of the Carrier to adequately train its work force to meet its expectations constitutes the main contributory cause of the incident. Certainly, the lack of such training cannot be negated as mitigating circumstances that must be considered when levying the severity of punishment.

In the Organization's assessment, even though the Carrier imposed a 30-day Record Suspension upon Claimant's record, Claimant was subjected to a one-day actual suspension and suffered financial loss when denied compensation for attending his investigation of March 6, 2020.

DECISION:

The Board does not find procedural error in this record sufficient to prejudice Claimant's case. The failure of the Carrier to call any eye witnesses can be a denial of due process when the Organization has requested the presence of an identified witness and the anticipated testimony could exonerate the Claimant. However, in this case there is no controversy about the accident. As a result, credibility decisions are not involved and additional witness testimony would not be helpful.

The attachment of Claimant's employment transcript and the PEPA Policy to post-investigation correspondence was out of order, and those exhibits are not considered evidence in the case. However, the agenda for the March 19, 2019 Safety Meeting was properly admitted because it is plainly a record kept in the ordinary course of business. The Carrier's only obligation when offering such evidence is to authenticate the document.

The agenda for the March 19, 2019 Safety Meeting establishes that Claimant has had training in lock out/tag out procedures. This is confirmed on pages 14, 15 and 31 of the Investigation Transcript. The record establishes that Claimant was trained in lock out/tag out procedures, and was issued a LOTO kit, which he could no longer account for.

We are not persuaded that the lack of a signature on the letter of discipline is probative in any way. The name provided under the letter of discipline was General Construction Supervisor Vincent Johnson. There is no reason to doubt that he drafted the letter.

As to the one-day actual suspension alleged by the Organization to have been improperly added to Claimant's penalty, we find this assertion to be well founded. As pointed out by other umpires, Claimant's penalty of a thirty-day record suspension with one year review period was effectively augmented, when he appeared for his investigation, yet received no compensation for his time.

The evidence is adequate to establish a sufficient basis for the thirty-day record suspension with one-year review period. O'Keefe inspected the machine after the accident and found it had not been locked out/ tagged out in contravention of Engineering Rule #1.10. This rule was specifically devised to avoid injury. However, the effective one-day actual suspension is an excessive addition to that penalty.

AWARD:

The claim is granted in part. Claimant will be reimbursed for eight hours pay at the rate he would have received on March 6, 2020, the date of the investigation in this case. Any other claims asserted by Claimant are otherwise denied.

Dated: February 10, 2022



Patricia T. Bittel, Neutral Member



Zachary Voegel, Labor Member



James Rhodes, Carrier Member