

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37261
Docket No. MW-36919
04-3-01-3-541

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(The Burlington Northern and Santa Fe Railway Company
((former Burlington Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [Level S – ninety (90) day suspension beginning August 12 through November 9, 2000 and a three (3) year probationary period] imposed upon Mr. S. Bertoli for alleged violation of Maintenance of Way Operating Rule 6.50.1 and Maintenance of Way Safety Rule S-14.1.2 in connection with operating a hy-rail involved in a rollover incident on May 19, 2000 near Mile Post 155.5 on the Helena Subdivision was unwarranted, excessive and in violation of the Agreement (System File B-M-802-F/11-00-0555 BNR).
- (2) As a consequence of the violation referred to in Part (1) above, any mention of this investigation and subsequent discipline shall be stricken from Mr. S. Bertoli's personal record, he shall be made whole for any losses of pay, credited for railroad retirement, vacation and any other related losses due to the discipline assessed.”

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.

The Claimant established and holds seniority, dating from May 19, 1969, in the Track Subdepartment. On the day in question, he was assigned and was working as Track Maintainer on the Helena Subdivision under the supervision of Roadmaster W. M. Bernard at Great Falls, Montana. The Claimant was assigned to operate a hy-rail pickup truck weighing less than 1.5 tons in capacity, equipped with hy-rail attachments.

The instant incident occurred on May 19, 2000. At approximately 1500 hours, the Claimant and Machine Operator G. DeVera were inspecting track, traveling in the hy-rail at a speed of approximately 20 to 25 miles per hour. At that time, the hy-rail truck derailed on a curve at Mile Post 155.5 on the Helena Subdivision, moving 114 feet off of the track, an additional 17 feet up a steep embankment, and eventually flipping over and coming to rest on its roof. The Claimant was traveling at the speed of 20 to 25 miles per hour, although there was a posted speed limit of 10 miles per hour. However, it should be noted that the Organization contends said posted limit applied to trains, not hy-rail vehicles. While neither the Claimant nor his co-worker was injured, the hy-rail experienced significant damage.

By letter dated May 24, 2000, the Carrier directed the Claimant to report on May 31, 2000, to "Attend investigation in the BNSF Annex Conference Room in Great Falls, MT, at 1000 hours on Wednesday, May 31, 2000, for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged involvement when BNSF Hyrail Vehicle 13063 derailed in the curve and rolled over at approximately 1550 (sic) hours on Friday, May 19, 2000 at Mile Post 155.5 on the Helena Subdivision while assigned to the Montana Division." The Investigation was postponed but was ultimately held on July 12, 2000.

In a letter dated August 10, 2000, Roadmaster G. L. Sheets, notified the Claimant as follows:

"This letter will confirm that as a result of investigation held on July 12, 2000 concerning your failure to determine proper speed when

taking into consideration the track conditions, such as grade, curvature, rail conditions or other conditions which might adversely affect the safe operation of on-track equipment and your failure to wear seatbelts while operating hyrail involved in rollover incident at approximately 1500 hours on Friday, May 19, 2000 near MP 155.5 on Helena Subdivision, you are issued a Level S- (90) ninety day suspension for violation of Maintenance of Way Operating Rule 6.50.1 and Maintenance of Way Safety Rule S-14.1.2. Your probationary period will be for three (3) years."

The Organization claims that the discipline imposed upon the Claimant was unwarranted, harsh and excessive. The Organization contends that the burden of proof in a discipline matter such as this is on the Carrier; that burden of proof has not been met. While the Organization concedes that the Claimant was involved in said accident, it is the Organization's position that the accident was not caused by the Claimant's negligence. It argues that the Claimant was operating the vehicle correctly and that equipment failure caused the accident. In addition, the Organization claims that it was not provided with an adequate notice of the charges and finally, that the conducting officer prejudged the Claimant. According to the Organization, the Carrier should now be required to clear the Claimant's record of any mention of the incident, to compensate him for all of his lost wages, including lost overtime, and to make him whole for vacation, holidays, and seniority.

Conversely, the Carrier takes the position that it met its burden of proof. The Claimant was afforded a fair and impartial Investigation in accordance with the requirements of the Agreement. The Carrier considers the Claimant guilty as charged. According to the Carrier, a review of the transcript developed during the Investigation leaves no doubt that the Claimant violated the applicable Rules.

In discipline cases, the Board sits as an appellate forum. We do not weigh the evidence de novo. As such, our function is not to substitute our judgment for the Carrier's, nor to decide the matter in accord with what we might or might not have done had it been ours to determine, but to rule upon the question of whether there is substantial evidence to sustain a finding of guilty. If the question is decided in the affirmative, we are not warranted in disturbing the penalty unless we can say it appears from the record that the Carrier's actions were unjust, unreasonable or arbitrary, so as to constitute an abuse of the Carrier's discretion. (See Second Division Award 7325, Third Division Award 16166.)

After a review of the evidence, the Board finds that the Carrier has proven that on May 19, 2000, the Claimant was operating a hy-rail at a high rate of speed, thereby directly leading to the accident in question in violation of the Rules cited by the Carrier. The Board finds that the Claimant was operating the hy-rail at a speed that was unsafe for conditions.

However, we sustain the Organization's position with regard to the eventual charge that the Claimant was not wearing his seatbelt. We find that the Claimant was not initially charged with a failure to wear his seatbelt. Thus, we find that the Claimant was not on notice of said charge, a violation of Rule 40. See Fourth Division Award 1983 ("... It is a fundamental principle that an employee can only be found to be in violation of those rules with which he is charged, as those rules are defined in the Notice of Charge.")

Based on this determination, we find that the discipline imposed in this matter was excessive. We find that a more appropriate discipline shall be a 60-day suspension with a two-year probation. Thus, we will reduce the discipline from a 90-day suspension with a three-year probation to a 60-day suspension with a 2-year probation. The Claimant shall be made whole for the additional 30 days served.

AWARD

Claim sustained in accordance with the Findings.

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 5th day of November 2004.