

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 41035  
Docket No. MW-40773  
11-3-NRAB-00003-090033**

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

**(Brotherhood of Maintenance of Way Employes Division -  
( IBT Rail Conference**  
**PARTIES TO DISPUTE: (**  
**(BNSF Railway Company (former Burlington**  
**( Northern Railroad Company)**

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The discipline [Level S thirty (30) day record suspension with a one (1) year probation period] imposed upon Mr. D. Welsch by letter dated October 18, 2007, on charges of failure to utilize the steering wheel cover with boom extended, at/or near Mile Post 70.15 on August 23, 2007, on the Orin Subdivision, while assigned as welder on Gang TRWX1128, temporarily headquartered at Douglas, Wyoming was arbitrary, capricious, disparate and in violation of the Agreement [System File C-08-D040-I/10- 08-0048(MW) BNR].**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant D. Welsch shall now receive the remedy prescribed by the parties in Rule 40(G).”**

**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 Carrier's engineering instructions require that all vehicles equipped with cranes, must be equipped with a standardized steering wheel cover with a message reminding the driver to stow the boom and outriggers prior to travel. The driver must place the cover over the steering wheel when the boom and outriggers are deployed. In this case, Claimant D. R. Welsch admitted that on August 23, 2007, he failed to comply with the above engineering instruction and did not utilize a steering wheel cover while the boom of his vehicle was extended.

By letter dated August 23, 2007, the Carrier directed the Claimant to attend a formal Investigation on September 6, “. . . for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to utilize the steering wheel cover with boom extended, at/or near MP 70.15 on August 23, 2007, on the Orin Subdivision, while assigned as welder on gang TRWX1128, temporarily headquartered at Douglas, Wyoming.”

The Hearing took place on September 27, pursuant to which, in a letter dated October 18, 2007, the Claimant was notified that he was being assessed a Level S 30-day record suspension with a one-year probationary period as a result of his violation of BNSF Railway Maintenance of Way Operating Rule 15.5.

By letter dated November 9, 2007, the Organization appealed the decision specifying that the Carrier did not meet its burden of proof and contending that the discipline assessed was unwarranted and excessive. On January 10, 2008, General Manager S. Sexhus denied the appeal. On January 21, the matter was appealed by the Organization to General Director of Labor Relations William A. Osborn. On March 14, the appeal was denied. On May 13, 2008, a conference was held, but the

parties were unable to resolve the matter. The matter was then appealed to the Third Division.

According to the Organization, the discipline imposed upon the Claimant was unwarranted, harsh, and excessive. It contends that the burden of proof in a discipline matter such as this is on the Carrier and that burden has not been met. It claims that (1) the Carrier has been arbitrary and capricious in its treatment of the Claimant, (2) the Carrier abused its discretion, and (3) the Carrier's determination to discipline the Claimant was based on inconclusive evidence, thus rendering the discipline harsh and excessive. It claims that the Claimant was denied a fair and impartial Investigation and contends that the Claimant was treated disparately compared to other similarly situated employees. It asserts that the Carrier should now be required to rescind the discipline and make the Claimant whole for all losses.

Conversely, the Carrier takes the position that it met its burden of proof. The Claimant was afforded a fair and impartial Hearing in accordance with the requirements of the Agreement. According to the Carrier, a review of the transcript developed during the Hearing makes clear that the Claimant was guilty as charged. The evidence shows that the Claimant violated an essential Rule of the Carrier and that such violation could have potentially led to an accident or injury. This was certainly improper. Based on the instant offense, the 30-day record suspension couple with a one-year probationary period was an appropriate penalty.

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 that of the Carrier, 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 and Third Division Award 16166.)

The Board concludes that the Organization's contention that the Claimant did not receive a fair and impartial Investigation is not persuasive. Likewise, the

Board cannot find any record evidence to support the Organization's argument that the Claimant was the victim of disparate treatment. The Board did, however, find substantial evidence in the record to uphold the Carrier's position in whole. The Carrier proved that the Claimant was guilty of the offense with which he was charged when he did not use the steering wheel cover as required. This was clearly improper. Based on the instant offense, the Board concludes that a Level S 30-day record suspension coupled with a one-year probationary period was an appropriate penalty. Accordingly, the claim is denied.

**AWARD**

Claim denied.

**ORDER**

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division**

Dated at Chicago, Illinois, this 23rd day of August 2011.