

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41038
Docket No. MW-40874
11-3-NRAB-00003-090161**

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

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference**
PARTIES TO DISPUTE: (
(BNSF Railway Company (former Atchison, Topeka
(and Santa Fe Railway Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [Level S Actual Suspension (August 17, 2007 through September 16, 2007)] imposed upon Mr. T. Martinez for alleged violation of Maintenance of Way Operating Rules 1.6 - Conduct and 1.9 Respect of Railroad Company, in connection with charges of allegedly operating a backhoe in an unsafe manner at Mile Post 614.7, Kingston, Oklahoma on August 17, 2007, was arbitrary, capricious, unwarranted and in violation of the Agreement [System File C-07-10D/13-08-0001 (MW) ATS].**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant T. Martinez shall now have the discipline removed from his record and he shall receive the remedy prescribed by the parties in Rule 13(f).”**

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.

On August 17, 2007, Claimant T. Martinez was assigned as a Machine Operator operating a backhoe. The Claimant moved his truck and backhoe to the work location near Kingston, Oklahoma, to begin work on a crossing, using his machine to move and install crossing planks. It is uncontested that while operating his backhoe, the Claimant damaged the crossing planks and a farmer's gate.

By letter dated August 17, 2007, the Carrier notified the Claimant that he was being withheld from service and instructed to attend a formal Investigation on August 24. The Hearing took place on September 7, pursuant to which, in a letter dated September 18, the Claimant was notified that he was being assessed a 30-day actual suspension as a result of his violation of Maintenance of Way Operating Rules 1.6 and 1.9.

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 November 20, General Manager R. Jackson denied the appeal. On January 4, 2008, the Organization appealed the matter to General Director of Labor Relations W. A. Osborn, who denied the appeal on March 17. A conference was held and 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 of proof has not been met. It claims that the Carrier has been arbitrary and capricious in its treatment of the Claimant, that the Carrier abused its discretion, and that the Carrier's determination to discipline the Claimant was based on inconclusive evidence, thus rendering the discipline harsh and excessive. The Organization also contends that the Claimant's actions were inadvertent and unintentional. Further, any damage to either the crossing planks or the farmer's gate was minimal. This is proven by the fact that the crossing planks are in use and that the farmer's gate assessed damage was \$85.00. The Organization claims that the Claimant was denied a fair and impartial Investigation because the Notice of Investigation was vague. It asserts that the Carrier should now be required to overturn 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. It contends that the Notice of Investigation was appropriate. According to the Carrier, a review of the transcript developed during the Hearing makes clear that the Claimant was guilty as charged. Based on the instant offense, the Claimant's 30-day actual suspension was appropriate.

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 has not found substantial evidence in the record to uphold the Carrier's position in whole. We note that the Carrier proved that the Claimant did engage in the conduct with which he was charged. However, we believe that the discipline imposed was too severe and should be reduced from a 30-day actual suspension to a 30-day record suspension, and the Claimant shall be compensated for the 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 23rd day of August 2011.