

****CORRECTED****

**Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41042
Docket No. MW-41444
11-3-NRAB-00003-100332**

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 Burlington
(Northern Railroad Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- 1) The discipline [Level S suspension of thirty (30) days and a probation period of one (1) year] imposed upon Mr. J. Johnston by letter dated August 10, 2004 for alleged violation of Maintenance of Way Operating Rules 1.3.1, 1.25 and 1.6 in connection with his participation in removing BNSF company material (rail) allegedly without proper authority on the Appleton Subdivision on or around June 9, 2004 through June 26, 2004 while assigned as a section foreman at Milbank, South Dakota was arbitrary, capricious, unwarranted and in violation of the Agreement (System File T-D-2796-H/11- 04-0244 BNR).**
- 2) As a consequence of the violation referred to in Part (1) above, “*** The Carrier must remove any and all mention of the discipline from Mr. Johnston’s record and make Mr. Johnston whole for any and all losses, including, but not limited to straight time pay for each regular work day, loss of overtime opportunity, and accreditation for vacation and other benefits.”**

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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.

In June 2004, Claimant J. Johnston was assigned as a Section Foreman in Milbank, South Dakota. At that time, the Claimant informed his Roadmaster of a company that could inexpensively clean up scrap from a derailment. The Roadmaster agreed to allow this company to perform the work, but because the company was owned and operated by the Claimant's brother-in-law, the Claimant was specifically instructed that he was not to be affiliated in any way with said work.

Senior Special Agent Novak was informed about track material leaving BNSF property, and subsequently observed vehicles delivering track material to the Claimant's brother-in-law's company. Novak became aware that checks for the purchase of track material were issued to the Claimant and his family members, but not to the company. Novak met with the Claimant, who admitted not only his participation in the derailment clean up, but that he had taken some rail that was not part of the derailment and sold it with the derailment site materials.

By letter dated July 6, 2004, the Carrier directed the Claimant to attend a formal Investigation on July 16, 2004:

“ . . . for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged participation in removing BNSF company materials (ties, rail, etc.) without

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proper authority on the Appleton Subdivision, on or around June 9, 2004 through June 26, 2004, while assigned as Section Foreman at Milbank, South Dakota. This alleged violation was first reported to this office by BNSF special agent on July 2, 2004.”

The Hearing was postponed and took place on July 21, 2004, pursuant to which, in a letter dated July 26, 2004, the Claimant was notified that he was being assessed a Level S 30-day suspension and 1-year probation as a result of his violation of Maintenance of Way Operating Rules 1.3.1, 1.25 and 1.6.

By letter dated August 17, 2004, the Organization appealed the decision specifying that (1) the Carrier did not meet its burden of proof (2) the discipline assessed was unwarranted and excessive, and (3) the Claimant was denied a fair and impartial Hearing. On September 30, General Manager M. Bruce denied the appeal. On October 20, the Organization appealed the matter to General Director of Labor Relations D. J. Merrell, who on December 23, 2004, denied the appeal. A conference was held on June 28, 2005, 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 contends that the Claimant was denied a fair and impartial Hearing because the charges were ambiguous and not made clear. 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. 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 engaged in behavior that he had

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been specifically instructed against. Based on the instant offense, the Claimant's 30-day suspension and 1-year probation were clearly 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 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 behavior with which he was charged. In addition, a review of the record yields that the Claimant was not denied a fair and impartial Investigation. Further, we do not find that imposition of a 30-day suspension coupled with a one year probationary period was inappropriate based on the transgression. Accordingly, the Board will not overturn the discipline assessed.

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.