

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41078
Docket No. MW-41188
11-3-NRAB-00003-090472**

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 thirty (30) day record suspension with a one (1) year probation period] imposed upon Mr. G. Robotham by letter dated September 4, 2008 for alleged violation of MWOR 1.6 Conduct (Dishonest) in connection with charges of allegedly providing false test responses to an audiological exam given as a result of the explosion that occurred at approximately 1555 hours May 5, 2008 at or near Mile Post 76.7 at or near Nodaway, Missouri while working as a Group 3 Machine Operator while assigned to Gang RP03 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement [System File C-09-D040-2/10-09-0051(MW) BNR].**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant G. Robotham 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.

Claimant G. Robotham established and maintains seniority in various classes within the Maintenance of Way Department. Prior to this incident, the Claimant had no disciplinary history in the more than 31 years he worked for the Carrier.

On May 5, 2008 an explosion occurred at or near Mile Post 76.7 near Nodaway, Missouri. On the morning of May 6, 2008, the Claimant notified his Supervisor, M. Feighner, that he needed to file a personal injury report regarding his hearing, which he believed had been affected by the explosion. Paperwork was filed and Supervisor Feighner brought the Claimant to the Heartland Occupational Medicine Clinic in St. Joseph, Missouri. The Claimant was examined by a doctor and underwent a hearing test, or audiogram, on the morning of May 6, 2008. According to Field Medical Officer S. Clark, the results from the May 6, 2008 test showed that the Claimant had varying degrees of hearing loss in both ears in most frequencies. The doctor at the Heartland Occupational Medicine Clinic recommended that the Claimant return for a follow-up visit and audiogram, which occurred on May 13, 2008.

Medical Officer S. Clark contended that the results from the May 13, 2008 audiogram indicated that the Claimant had severe to profound hearing loss. She further contended that between May 6 and May 13, 2008, the hearing loss in the Claimant's left ear progressed from moderate/severe to profound, and in the right ear progressed from moderately severe/severe to profound.

Clark also concluded from the May 6, 2008 audiogram that the Claimant would have difficulty understanding verbal cues and, therefore, struggle to properly perform his duties. Clark contended that the May 13, 2008 audiogram indicated that the Claimant no longer had the ability to hear any verbal cues. Clark testified that the progression of the Claimant's hearing loss was unusual because hearing losses of this type usually resolve over time.

Following the May 13, 2008 audiogram, the Heartland Occupational Medicine Clinic prescribed medication to the Claimant, and he was instructed to be retested a third time. The Claimant's May 21, 2008 audiogram showed significant improvement.

By letter dated May 23, 2008, the Carrier directed the Claimant to report for a formal Investigation on June 4, 2008:

“. . . for the purpose of ascertaining the facts and determining the Claimant's responsibility in providing false test responses to an audiological exam.”

The Hearing was postponed and took place on August 13, 2008, pursuant to which, in a letter dated September 4, 2008, the Claimant was notified that he was being assessed a 30-day record suspension with a one-year probationary period, as a result of his violation of MWOR 1.6 Conduct, Dishonesty, for providing false test responses to an audiological exam.

By letter dated October 6, 2008, the Organization appealed the decision based on the contentions (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 December 2, 2008, Division General Manager B. D. Andrew denied the appeal. On January 26, 2009, the Organization appealed the matter to General Director of Labor Relations W. A. Osborn, who denied the appeal on March 25, 2009. 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 further claims that (1) the Carrier has been arbitrary and capricious in its treatment of 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. The Organization also contends that the Claimant was denied a fair and impartial Hearing and 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 it clear that the Claimant is guilty as charged. The evidence shows that the Claimant engaged in the falsification alleged. Based on his behavior, the Claimant's discipline of a 30-day record suspension and a one-year probationary period 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.)

After a thorough review of the case record, the Board found substantial evidence to uphold the Carrier's position in whole. The Board notes that the Carrier proved that the Claimant engaged in falsification, which led to his discipline. The Claimant was afforded a fair and impartial Hearing. Lastly, the Board finds that the discipline imposed, a 30-day record suspension with a one-year probationary period, was appropriate based on the transgression. Accordingly, the Board will not overturn the assessed discipline.

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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 18th day of October 2011.