

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41080
Docket No. MW-41272
11-3-NRAB-00003-100110**

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] imposed upon Mr. T. Dietrick by letter dated January 8, 2009, for alleged violation of MOW Operating Rules 1.1.3 Accident, Injuries and Defects and 1.2.5 Reporting in connection with charges of alleged failure to report an injury to an officer of the company by the first means of communication and alleged falsification of a personal injury report that occurred at/or near Marsh, Montana on July 28, 2008, was arbitrary, capricious and in violation of the Agreement [System File C-09-D040-3/10-09-0177(MW) BNR].**
- (2) As a consequence of the violation referred to in Part (1) above, ‘. . . the Level S, thirty (30) day record suspension issued to Mr. Dietrick must be immediately removed from his record.’”**

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.

At the time of the injury in question, the Claimant had approximately one year and seven months of seniority with the Carrier. On July 28, 2008, the Claimant was working as a Machine Operator on Region/System Gang TP11 in the vicinity of Marsh, Montana, with Assistant Foreman S. Andersen. The two employees were working on top of a car unloading machines. Andersen saw the Claimant "wobble," and disappear. Andersen checked on the Claimant and discovered that he had fallen off of the car and onto the ground, landing on ballast. Andersen asked the Claimant if he had sustained any injuries and escorted him to Foreman A. Landers. Landers asked the Claimant how he felt, and he responded that he would be fine and asked if he could sit in the van for the remainder of his shift. Roadmaster S. Ellis spoke with the Claimant and was told there was no incident and no injuries to report.

The following day at work, the Claimant made no further comments or complaints about a possible injury from the day before. The Claimant continued working without any evidence of injury until October 5, 2008, when he left a voicemail stating that he needed a few days off for medical appointments, but did not provide a reason for said appointments. The Claimant never returned to work on Region/System Gang TP11. On October 22, Roadmaster Ellis received notice that the Claimant had filed a personal injury report on October 5, indicating that he had been injured on July 28.

By letter dated October 28, 2008, the Carrier directed the Claimant to report for a formal Investigation on November 5, 2008:

"... for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to report an injury to an officer of the company by the first means of communication and alleged falsification of a personal injury that

allegedly occurred at or near Marsh, Montana on the Forsyth Subdivision on July 28, 2008, while assigned as a Group 3/4 Machine Operator on Gang TTPX0011, temporarily headquartered at Glendive, Montana. The Carrier first became aware of the alleged violations on October 22, 2008.”

The Hearing took place on December 15, 2008, pursuant to which, in a letter dated January 8, 2009, the Claimant was notified that he was assessed a Level S, 30-day record suspension as a result of his violation of BNSF Railway MOW Operating Rules 1.1.3 Accident, Injuries, and Defects and 1.2.5 Reporting. By letter dated January 28, 2009, 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 March 23, 2009, General Manager T. Albanese denied the appeal. On April 13, 2009, the Organization appealed the matter to General Director of Labor Relations William A. Osborn, who denied the appeal on June 10, 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. The Organization contends that the burden of proof in a discipline matter such as this is on the Carrier and asserts that burden has not been met. It further 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. The Organization also contends that the Claimant was denied a fair and impartial Hearing. Lastly, the Organization 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 record evidence shows that the Claimant failed to report an injury in spite of the fact the Carrier’s Rules clearly obligated him to do so. Based on his unacceptable behavior, the Claimant’s discipline 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 has not found substantial evidence to uphold the Carrier's position in whole. The Board notes that the Carrier proved that the Claimant did not report an injury as required. However, because it is clear that the Claimant's supervisor observed the Claimant's injury and did not specifically instruct him to immediately prepare an injury report, the Board cannot find that the discipline of a 30-day record suspension was appropriate based on the specific and unique circumstances of this case. Therefore, the Board orders that the assessed discipline shall be reduced from a 30-day Level S, record suspension to a ten-day non-level S, record suspension.

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 18th day of October 2011.