

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41082
Docket No. MW-41377
11-3-NRAB-00003-100252**

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
(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 record suspension of thirty (30) days and assigned a one (1) year probation] imposed upon Mr. J. Armstrong for alleged violation of Maintenance Of Way Operating Rule 1.2.5 - Reporting, in connection with charges of alleged late reporting of a personal injury while assigned as a sectionman, Dayton's Bluff Section, St. Paul, Minnesota was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File T-D-3408- H/11-09-0104 BNR).
- (2) As a consequence of the violation referred to in Part (1) above, the Carrier shall now '*** remove any and all mention of the discipline from Mr. Armstrong's record and make Mr. Armstrong 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. The Carrier must provide a copy of Mr. Armstrong's personal record to insure that no discipline, or comment is present concerning the investigation held on October 21, 2008. *** ”

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 J. Armstrong established and has held seniority as a Sectionman for approximately 18 years. During that period of time he has maintained an unblemished record.

On September 25, 2008, the Claimant was working as a Sectionman on a gang headquartered at Dayton's Bluff, Minnesota. At approximately 3:00 P.M., the Claimant was riding in a vehicle along with his Assistant Foreman R. Roelofs. They were returning from the field to Dayton's Bluff Yard. The two employees were sitting at a stop sign when they were hit from behind by a loaded cement truck. Because they were only three blocks from their Section House at Dayton's Bluff, the Claimant and Roelofs drove there to call the police and file a police report. When Roelofs asked the Claimant how he was feeling he responded that he might have a little headache, but he was not sure. Roadmaster C. Golding arrived at the Section House at approximately 3:15 P.M., at which time the Claimant told him that he was not injured.

The following day the Claimant showed up for work and made no comments or complaints about a possible injury from the day before. The Claimant continued working without any indication of injury on Friday, September 26, 2008. The Claimant observed his two rest days on Saturday and Sunday, and called in sick on Monday and Tuesday, September 29 and 30, 2008. On September 30, Foreman Pawlu informed Roadmaster Golding that the Claimant had called in sick for a doctor's appointment. Golding contacted the Claimant at home, whereupon the Claimant told him that he had just returned from the doctor's office where he was seen for headache and shoulder pain caused by the rear-end collision on September 25, 2008.

By letter dated October 2, 2008, the Carrier directed the Claimant to report for a formal Investigation on October 10, 2008:

“. . . for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged late reporting of a

personal injury while assigned as a Sectionman, Dayton's Bluff Section, St. Paul, Minnesota. The alleged injury allegedly resulted from a company vehicle accident on September 25, 2008, and was first reported to a company officer on September 30, 2008.”

The Hearing took place on October 21, 2008, pursuant to which, in a letter dated November 17, 2008, the Claimant was notified that he was assessed a 30-day Level S record suspension and a one-year probationary period for his violation of Maintenance of Way Operating Rule 1.2.5.

By letter dated January 13, 2009, the Organization appealed the decision based on the contention (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 January 20, 2009, General Manager R. Ebel denied the appeal. On March 10, 2009, the Organization appealed the matter to General Director of Labor Relations W. A. Osborn, who denied the appeal on May 8, 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 (1) the burden of proof in a discipline matter such as this is on the Carrier and asserts that burden has not been met. The Organization 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 further contends that the Claimant was denied a fair and impartial Hearing. Lastly, 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 it clear that the Claimant is guilty as charged. The evidence shows that the Claimant failed to report his injury in a timely manner as required. 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. While the Board notes that the Carrier proved that the Claimant failed to report his injury in a timely manner, we find that the discipline assessed is too harsh. Based on the totality of the record, the Board concludes that a more appropriate penalty is a ten-day non-level S record suspension without a probationary period.

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.