

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41086
Docket No. MW-41445
11-3-NRAB-00003-100349**

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 [ten (10) day record suspension with a twelve (12) month review period] imposed upon Mr. K. Beachum for alleged failure to comply with Engineering Instructions 6.7.5 (E) in connection with alleged failure to place match marks at Mile Post 390.8 at Sanger, Texas on April 6, 2009 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File F-09-14D/13-09-0026 ATS).**
- (2) As a consequence of the violation referred to in Part (1) above, the discipline shall now ‘. . . be rescinded and that any mention thereof be removed from Mr. Beachum’s personal 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.

On April 6, 2009 the Claimant was assigned as a Foreman and, as instructed, he cut out a defective section of rail at Milepost 390.8 at Sanger, Texas. Later that day, Roadmaster M. Watkins was conducting an audit and discovered there were no match marks and no measurements written on the rail that the Claimant had cut out. In an effort to afford the Claimant an opportunity to explain the alleged violation, Roadmaster Watkins rode with the Claimant to the site of the cut out rail on April 9, 2009.

By letter dated April 15, 2009, the Carrier directed the Claimant to report for a formal Investigation on April 21, 2009:

“ . . . to ascertain the facts and determine your responsibility, if any, in connection with your alleged failure to place match marks at MP 390.8 at Sanger, Texas on the Fort Worth Subdivision April 6, 2009, which was discovered by Roadmaster Watkins on April 9, 2009.”

The Hearing took place on April 21, 2009, pursuant to which, in a letter dated May 20, 2009, the Claimant was notified that he was assessed a ten-day record suspension with a 12-month review period for his failure to comply with Engineering Instructions 6.7.5 (E).

By letter dated July 14, 2009, the Organization appealed the decision based on the contentions (1) the Carrier did not meet its burden of proof and (2) the discipline assessed was unwarranted and excessive. On August 5, 2009, General Manager R. Jackson denied the appeal. On September 17, 2009, the Organization appealed the matter to General Director of Labor Relations W. A. Osborn, who denied the appeal on November 19, 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. The Organization indicated that the evidence in this matter was hearsay and not direct. 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. 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. 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 behavior alleged. 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 failed to provide substantial direct evidence to prove that the Claimant did not make the appropriate match marks. Because the Carrier has been unable to sustain its burden, the Board cannot uphold the discipline imposed. Accordingly, the Board orders that the involved discipline shall be removed from the Claimant's record.

AWARD

Claim sustained.

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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.