

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41088
Docket No. MW-41459
11-3-NRAB-00003-110025**

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. S. Miller by letter dated December 11, 2009 for alleged violation of MOWOR 1.15 Duty, Reporting or Absence for allegedly being absent from duty without proper authority on Sunday, October 18, 2009 at Congress Park, while assigned as Foreman SC10, was arbitrary, capricious, unwarranted, on the basis of unproven charges and in violation of the Agreement (System File C-10-D040-10/10-10-0118 BNR).**
- 2) As a consequence of the violation referred to in Part (1) above, Claimant S. Miller 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 S. Miller has been an employee of the Carrier for more than 33 years and during his tenure has established and retained seniority in various classifications within the Maintenance of Way and Structures Department. During this dispute, he was regularly assigned as a Foreman on Region/System Surfacing Gang SC10, with a scheduled workweek of Sunday through Thursday, and Friday and Saturday as designated rest days.

The Region/System Surfacing Gang was working in conjunction with Region/System Tie Gang TP10. At the time of this incident, the scheduled workweek for both gangs was Sunday through Thursday. On Thursday, October 15, 2009, both gangs were informed that they would not be working on Sunday, October 18. However, later in the day on Thursday, October 15, at approximately 2:00 P.M., Manager Hochstatter discovered that an affected track structure was not going to be surfaced by Surfacing Gang SC10 before the conclusion of the scheduled work week. Hochstatter asserts that he then instructed the Claimant's crew to report for work on October 18, 2009 to perform the work in question. The Claimant contends that he made the necessary arrangements to have this work completed before Sunday, October 18, 2009 so that his crew could observe their day off. On Sunday, October 18, neither the Claimant nor his crew reported for work, leading to the instant dispute.

By letter dated October 22, 2009 the Carrier directed the Claimant to report for a formal Investigation on October 30, 2009:

“... for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged being absent from duty without proper authority on Sunday, October 18, 2009, 0730 hours at Congress Park, while assigned as Foreman on SC 10.”

The Hearing took place on November 17, 2009, pursuant to which, in a letter dated December 11, 2009, the Claimant was notified that he was being assessed a 30-day record suspension for being absent from duty without proper authority on Sunday, October 18, 2009.

By letter dated January 27, 2010, 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 February 23, 2010, General Manager R. Reilly denied the appeal. On March 8, 2010, the Organization appealed the matter to General Director of Labor Relations W. A. Osborn, who denied the appeal on May 5, 2010. 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 asserts that burden has not been met. The Organization 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 evidence shows that the Claimant failed to report for duty 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. While the Board notes that the Carrier proved that the Claimant did not report for duty, it appears that the Claimant's failure to report for work stemmed from a legitimate misunderstanding and was not a purposeful failure to report for duty. Therefore, the Board orders that the discipline imposed shall be removed from the Claimant's record and he shall now receive the remedy prescribed by the parties in Rule 40(G) of the Agreement.

AWARD

Claim sustained.

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.