

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No.41139
Docket No. MW-40968
11-3-NRAB-00003-090252**

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

**(Brotherhood of Maintenance of Way Employes 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 [ten (10) day record suspension] imposed upon Mr. B. Peters for alleged violation of BNSF Railway MOW Operating Rules 1.1 and 1.1.4 and MOW Safety Rule S-1.2.2 in connection with charges of alleged failure to properly maintain and inspect the lowboy trailer before loading a tie crane at/or near Mile Post 58.4 on the Orin Subdivision on October 15, 2007, while assigned as a lowboy operator, Gang TMOX2077 headquartered at Gillette, Wyoming, was arbitrary, capricious, without merit and in violation of the Agreement [System File C-08-D040-2/10-08-0174(MW) BNR].
- (2) As a consequence of the violation referred to in Part (1) above, the Carrier shall now remove the ten (10) day record suspension from Claimant B. Peters’ 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 October 15, 2007, the Claimant was assigned as a Lowboy Operator and was assigned to load a TKO and a tie crane onto a lowboy trailer. After loading the TKO onto the trailer, the Claimant attempted to load the tie crane, but was unable to do so. During the Claimant's second attempt, the tie crane fell off of the loading ramp.

By letter dated October 24, 2007, the Carrier directed the Claimant to report for a formal Investigation on October 30, 2007:

“. . . for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to properly maintain and inspect your lowboy trailer before loading a tie crane at/or near MP 58.4 on the Orin Subdivision, on October 15, 2007, while assigned as Lowboy Operator, Gang TM0X2077, headquartered at Gillette, Wyoming. ‘Pursuant to BNSF/BMWED Memorandum dated November 28, 2005 this notice is AHP eligible.’”

The Hearing was postponed by mutual agreement and finally took place on December 6, 2007, pursuant to which, in a letter dated January 4, 2008, the Claimant was notified that he was issued ten-day record suspension as a result of his violation of BNSF Railway Maintenance of Way Operating Rules 1.1 and 1.1.4 and MOW Safety Rule S-1.2.2.

By letter dated February 1, 2008, the Organization appealed the decision based on the contention the Carrier failed to meet its burden of proof and, in any

event, the discipline assessed was unwarranted and excessive. On March 18, 2008, General Manager S. Sexhus denied the appeal. On April 8, 2008, the Organization appealed the matter to General Director of Labor Relations W. A. Osborn, who denied the appeal on June 5, 2008. 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 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. 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 clear that the Claimant is guilty as charged. Based on this infraction, 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 record, the Board found substantial evidence to warrant upholding the Carrier's position in whole. The Board notes that the

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Carrier proved that the Claimant engaged in the behavior alleged that led to the accident. Based on the totality of the record, the Board finds that the Claimant was afforded a fair and impartial Hearing. Further, the Board does not find that the discipline of a ten-day record suspension was inappropriate based on the transgression. Accordingly, the Board will not disturb the assessed discipline.

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 21st day of November 2011.