

**Form 1**

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 41142  
Docket No. MW-41340  
11-3-NRAB-00003-100230**

**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 (removed and withheld from service beginning December 18, 2008 and a Level S 30-day Record Suspension by letter dated February 9, 2009) imposed upon Mr. S. Wolfe on charges of violating BNSF Engineering Instruction 15.4.11 – Hy-Rail Limits Compliance System (HLCS) in connection with charges of alleged intentional misuse of company property and failure to activate the HLCS on Vehicle 17561 and occupied main line track between ESS Devon (SW-N) and EBCS ESS Dunkirk (SW-Y) while working as a relief track inspector on December 18, 2008, was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File B-M-1958-M/11-09-0247 BNR).**
- (2) The discipline (removed and withheld from service beginning December 18, 2008 and dismissal by letter dated February 9, 2009) imposed upon Mr. S. Wolfe on charges of violating BNSF Maintenance of Way Operating Rule(s) 10.3 – Track and Time, and 1.6 – Conduct, in connection with charges of failure to have Main Track Authority between East Switch Devon and West Switch Lothair where the westbound Train Q-CHCPTL3-13A**

**struck BNSF Hy-rail Vehicle 17561 while working as a relief track inspector on December 18, 2008 was arbitrary, capricious, disparate, on the basis of unproven charges and in violation of the Agreement (System File B-M-1950-M/11-09-0179).**

- (3) As a consequence of the violation referred to in Part (1) above, ‘. . . we respectfully request that the record of Scott R. Wolfe be cleared of the charges and proceedings of this investigation (File Number 08-0382). We also request that Mr. Wolfe be made whole for any loss of earnings from the time withheld from service on December 18, 2008, until he is returned to service and he be reimbursed for personal mileage, on a round trip basis, from his home in Whitefish, MT to Shelby, MT where the investigation was held, along with reimbursement for lodging and meals to attend the investigation. We further request Mr. Wolfe be made whole for any loss of fringe benefits, including but not limited to, insurance, railroad retirement credit, vacation credit, etc.’**
- (4) As a consequence of the violation referred to in Part (2) above, ‘. . . we respectfully request that the record of Scott R. Wolfe be cleared of the charges and proceedings of this investigation (File Number 08-0381). We also request that Mr. Wolfe be made whole for any loss of earnings from the time withheld from service on December 18, 2008, until he is returned to service and he be reimbursed for personal mileage, on a round trip basis, from his home in Whitefish, MT to Shelby, MT where the investigation was held, along with reimbursement for lodging and meals to attend the investigation. We further request Mr. Wolfe be made whole for any loss of fringe benefits, including but not limited to, insurance, railroad retirement credit, vacation credit, etc.’”**

**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. Wolfe was a Section Foreman and has held seniority in various classifications during his more than 27 years of service as a BMW-represented employee.

On the morning of December 18, 2008, the Claimant was assigned and working as a Relief Track Inspector on the Hi Line Subdivision of the Montana Division. The Claimant was operating a Hy-Rail vehicle over the Carrier's mainline track. It is uncontested that anyone occupying the main track using such a vehicle must strictly comply with the relevant Rules and Instructions. The Carrier contends that the Claimant violated certain Rules and Instructions, resulting in a collision between the Claimant's Hy-Rail vehicle and a westbound freight train. According to the Carrier, the Claimant committed two Rule violations that ultimately led to the collision. First, he did not engage the HLCS mechanism that would have indicated the location of his Hy-Rail. Second, he violated his track authority.

By letter dated December 18, 2008 the Carrier directed the Claimant to report for a formal Investigation on December 26, 2008:

“ . . . for the purpose of ascertaining the facts and determining responsibility, if any, in connection with alleged failure to have Main Track Authority between East Switch Devon and West Switch

**Lothair which resulted in westbound Train Q-CHCPTL3-13A striking HyRail BNSF Vehicle 17561 on Single Main near Mile Post 1042.3 at approximately 1030 hours on Thursday, December 18, 2008 while working as a Relief Track Inspector on the Hi Line Subdivision.**

**You will be withheld from service pending the results of the investigation.”**

**The Hearing was postponed by mutual agreement of the parties and eventually took place on January 20, 2009, pursuant to which, in a letter dated February 9, 2009, the Claimant was notified that he was issued a 30-day Level S record suspension for his violation of the BNSF Engineering Instruction 15.4.11-Hy-Rail Limits Compliance System (HLCS). The Claimant was also dismissed for his violation of the following Rules, both of which were categorized as dismissible offenses:**

- BNSF Maintenance of Way Operating Rule 10.3 - Track and Time. Your failure to have Track and Time authority caused a collision that resulted in Hy-Rail vehicle 17561—which has a replacement value greater than \$100,000—being deemed a total loss.**
- BNSF Maintenance of Way Operating Rule 1.6 - Conduct. Employees must not be: 1 Careless of the safety of themselves or others, and 2. Negligent. You were both careless of your own safety and the safety of the train crew, and negligent, when you failed to consult your manual or track profile after being granted specific Track and Time authority, which resulted in your being on the track without authority.**

**By letter dated February 26, 2009, the Organization appealed the decision based on the contentions (1) the Carrier failed to 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 April 24, 2009, General Manager R. Bartoskewitz denied the appeal. On May 5, 2009, the Organization appealed the matter to**

General Director of Labor Relations W. A. Osborn, who denied the appeal on July 3, 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 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. In addition, the Claimant was denied the right to utilize the Alternative Handling Process. (See Third Division Award 41143.) The Organization asserts that the Carrier should now be required to rescind the discipline and make the Claimant whole for all losses.

Conversely, the Carrier takes the position that it met its burden of proof and that 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. The evidence shows that the Claimant failed to safely operate equipment as required. Based on his transgressions, the Claimant's discipline was appropriate. In addition, because the monetary value of the damage to the Hy-Rail vehicle exceeded \$100,000.00, the Claimant was not entitled to access the Alternative Handling Process. (See Award 41143.)

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 has not found substantial evidence to warrant upholding the Carrier's position in whole. The Board finds that the Carrier proved that the Claimant failed to engage his HLCS and violated his track authority. The resolution of the Alternative Handling issue is dealt with in Award 41143. The Board notes that the Claimant's 30-day Level S record suspension was reasonable for his HLCS violation; however, the Board finds that the discipline of dismissal was too severe a penalty. Therefore, the Board will reduce the dismissal to a long term suspension. The Claimant shall be reinstated with seniority unimpaired, but without backpay.

**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 21st day of November 2011.

LABOR MEMBER'S DISSENT  
TO  
AWARD 41142, DOCKET MW- 41340  
(Referee Bierig)

Although Awards 41142 and 41143 involve the same Claimant and the same incident, the awards address separate disputes over the interpretation and application of the Agreement. As explained within the Labor Member's Dissent to Award 41143, had the Carrier not violated the Agreement by denying the Claimant the benefits of the contractually agreed Alternative Handling Process, the Claimant would not have been subjected to the disciplinary process and, thus, this case would never have arisen. However, having already violated the Agreement by spinning a property damage estimate out of thin air to suit its purpose, a charge letter was issued, an investigation was held and the Claimant was dismissed. Inasmuch as the Board in the end ordered that the Claimant be reinstated to service with seniority unimpaired, a limited concurrence is warranted. However, in its decision in Award 41142, the Majority has made a fundamental error which has led it to an erroneous decision. Therefore, dissent is also required.

Rule 40 of the parties' Agreement provides that before discipline is assessed, the employee will be afforded a fair and impartial hearing. In this case, the hearing afforded the Claimant was neither. While there were multiple breaches of the duty to afford a fair and impartial hearing, the fact is most clearly shown by the fact that the Carrier intentionally created an incomplete recording of the conversation between the Claimant and the dispatcher from whom he obtained track and time. The Claimant testified that a full record of his conversation with the dispatcher would reveal exculpatory evidence. However, instead of making the complete recording of the conversation available, as would be required to fully convey the factual background of the incident, the Carrier refused to allow any parts of the conversation that did not support its decision to dismiss the Claimant to be heard. It should be remembered that it was the Carrier who was in sole possession of the full recording and could have made the recording available had it been interested in affording the Claimant a fair and impartial hearing. However, throughout the entire process, the Carrier took the position that it was not required to allow full development of the facts, but that it only was required to produce substantial evidence supporting its finding of guilt. A proceeding can under no circumstances be described as "fair and impartial" when the evidence is restricted to only that which tends to support the prosecution's side.

Thankfully, within Award 41224 this Division has subsequently reversed its error and found that when BNSF denies an employee a fair and impartial hearing, the discipline must be set aside. The reader is referred to that award for a thorough discussion of the principles involved. The same principles should have been applied in the instant case.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Gary L. Hart", written in dark ink.

Gary L. Hart  
Labor Member