

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41177
Docket No. MW-41455
11-3-NRAB-00003-110010**

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 and a three (3) year probation period] imposed upon Mr. J. Gillette by letter dated November 13, 2009, for alleged violation of MOWOR 1.1.2 Alert and Attentive, MOWOR 1.19 Care of Property and MOWOR 1.6 Conduct when, while assigned as track inspector, the vehicle he was operating was involved in an accident on MO Hwy 10, three (3) miles west of Carrolton, Missouri on September 9, 2009, was arbitrary, capricious, unwarranted, excessive and in violation of the Agreement (System File C-10-D040-6/10-10-0051 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Gillette 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.

On September 9, 2009, the Claimant, who was assigned as a Track Inspector, was operating a hi-rail pickup truck westbound on Missouri Highway 10 when he “blacked out” and lost control of the vehicle. The vehicle veered off the right side of the road and into a ditch. When the Claimant regained consciousness, he was approximately ten feet from a telephone pole. The vehicle, sustained approximately \$40,000 worth of damages and, as a result, was declared a total loss.

By letter dated September 18, 2009, the Carrier directed the Claimant to report for a formal Investigation on September 23, 2009:

“ . . . for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to be alert and attentive when the BNSF vehicle #20098 you were operating was involved in an accident on MO Hwy 10, 3 miles west of Carrolton, at approximately 1350 hours on September 9, 2009, resulting in the vehicle being a total loss, while assigned as Track Inspector. . . .”

The Hearing was postponed and eventually was held on October 28, 2009, pursuant to which, in a letter dated November 13, 2009, the Claimant was notified that he was assessed a Level S 30-day record suspension and a three-year probationary period for his failure to be alert and attentive when the vehicle he was operating was involved in an accident on September 9, 2009, resulting in a total loss of the vehicle.

By letter dated December 16, 2009, 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. In addition, the Organization contended that the Claimant had a medical condition that could have led to the accident. On January 18, 2010, General Manager R. Reilly denied the appeal. On February 1, 2010, the Organization appealed the matter to General Director of Labor Relations W. A. Osborn, who denied the appeal on March 31, 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. 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's accident was caused by a medical condition and as such, the Claimant was not responsible for the accident. 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 record evidence shows that the Claimant's carelessness led to the accident. While the Organization asserted that a medical condition caused the accident, the Organization failed to provide sufficient proof that such a medical condition existed. Based on his transgressions, 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 finds that the Carrier proved that the Claimant was careless, leading to the accident. We note that the Claimant's 30-day Level S record suspension coupled with a three-year probationary period was reasonable for his violation. Accordingly, the Board will not overturn 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 December 2011.