

**Form 1**

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 41178  
Docket No. MW-41458  
11-3-NRAB-00003-110021**

**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 [ten (10) day record suspension] imposed upon Mr. D. Palmgren by letter dated December 30, 2009, for alleged violation of MOWOR 1.1.1 Maintaining a Safe Course, MOWOR 1.1.2 Alert & Attentive and MOWSR S-1.2 Sufficient Time in connection with a personal injury when removing a chain from a basket in the back of the section truck on October 25, 2009 at/or near Mile Post 516.3 on the Black Hills Subdivision while assigned as a truck driver on Gang TSEC0371 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File C-10-D040-11/10-10-0147 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant D. Palmgren 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 D. Palmgren was hired as a Trackman in 1994. On October 25, 2009, the Claimant was assigned as a Truck Driver for the Newcastle, Wyoming, Section Gang, which was assigned to repair a broken insulated joint. While cleaning up after the repairs, a piece of rail was discovered under the overpass. The boom truck was unable to reach the rail. The Claimant retrieved a chain to enable the gang to pull the rail closer to the truck so that its boom could be utilized to load it.

The chain retrieved by the Claimant usually hangs on an elevated metal basket in the truck bed. On October 25, 2009, however, the chain was inside the basket. As the Claimant attempted to pull the chain out of the basket, the chain caught on something, flew out of the basket and hit the Claimant in the mouth.

By letter dated October 27, 2009 the Carrier directed the Claimant to report for a formal Investigation on November 9, 2009:

“ . . . for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged responsibility, when you were removing a chain from a basket in the back of the section truck, causing injury to yourself, at approximately 1700 hours, on October 25, 2009, at/or near MP 516.3 on the Black Hills

Subdivision, while assigned as Truck Driver on gang TSEC0371, headquartered at Newcastle, Wyoming.”

The Hearing was postponed and eventually held on December 8, pursuant to which, in a letter dated December 30, 2009, the Claimant was notified that he was assessed a ten-day record suspension for his responsibility in connection with the incident described above.

By letter dated January 7, 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 March 4, 2010, General Manager T. C. Albanese denied the appeal. On March 23, 2010, the Organization appealed the matter to General Director of Labor Relations W. A. Osborn, who denied the appeal on May 21, 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 Organization contends that the Carrier improperly used hearsay to prove its case. 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’s carelessness led to the accident. 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 in his behavior, leading to the accident. We note that the Claimant's ten-day record suspension was reasonable for his violation. Accordingly, the Board will not overturn the assessed penalty.

**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.