

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41181
Docket No. MW-41478
11-3-NRAB-00003-110059**

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 one (1) year probation period commencing December 2, 2009] imposed upon Mr. R. Peetz by letter dated December 24, 2009, for alleged violation of MOWOR 1.1.2 Alert & Attentive in connection with alleged failure to be alert and attentive while pulling out of the parking lot at the Scottsbluff, Nebraska Section House and scraping the bumper of a parked car on November 12, 2009 while assigned as a truck driver on Gang TSEC0374 was arbitrary, capricious, unwarranted, excessive and in violation of the Agreement (System File C-10-D040-14/10-10-0144 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. Peetz 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 R. Peetz, who established and has held seniority as a Truck Driver for more than 32 years, works on Gang TSEC0374 in Scottsbluff, Nebraska. While driving out of a parking lot in his assigned vehicle on November 12, 2009, the Claimant hit the front bumper of a parked car that belonged to fellow employee B. Kutchara. The incident occurred in a parking lot designated for employee parking at the Carrier's Scottsbluff, Nebraska, facility.

On the day in question, the Claimant was working with Laborer H. Sulzbach, who stood behind the company vehicle, guiding the Claimant as he backed the vehicle out of the garage and into the parking area. When the Claimant began to pull forward without the assistance of Sulzbach, he struck the front bumper on the driver's side of the parked car. The estimated damage to Kutchara's vehicle was \$1,800.00 and no damage was sustained by the Carrier's vehicle.

By letter dated November 13, 2009, the Carrier directed the Claimant to report for a formal Investigation on November 24, 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 while pulling out of the parking lot at the Scottsbluff Section House on November 12, 2009 at approximately 0830 hours and allegedly scraping the bumper of a parked car while assigned as Truck Driver on gang TSEC0374 headquartered at Scottsbluff, Nebraska on the Valley Subdivision.”

The Hearing was postponed and eventually held on December 2, pursuant to which, in a letter dated December 24, 2009, the Claimant was notified that he was assessed a Level S 30-day record suspension and a one-year probationary period for his failure to be alert and attentive while pulling out of the parking lot at the

Scottsbluff Section House and scraping the bumper of a parked car on November 12, 2009.

By letter dated January 6, 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 3, 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 and the penalty was disproportionate to the offense. 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 transgression, 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, the Board concludes that the record does not contain substantial evidence to warrant upholding the Carrier's position in whole. While the Board finds that the Carrier proved that the Claimant's carelessness led to the accident, we find that based on the Claimant's outstanding record, the assessed penalty was too harsh. As a consequence, the Claimant's penalty shall be reduced to a ten-day record, non-Level S suspension and the probationary period shall be withdrawn.

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 December 2011.