Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41527
Docket No. MW-41688
13-3-NRAB-00003-110315

The Third Division consisted of the regular members and in addition Referee Richard Mittenthal when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes Division - IBT Rail Conference
(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 with a one (1) year probation] imposed upon Mr. D. Tate by letter dated June 28, 2010 for alleged violation of MOWOR 1.1.2 Alert & Attentive and MOWOR 1.6 Conduct when the vehicle he was driving on a BNSF access road near Mile Post 81.5 at Rochelle, Illinois, at approximately 0930 hours on May 7, 2010, went off the road and tipped over, allegedly causing damage of over one thousand five-hundred dollars ($1,500.00) to the vehicle was unwarranted, on the basis of unproven charges and in violation of the Agreement (System File C-10-D040-32/10-10-0410 BNR).

(2) As a consequence of the violation referred to in Part (1) above, Claimant D. Tate 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 May 7, 2010, the Claimant was operating a rotary dump truck as assigned along a gravel access road built and maintained by the Carrier. The access road was located between the Carrier's tracks and a ditch, which dropped off approximately eight feet from the road's surface. While driving and maintaining no more than the two feet of clearance that was maximally afforded him from fouling the track ballast on the side of the road, the Claimant realized that the road underneath the truck on the passenger's side was beginning to give way under the weight of the truck. The Claimant's efforts to steer away from the crumbling embankment proved futile and he decided to turn the truck toward the ditch in an attempt to minimize any damage. The truck fell to the bottom of the ditch and landed on its passenger side. The fall resulted in no injuries, and damages which the Carrier valued at approximately $1500.00.

By letter dated May 11, 2010, the Carrier directed the Claimant to report for a formal Investigation on May 21, 2010. The Notice of Investigation specified that said Investigation would be held:

> ". . . for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to be Alert and Attentive and your alleged Carelessness, when vehicle 18604, which you were driving on the BNSF access road near MP 81.5 at Rochelle, IL, at approximately 0930 hours on May 7, 2010 went off the road and tipped over on the passenger side causing damage in excess of $1500 to the vehicle, while assigned as a truck driver."

The Investigation was postponed by mutual consent and was finally held on June 9, 2010. By letter dated June 28, 2010, the Carrier notified the Claimant as follows:

> "As a result of investigation held on June 9, 2010 at 1100 hours at Roadmaster's Office, 123 North Main Street, Rochelle, IL, 61068 you are hereby assessed a Level S 30 Day Record Suspension for your failure to be Alert and Attentive and your Carelessness when vehicle 18604 you were driving on the BNSF access road near MP 81.5 at Rochelle, IL, at approximately 0930 hours on May 7, 2010 went off the road and tipped over on the passenger side, causing damage in excess of $1500 to the vehicle.
>
> In addition, you are being assessed a One (1) Year Probation. Any rules violation during this probation period could result in further disciplinary action.
>
> It has been determined through testimony and exhibits brought forth during the investigation that you were in violation of MOWOR 1.1.2 Alert & Attentive and MOWOR 1.6 Conduct."

The Carrier contends that the Claimant exhibited carelessness, as well as a failure to be alert and attentive and, as a result, he drove the truck off of the embankment. The Organization contends that the Carrier's case is built on mere supposition. It asserts that there is no proof that the Claimant was anything but alert and attentive to his duties, and that he proceeded with care in the performance of the work assigned to him, i.e., driving the rotary dump truck along the access road. The Organization further contends that the Carrier's entire case is based on its assumption that because the accident occurred, the Claimant must have violated a Rule.

According to the unrefuted testimony in this case, the Claimant had traveled down the access road earlier the same day without incident. However, on the second such trip, the Claimant felt the roadway giving away and he took action as quickly as possible to minimize any damage that might occur to the truck. The sole Carrier witness at the Investigation was not, in fact, a witness to the accident. His testimony consisted of the conclusions that he had reached as a result of his survey of the scene after the accident had occurred. While a post-accident inspection does not rule out reaching certain conclusions borne out by the physical evidence, the Carrier could not point to any physical evidence in this case that would support its narrative and its conclusion that the Claimant must have been careless and could not have been alert and attentive when the accident occurred. The Board's thorough examination

of the on-property record revealed no probative evidence that the Claimant violated any Carrier Rules.

In disciplinary matters, it is well-established that the burden rests with the Carrier to prove the charges against the employee by substantial evidence. For the reasons explained above, we find and hold that the Carrier failed to meet its burden of proof. Accordingly, the claim must be sustained.

AWARD

Claim sustained.

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 19th day of February 2013.