Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37262
Docket No. MW-37103
04-3-01-3-681

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(The Burlington Northern and Santa Fe Railway Company
((former Burlington Northern Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Level 1 - Formal Reprimand and two (2) year probationary period for violation of MW Safety Rule 1.5.2 assessed Track Inspector B. C. Hunter for his alleged failure to properly inspect his work location for any unsafe conditions at Longview, Washington which resulted in a personal injury on April 27, 2000 was without just and sufficient cause and excessive punishment [System File S-P-782-O/11-00-0420 D (MW) BNR].

(2) As a consequence of the violation referred to in Part (1) above, Track Inspector B. C. Hunter shall now have his record cleared of this incident."

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.

The Claimant established and holds seniority as a Machine Operator, Welder, and Track Inspector with 24 years of service. The incident occurred on April 27, 2000, at which time the Claimant was assigned and was working as a Track Inspector headquartered at Longview, Washington.

The Carrier uses an old boxcar as a tool storage shed at Longview, Washington. The wheels have been removed from the car and it sits slightly raised from the ground. Two ties are placed at the entrance to the car as steps and access is gained by stepping off of these ties into the car. There is a steel grate on the bottom of the car and no lighting within. Outside the entrance to the car is a piece of grating that is broken off and is missing.

On the day of the incident, following a morning job briefing, the Claimant was preparing for the days' work and determined that he needed switch lubricant. The lubricant was stored inside the boxcar. Prior to entering the boxcar to retrieve the lubricant, the Claimant asked Track Maintainer P. G. Lee for a flashlight, but none was available. As the Claimant attempted to enter the boxcar, he stepped on the threshold, caught his foot on the broken grating and tripped. He attempted to gain his balance with his other foot, but it slipped out from under him and he fell into a storage cabinet, sustaining injury. The Claimant then immediately reported his injury and medical attention was provided.

By letter dated May 5, 2000, the Carrier directed the Claimant to report on May 11, 2000, ". . . for the purpose of ascertaining the facts and determining responsibility, if any, in connection with your alleged failure to properly inspect your work location for any unsafe conditions resulting in your alleged personal injury, at Longview, Washington, at approximately 0715 hours, April 27, 2000." The Investigation was postponed but was ultimately held on May 18, 2000.

In a letter dated June 5, 2000, Assistant Division Engineer M. R. Bader notified the Claimant as follows:

> "This letter will confirm that as a result of investigation on May 18, 2000, concerning your failure to properly inspect your work location for any unsafe conditions resulting in your alleged personal injury, at Longview, Washington, at approximately 0715 hours, April 27, 2000, you are issued a Level 1 – Formal Reprimand, for violation of MW

Safety Rule 1.5.2. Additionally, you have been assigned a probation period of two years."

The Organization claims that 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; that burden of proof has not been met. While the Organization concedes that the Claimant was involved in said accident, it is the Organization's position that the accident was not caused due to the Claimant's negligence. It claims that the Claimant was disciplined solely for being involved in an accident and suffering injury. This is not a basis for discipline. The Organization asserts that numerous employees had been in and out of the boxcar without reporting the missing grating as a condition that could potentially cause injury. Thus, it is clear that the broken grating was not perceived as a safety hazard. According to the Organization, the Carrier should now be required to clear the Claimant's record of any mention of the incident.

Conversely, the Carrier takes the position that it met its burden of proof. According to the Carrier, it is clear that the floor was hazardous and required that any individual watch their step, which the Claimant clearly did not. The Carrier did not reprimand the Claimant for injuring himself. Rather, the Claimant was reprimanded because he did not properly inspect the floor and report the obvious unsafe condition. The Carrier considers the Claimant guilty as charged. According to the Carrier, a review of the transcript developed during the Investigation leaves no doubt that the Claimant violated the relevant Rules.

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 the Carrier's, 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, Third Division Award 16166.)

In the instant case, the Claimant is charged with a violation of Rule 1.5.2 that requires an employee to inspect the work location for any condition that might cause injury. Specifically, the Rule provides:

"Inspect your work locations and vehicles for any conditions that might cause injury, property damage, or interference with service. If you find such a condition, take necessary action to protect against the hazard, or discontinue activities in the area or with the vehicle. Promptly . . . report any defect or hazard to your supervisor or person in charge."

After a review of the evidence, the Board cannot find that there was substantial evidence in the record to sustain the Carrier's position that the Claimant did not follow Rule 1.5.2. The Organization was able to present sufficient evidence to show that the allegedly hazardous condition existed for a substantial period of time without submission of a report. Further, the Organization successfully argued that the Carrier's Slip Trip and Fall Team had previously inspected the structure and noted no exceptions or hazards in connection with the grating.

Based on this determination, the Board overturns the discipline imposed in this matter. The Claimant's record shall be expunged of the discipline.

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 5th day of November 2004.