

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37264
Docket No. MW-37393
04-3-02-3-413

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 Employees
(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 discipline [Level S suspension of thirty (30) days and probation period of three (3) years] imposed upon Mr. J. M. Chapple for alleged violation of Rule 6.51 and Rule 6.27 while assigned as a track inspector on March 5, 1999 when Unit #14631 struck the rear of Herzog Chase Vehicle #7 at or near Bellevue, Nebraska was unwarranted, excessive and in violation of the Agreement [System File C-99-S090-13/10-99-0249 (MW) BNR].
- (2) As a consequence of the violation referred to in Part (1) above, Mr. J. M. Chapple shall now ‘. . . be made whole for all losses suffered account of this discipline being assessed. I also request any mention of this discipline be removed from the principle’s personal record.’”

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 Rank 1 Track Inspector in the Track Subdepartment. On Friday, March 5, 1999, the Claimant was regularly assigned as such to the Track Inspector position patrolling track under the supervision of Roadmaster J. Johnston.

On March 5, 1999, the Claimant was operating a hy-rail vehicle (Unit #14631) in the vicinity of Bellevue, Nebraska, when he failed to stop short of Herzog Chase Vehicle No. 7 which had stopped at or near Mile Post 6.5. The Claimant's vehicle struck the rear of Herzog Chase Vehicle No. 7 causing it to move forward and strike the operator of Herzog Chase Vehicle No. 7, who was standing in front of the vehicle. The result of the incident, which did not cause injury to the Operator, caused approximately \$400.00 worth of damage to the Herzog Chase Vehicle and approximately \$400.00 worth of damage to the hy-rail vehicle.

By letter dated March 11, 1999, the Claimant was directed to "Arrange to attend investigation in the Burlington Northern Santa Fe Railroad Conference Room, Gibson Yard office, 4302 Gibson Road, Omaha, NE at 0900 hours Friday, March 19, 1999, for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged involvement in a vehicle incident, when Unit #14631 struck the rear of Herzog Chase Vehicle #7 on March 5, 1999 at or near Bellevue, Ne at approx. 1330 hours while assigned as Track Inspector."

By letter dated April 15, 1999, Division Engineer T. G. Koeniguer notified the Claimant as follows:

"This letter will confirm that as a result of the investigation afforded you on March 19, 1999, you are issued a Level S Thirty (30) day Suspension and Three years Probation beginning on April 20, 1999 and ending May 19, 1999 for violation of Rule 6.51 (Maintain a Safe Braking Distance) and Rule 6.27 (Movement at Restricted Speed) concerning your alleged involvement in a vehicle incident, when Unit #14631 struck the rear of Herzog Chase Vehicle #7 on March 5, 1999 at or near Bellevue, Ne at approx. 1330 hours while assigned as Track Inspector."

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 the accident in question, it claims that the accident occurred through no fault of the Claimant. Prior to the accident, a liquid compound of anti-freeze and water had been placed on the track making it very difficult for the hy-rail to stop, thus causing the accident. In addition, the Carrier did not provide a complete transcript of the Investigation in a timely manner. According to the Organization, the Carrier should now be required to clear the Claimant's record of any mention of the incident, to compensate him for all of his lost wages, including lost overtime and to make him whole for vacation, holidays, and seniority.

Conversely, the Carrier takes the position that it met its burden of proof. According to the Carrier, it is clear that the Claimant clearly violated well-established Rules when he collided with Herzog Chase Vehicle No. 7. The Carrier considers the Claimant guilty as charged. It is only through fortuity that there was no physical injury caused. 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 Rules 6.51 and 6.27, which provide that operators are to maintain a safe braking distance and be able to stop within half the range of vision of an approaching train.

After a review of the evidence, the Board finds that there was substantial evidence in the record to sustain the Carrier's position that the Claimant did not act appropriately when he did not maintain a safe breaking distance, thereby striking Herzog Chase Vehicle No. 7. While it does appear to be true that there was a liquid applied to the tracks, it is the Operator's obligation to inspect the track in order to take appropriate precautions. In the instant case, the Carrier has proven that the Claimant engaged in the violations alleged.

In sum, we find that the discipline imposed was reasonable and we will not disturb it.

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 5th day of November 2004.