

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37328
Docket No. MW-37344
05-3-02-3-370**

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
PARTIES TO DISPUTE: (
(Duluth, Missabe and Iron Range Railway Company**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The discipline [five (5) day suspension and six (6) month disqualification as a 'B' Machine Operator] assessed 'B' Machine Operator D. A. Bjorlin for his alleged responsibility when Front End Loader SWL 021 became stuck at Ambridge on June 7, 2001 was without just and sufficient cause and based on unproven charges.**
- (2) 'B' Machine Operator D. A. Bjorlin shall now be compensated for all wage loss suffered in connection with the five (5) day suspension and disqualification and have his record cleared of all charges."**

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.

At the time of the incident on June 7, 2001, Claimant D. A. Bjorlin held seniority and was assigned to the Track Subdepartment as a Class 'B' Machine Operator. He was assigned on Front End Loader SWL 021 (a swing loader) at Ambridge when the incident involved in this dispute occurred. At that time, he had approximately 18 years of satisfactory service with the Carrier.

According to the record and the Hearing Officer's factual determinations, the Claimant drove his 32,400-pound front-end loader into a swamp in order to position it for the beginning of his workday on. According to the Carrier, there was ample room to simply back up the front-end loader to return to the work site, but instead, the Claimant chose to make a forward U-turn. It is uncontested that it had rained heavily during the night. During the course of the U-turn, the front-end loader became stuck in the mud, causing delay to the crew and a costly process to extract the front-end loader.

By letter dated June 11, 2001, the Carrier directed the Claimant to report for an Investigation on June 21, 2001. The letter indicated that the Claimant was charged with "... failure to perform your duties as an equipment operator in a safe and responsible manner in a June 7, 2001 incident with Front End Loader SWL 021 at Ambridge." The Investigation, which was postponed by mutual understanding, eventually took place on June 28, 2001.

In a letter dated July 9, 2001, Building and Bridges Engineer K. L. Ehrenreich found the Claimant guilty of all Rules cited in the Notice of Investigation and informed him that he would receive "... a 5 day suspension from service without pay and your B Machine Operator seniority is suspended for 6 months effective today. You will be restricted to working only as a track laborer during this time period."

The Organization contends that the discipline imposed upon the Claimant was unwarranted, harsh, and excessive. It contends that the burden of proof in a discipline matter such as this is on the Carrier and that burden has not been met. While the Organization concedes that the Claimant was involved in said incident, it

is the Organization's position that the incident was caused not by the Claimant, but rather by a series of conditions including weather. In addition, the Organization contends that miring of a front-end loader does not normally result in discipline. 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. In addition, the Organization contends that there was no need to disqualify the Claimant from his class 'B' Machine Operator position.

Conversely, the Carrier takes the position that it met its burden of proof. The Claimant was afforded a fair and impartial Investigation in accordance with the requirements of the Agreement. It considers the Claimant guilty as charged. According to the Carrier, a review of the Investigation transcript makes it clear that the Claimant was responsible for the incident and therefore 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 its discretion. See Second Division Award 7325 and Third Division Award 16166.

In the event of a credibility conflict, the Hearing Officer is charged with making credibility determinations, as is the case in the instant matter. Unless it can be shown that the Hearing Officer's determination is arbitrary or capricious, the Board may not substitute its judgment:

"In adopting the system of investigations and discipline prevalent in the railroad industry, the parties have accepted the long-standing practice that the hearing officer, not the Board, is charged with evaluating the evidence and testimony presented at the investigation. It is the hearing officer who makes the determinations regarding the

credibility of witnesses. The Board may overturn such a determination only when the record shows the hearing officer acted in an arbitrary and capricious manner.”

See Special Board of Adjustment No. 910, Award 763.

After a review of the evidence, the Board finds substantial evidence in the record to uphold the Carrier’s position. We note that the Carrier proved that the Claimant used poor judgment resulting in the miring of the front-end loader. The evidence, including the written report of Roadmaster D. Barber, confirms that the actions of the Claimant caused the front-end loader to become mired. While there is admittedly a conflict in the testimony between the parties, the Board cannot find that the Hearing Officer’s determination was arbitrary or capricious and, therefore, will not overturn such determination.

Further, we find that the five-day suspension and six-month disqualification was reasonable and 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 19th day of January 2005.