

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37356
Docket No. MW-36914
05-3-01-3-527

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
(Duluth, Missabe and Iron Range Railway Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [suspended from service without pay for fifteen (15) workdays] imposed upon Ms. C. A. Follmer for alleged violation ‘. . . of the Engineering Department Rules 1.1, 1.1.1, 1.1.2, 1.19 and 1.30.1 of the Maintenance of Way Operating Rules, effective October 1, 2000 and Rule 2 Section F, Maintenance and Use of Engineering Equipment, of the Engineering Department Rule Book, effective January 1, 1992, in connection with an incident on October 12, 2000 . . .’ was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement.
- (2) As a consequence of the aforesaid violation, Claimant C. A. Follmer’s record shall be cleared of the charges leveled against her and she shall be compensated for all wage loss suffered.”

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 October 12, 2000, Claimant C. A. Follmer was assigned and working as a Trackman under the supervision of Track Supervisor D. R. Rohweder. The Claimant has been employed with the Carrier since 1976. The Claimant incurred discipline several times since March 1996 that involve safety, poor work performance and a violation of the Carrier's drug policy.

On October 12, 2000, the Claimant was operating a truck following a ballast-carrying front-end loader operated by D. Bjorlin. Bjorlin noticed that Foreman J. Olsen had blocked the path ahead and was signaling to Bjorlin the location to place the ballast. Bjorlin stopped, placed the front-end loader in reverse, and backed up to a road crossing so that he could get to the point where the ballast was to be placed. Bjorlin intended to cross over the tracks and follow an alternative route to the drop site.

The Claimant saw the front-end loader stop, noticed the back-up lights illuminate and observed the loader approaching her truck. She attempted to put the vehicle in reverse, but could not move fast enough to avoid a collision. At the Investigation, Bjorlin said he looked before moving in reverse, but did not see the Claimant. Bjorlin said he had no idea the distance he traveled in reverse prior to striking the Claimant's truck. He indicated that he was not moving very quickly because his air bags would ordinarily deploy at five m.p.h. and in this case, did not do so.

By letter dated October 16, 2000, the Carrier directed the Claimant to report on November 2, 2000 for an Investigation. The Claimant was charged with "failure to operate a DM&IR truck, vehicle 411, in a safe manner resulting in a collision

with a DM&IR front-end loader in an October 12, 2000, incident at Steelton." The Investigation took place as scheduled.

In a letter dated November 10, 2000, the Carrier notified the Claimant that she had been found guilty of violating the Carrier's Operating Rules because "... the vehicle you were operating was struck and damaged by a front-end loader at Steelton Yard." The Claimant was assessed a 15-day suspension for her transgression.

The Organization claims 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 accident, it is the Organization's position that the accident was caused not by the Claimant, but rather by Bjorlin, who admitted that he had not been looking behind him when he struck the Claimant. According to the Organization, the Carrier should now be required to clear the Claimant's record of any mention of the incident, to compensate her for all of her lost wages, including lost overtime, and to make her whole for vacation, holidays and seniority.

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. The Carrier considers the Claimant guilty as charged. According to the Carrier, a review of the transcript developed during the Investigation makes it clear that the Claimant was following Bjorlin too closely, thereby causing the accident.

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.

If there is a conflict in testimony, the Hearing Officer is charged with making determinations of credibility, as was the case in the instant matter. Unless it can be shown that the Hearing Officer's determination was arbitrary or capricious, the Board may not substitute its judgment. See Special Board of Adjustment No. 910, Award 763 wherein it was held:

"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. This Board may overturn such a determination only when the record shows the hearing officer acted in an arbitrary and capricious manner."

In the instant case, after a review of the evidence, the Board finds that there was substantial evidence in the record to uphold the Carrier's position. The Carrier proved that on October 12, 2000, the Claimant was operating a truck and following a front-end loader too closely, thereby causing an accident in violation of Maintenance of Way Operating Rules and the Engineering Rule Book. While there is a conflict in the testimony, the Board cannot find that the Hearing Officer's determination was arbitrary or capricious and will not overturn such determination.

Further, we find that the 15-day suspension was reasonable and we will not disturb it.

AWARD

Claim denied.

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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 24th day of February 2005.