

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41034
Docket No. MW-40768
11-3-NRAB-00003-080636**

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 Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(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 period] imposed upon Mr. C. Kelly by letter dated June 15, 2007, on charges of alleged dishonest behavior on April 24, 2007, in connection with allegation of taking an exhibit (glove) at approximately 2330 hours from the Roadmaster's office that was allegedly pertinent to the facts relating to a personal injury of an employee and allegedly hindered the fact gathering process on April 24, 2007, while he was assigned as a motor grader operator on Gang TMOX2234 headquartered at Alliance, Nebraska was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement. [System File C-07-D040-1/10-07-0374(MW) BNR].**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant C. Kelly 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.

This is a discipline case involving Claimant C. R. Kelly, who was issued a Level S 30-day record suspension with a 1-year probationary period for removing evidence regarding an injury investigation. The Claimant is employed full time as a Group 2 Machine Operator. He also is President of a BMW Local Lodge. The Claimant's son, Chad Kelly, is also employed by the Carrier.

On April 24, 2007, the Claimant's son sustained a cut to his thumb while on duty. Assistant Roadmaster Schultz took him to a local hospital where he was treated and released. He was then transported to Roadmaster S. Lyne's office to prepare the required paperwork in connection with the on-duty injury. While at the hospital, Chad Kelly asked the Claimant to come to the Roadmaster's office, at which time the Claimant was allowed to examine the Carrier - issued glove that his son had been wearing at the time of the accident. The Claimant and his son were informed that the glove was being retained by the Carrier as evidence in connection with the Carrier's injury investigation process. Upon completion of the paperwork, the Claimant and his son left the property.

Shortly thereafter, it was discovered that the glove was missing. After conducting a search, the Carrier contacted Chad Kelley and asked if he had taken the glove. Chad denied doing so. The Carrier then made an unsuccessful attempt to contact the Claimant. The next morning, Roadmaster D. Wade spoke with the Claimant and the Claimant admitted that he had taken the glove.

By letter dated April 30, 2007, the Carrier directed the Claimant to attend a formal Investigation on May 10, 2007:

“ . . . for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged dishonest behavior on April 24, 2007 when you admittedly took an exhibit at approximately 2330 hours, from the Roadmaster's office that was pertinent to an investigation of facts relating to a personal injury of [an] employee, which in turn hindered the fact gathering process, on April 24, 2007, while you were assigned as motor grader operator on gang TM0X2234, headquartered in Alliance, Nebraska. The Carrier first became aware of the alleged violation on April 26, 2007.”

The Hearing took place on May 22, pursuant to which, in a letter dated June 15, 2007, the Claimant was notified that he was being assessed a Level S 30-day record suspension with a one-year probationary period as a result of his violation of BNSF Railway Maintenance of Way Operating Rule 1.6.

By letter dated July 13, 2007, the Organization appealed the decision specifying that the Carrier did not meet its burden of proof and contending that the discipline assessed was unwarranted and excessive. On August 23, General Manager S. Sexhus denied the appeal. On October 5, the matter was appealed by the Organization to General Director of Labor Relations R. Karov. On November 30, the appeal was denied. On January 22, 2008, a conference was held, but the parties were unable to resolve the matter. The matter was then appealed to the Third Division.

According to the Organization, 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. It claims that (1) the Carrier has been arbitrary and capricious in its treatment of the Claimant, (2) the Carrier abused its discretion, and (3) the Carrier's determination to discipline the Claimant was based on inconclusive evidence, thus rendering the discipline harsh and excessive. It claims that the Claimant was

denied a fair and impartial Investigation. It asserts that the Carrier should now be required to overturn the discipline and make the Claimant whole for all losses.

Conversely, the Carrier takes the position that it met its burden of proof. The Claimant was afforded a fair and impartial Hearing in accordance with the requirements of the Agreement. According to the Carrier, a review of the transcript developed during the Hearing makes clear that the Claimant was guilty as charged. The evidence shows that the Claimant improperly took an exhibit that was essential for a Carrier investigation of a workplace injury. Based on the instant offense, the 30-day record suspension coupled with a one-year probationary period is an appropriate penalty.

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 that of the Carrier, 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 and Third Division Award 16166.)

The Board concludes that the Organization's contention that the Claimant did not receive a fair and impartial Investigation is not persuasive. The Board found substantial evidence in the record to uphold the Carrier's position in whole. The Carrier proved that the Claimant was guilty of the offense with which he was charged when he removed his son's glove from the Carrier's possession. This was clearly improper. Based on the instant offense, we conclude that a Level S 30-day record suspension coupled with a one-year probationary period is an appropriate penalty.

Accordingly, the claim is denied.

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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 23rd day of August 2011.