

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41036
Docket No. MW-40820
11-3-NRAB-00003-090060**

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 Atchison,
(Topeka & Santa Fe Railway Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (withheld from service from June 25 through July 6, 2006 and subsequent Level S 30-day Record Suspension) imposed upon Mr. K. Beachum for alleged violation of Maintenance of Way Operating Rules 1.13 – Reporting and Complying with Instructions and 1.6 – Conduct, in connection with charges of alleged insubordination and failure to comply with instructions on June 29, 2007, was excessive, arbitrary, capricious and in violation of the Agreement [System File F-07-18D/13-07-0017(MW) ATS].**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant K. Beachum shall now have the discipline removed from his record and he shall receive the remedy prescribed by the parties in Rule 13(f).”**

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 Carrier contends that on June 29, 2007, during a 7:00 A.M. conference call, Claimant K. Beachum was insubordinate and failed to follow the instructions of his Supervisor when he allegedly decided to cancel a Form B. During the conference call, Track Supervisor M. R. Powell instructed the Claimant to work on a Form B at the Saginaw siding. Track Supervisor Powell instructed the Claimant not to cancel the Form B before 5:00 P.M.

According to the Claimant, the terms of his recent divorce included an arrangement that required him to pick up and drop off his children every other weekend. When the Claimant notified Management of this situation, Management allowed the Claimant to leave by 3:30 P.M. every other Friday afternoon. During the June 29, 2007 conference call, Supervisor Powell advised the Claimant that a Form B was necessary until 5:00 P.M., and that if the Claimant had to leave early to pick up his children he would be relieved by Supervisor Powell and allowed to leave. The Claimant indicated to Supervisor Powell that he did not want anyone else running the Form B on his behalf, and that he planned to cancel the Form B; however, the Claimant was instructed to work the Form B. Supervisor Powell was accidentally disconnected from the conference call, and subsequently tried to reach the Claimant twice on his cell phone. The Claimant did not answer his cell phone. Supervisor Powell then contacted Division Engineer D. Rankin to discuss the Claimant's insubordination. Following this conversation, the Claimant was removed from service. The Claimant was allowed to return to service on July 6, 2007.

By letter dated July 10, 2007, the Carrier directed the Claimant to attend a formal Investigation on August 8 to investigate the Claimant's alleged insubordination and failure to comply with instructions from Track Supervisor M. R. Powell while working as Foreman on the Alliance Section.

The Hearing took place on August 8, 2007, pursuant to which, in a letter dated August 29, the Claimant was notified that he was being assessed a Level S 30-day record suspension as a result of his violation of BNSF Railway Maintenance of Way Operating Rules 1.13 and 1.6.

By letter dated October 25, 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 November 20, General Manager R. Jackson denied the appeal. On December 13, the matter was appealed by the Organization to General Director of Labor Relations William A. Osborn. On February 8, 2008, the appeal was denied. On May 20, 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 contends that while the Claimant had an argument with his Supervisor, he never cancelled the Form B and was discussing it when the conversation was cut off. It claims that the Claimant was denied a fair and impartial Investigation. It asserts that the Carrier should now be required to rescind 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 was insubordinate and that such behavior was clearly improper. Based on the instant offense, the Claimant's 30-day record suspension and withholding from service was appropriate.

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 has not found substantial evidence in the record to uphold the Carrier's position in whole. The Carrier proved that the Claimant engaged in an argument with a Supervisor. The Claimant's behavior, while argumentative, did not rise to the level of insubordination. The Board has determined that a Level S 30-day record suspension and being removed from service was excessive and not an appropriate penalty. The Board concludes that a ten-day record suspension would be a more appropriate penalty. In addition, the compensation lost by the Claimant for being removed from service shall be reimbursed to the Claimant.

AWARD

Claim sustained in accordance with the Findings.

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 23rd day of August 2011.