

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41039
Docket No. MW-40901
11-3-NRAB-00003-090158**

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 (dismissal) imposed on January 11, 2008 upon Mr. B. A. Sullens on charges of alleged violation of Maintenance of Way Operating Rule 6.3 and Maintenance of Way Rule 10.3 in connection with charges of alleged track and time violation, traveling beyond authority on Stabilizer Machine #X8600022 and colliding into the side of the westbound Train H-DENLAU1-23A at East Cassa on July 24, 2007 at approximately 1735 hours, at/or near Mile Post 107.9 on the Canyon Subdivision, resulting in his personal injury, while assigned as machine operator on Gang TSCX0050, temporarily headquartered in Guernsey, Wyoming was disparate, excessive and in violation of the Agreement [System File C-08-D070-1/10-08-0182(MW) BNR].**
- (2) The claim as presented by Vice General Chairman R. L. Miller to General Manager S. C. Sexhus on January 28, 2008 shall be allowed as presented because said claim was not disallowed in accordance with Rule 42.**
- (3) As a consequence of the violation referred to in Parts (1) and/or (2) above, Mr. B. A. Sullens shall 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.

Prior to his dismissal, Claimant B. Sullens had accumulated 28 years of service, and held seniority in various classifications within the Maintenance of Way and Structures Department. On the date this dispute arose, the Claimant was assigned and working as a Group 3 Machine Operator. He was assigned to Surfacing Gang TSCX0050 operating Track Stabilizer No. X8600022.

On July 24, 2007, the Claimant and his gang were scheduled to move their gang machines to a new location in preparation for the next day's work. The Machine Operators were to move their respective machines over the track from Orin to the new tie-up location near Wheatland. On that afternoon, the Claimant led the gang move to the new work location. At approximately 5:35 P.M., the Claimant's Track Stabilizer machine was involved in an accident with a westbound train as the train crossed over to the No. 2 Mainline track.

By letter dated July 26, 2007, the Carrier notified the Claimant that he was to attend a formal Investigation on August 3, 2007:

“ . . . for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged track and time violation, traveling beyond your authority on Stabilizer machine #X8600022 and colliding into the side of the westbound train "H-DENLAUI-23A at East Cassa on July 24, 2007 at approximately 1735 hours, at/or near MP 107.9 on the Canyon Subdivision, resulting in a life threatening injury while assigned as Machine

Operator on gang TSCX0050, temporarily headquartered at Guernsey, Wyoming.”

The Hearing was postponed several times and took place on December 14, 2007, pursuant to which, in a letter dated January 11, 2008, the Claimant was notified that he was being dismissed from service as a result of his violation of Maintenance of Way Operating Rules 6.3 and 10.3

By letter dated January 28, 2008, 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 February 20, General Manager S. C. Sexhus denied the appeal. On April 18, the Organization appealed the matter to General Director of Labor Relations W. A. Osborn, who denied the appeal on June 12, 2008. A conference was held and 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 the Carrier has been arbitrary and capricious in its treatment of the Claimant, that the Carrier abused its discretion, and that the Carrier’s determination to discipline the Claimant was based on inconclusive evidence, thus rendering the discipline harsh and excessive. It contends that the Claimant was denied Agreement due process because the Carrier did not respond to the Organization’s appeal. 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. The Carrier contends that it properly responded to the Organization’s appeal. It insists that although the Organization contends that it did not receive the Carrier’s response, it did transmit a response. According to the Carrier, a review of the transcript developed during the Hearing makes clear that the Claimant was guilty as charged. The record evidence shows that the Claimant’s behavior in operating beyond his authority had serious implications, including serious injury to the Claimant. Based on the instant offense, the Claimant’s dismissal 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.)

First, the record reflects that the Carrier responded to the Organization's January 28, 2008 appeal in a timely manner. Consequently, Part (2) of the claim is denied. With regard to the merits, the Board has not found substantial evidence in the record to uphold the Carrier's position in whole. While we note that the Carrier proved that the Claimant did exceed his track authority on the date in question, leading to the accident, we cannot find that the discipline of dismissal is appropriate. Based on the totality of the circumstances in this case, especially considering the Claimant's many years of service without prior discipline, we believe that a lengthy suspension would be an appropriate penalty. Based on these considerations, the Claimant's dismissal is reduced to a 24-month suspension. The Claimant shall be reinstated subject to the 24-month suspension.

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.