

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 41040
Docket No. MW-40934
11-3-NRAB-00003-090227

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 Division -
(IBT Rail Conference
(BNSF Railway Company (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- 1) The discipline imposed upon Mr. C. Gloria (dismissal by letter dated March 19, 2008 with subsequent leniency reinstatement by letter dated July 21, 2008) for alleged violation of Rule 1.6 of the Maintenance of Way Operating Rules and Rule 16.25 of the Maintenance of Way Safety Rules for alleged failure to be alert and attentive, alleged failure to properly job brief and allegedly careless of the safety of himself and others while working as a sectionman on Mobile Gang TCOOO1 when the hydraulic hose of a hydraulic rail saw he was operating was cut and caused a hydraulic oil fire at Mile Post 18.5 near Amarillo, Texas at approximately 1500 hours on April 16, 2007 was arbitrary and capricious on the basis of unproven charges and in violation of the Agreement [System File C-08-D070-2/10-08-0258(MW) BNR].
- 2) As a consequence of the violation referred to in Part (1) above, Mr. C. Gloria 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.

Claimant C. Gloria was assigned to a P-811 crew performing track renewal. At the end of each work day, the P-811 Machine is taken through a process called "cutting out." This process serves to remove the P-811 from the rail and to reposition the rail back on the ties. In order to remove the P-811 from the rail, the rail is manually cut twice. The initial cut is made with acetylene torches and the finishing cut is made with hydraulic rail saws. Among the Claimant's duties was the performance of the finishing cut.

On April 16, 2007, the Claimant was informed that his assistant, J. Kramer, would not be available that day. Kramer typically helped the Claimant with the hydraulic saw setup and observed the process to ensure that the hydraulic hose would not come into contact with the saw blade as the rail was cut. The Claimant asked a supervisor if he would have another assistant in Kramer's absence. The Claimant was told that no one was available to assist him at that time. The Claimant proceeded without assistance. While the Claimant was cutting the rail, the hose crept underneath the saw blade and was cut.

Both the Claimant and R. Jarvis, who was standing nearby on fire watch duty, were sprayed with hydraulic fluid. A spark from the rail saw ignited the hydraulic fluid and caused both the Claimant and Jarvis to receive burns. As a result of this incident, both the Claimant and Jarvis suffered significant injuries.

By letter dated April 20, 2007, the Carrier directed the Claimant and a fellow employee to attend a formal Investigation on April 30, 2007:

". . . for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to be alert and attentive, failure to properly job brief and were careless of the safety of yourself and others when you allegedly allowed the hydraulic

saw you were using to cut the hydraulic hose causing [a] hydraulic oil fire while working at MP 18.5 near Amarillo, Texas on April 16, 2007 at approximately 1500 hours while assigned as Sectionman and Machine Operator respectively on Mobile Gang TC01, TTCX0001."

The Hearing was postponed several times and eventually took place on February 21, 2008, pursuant to which, in a letter dated March 19, 2008, the Claimant was notified that he was being dismissed from service as a result of his violation of Maintenance of Way Operating Rules 1.6 and Safety Rule 16.25.

By letter dated March 31, 2008, the Organization appealed the decision specifying that (1) the Carrier did not meet its burden of proof (2) the discipline assessed was unwarranted and excessive and (3) the Claimant was denied a fair and impartial Hearing. On May 23, 2008, Division General Manager J. Thompson denied the appeal. On June 24, the Organization appealed the matter to General Director of Labor Relations W. A. Osborn, who denied the appeal on August 21, 2008. Meanwhile, on July 21, 2008, the Claimant was reinstated pursuant to managerial leniency and his discipline was reduced to time served. A conference was held on August 28, 2008, 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 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 further contends that the Claimant was denied a fair and impartial Hearing and that he was treated in a disparate manner. Lastly, the Organization 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 record evidence shows that the Claimant engaged in the behavior with which he was charged and that behavior resulted in serious injury to himself and R. Jarvis.

Based on the instant offense, the Claimant's dismissal and subsequent leniency reinstatement 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 found substantial evidence in the record to uphold the Carrier's position in whole. We note that the Carrier proved that the Claimant engaged in behavior that caused serious injury to himself and a fellow employee. Further, we do not find that the discipline imposed, i.e., dismissal and subsequent leniency reinstatement, was inappropriate based on the transgression, and the Board will not overturn the assessed penalty.

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.