

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41076
Docket No. MW-41088
11-3-NRAB-00003-090361**

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 upon Mr. N. Payne by letter dated September 19, 2008 for alleged violation of Maintenance of Way Operating Rule 1.15, Duty-Reporting or Absence, effective October 31, 2004 and Engineering Instruction Rule 22.6.1 BNSF Absenteeism and Layoff Policy in connection with charges of failure to report for duty or call in to an exempt officer on August 20, 2008 while assigned as a trackman on Gang TMGX0833, headquartered in Crawford, Nebraska, was arbitrary, capricious, disparate and in violation of the Agreement [System File C-08-D070-4/10-08-0479(MW) BNR].**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant N. Payne 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.

Claimant N. Payne established and holds seniority in various classifications within the Maintenance of Way and Structures Department. Prior to the instant dispute, the Claimant was assigned and working as a Trackman on Gang TMGX0833, which was headquartered at Crawford, Nebraska.

During the four months leading up to the instant incident, the Claimant received the following disciplinary actions:

“May 22, 2008 - 10-day record Suspension for failure to report to duty or call in
May 29, 2008 - 20-day record Suspension for the same offense
June 4, 2008 - 30-day record Suspension for the same offense
June 5, 2008 - 30-day record Suspension for the same offense”

May 22, 2008 was the beginning of a series of absences that eventually led to the Claimant's dismissal. Roadmaster C. Yeoman became aware that the Claimant had a prior history of missing work without authorization. Yeoman provided the Claimant with written procedures that, when complied with, would allow the Claimant to be granted permission to be off from work. Included within the procedures was the specific instruction that the Claimant must personally contact either Assistant Roadmaster S. Waggener or Roadmaster Yeoman to request time off. Pursuant to Engineering Instruction 22.6.1, the Claimant was specifically instructed that leaving a voicemail message would not be deemed to be in compliance with these instructions.

On August 20, 2008, the Claimant was absent from work. He had been in North Platte, Nebraska, for personal reasons. Approximately seven hours before his shift began, the Claimant left a voicemail message for Assistant Roadmaster

Waggener and Roadmaster Yeoman, informing them of his impending absence. The Claimant's absence was determined to be unexcused and in violation of the specific instructions provided to him.

By letter dated August 26, 2008, the Carrier directed the Claimant to report for a formal Investigation on September 3, 2008:

“ . . . for the purpose of determining your responsibility, if any, in connection with your alleged failure to report for duty or call in on August 20, 2008, while assigned as a trackman on Gang TMOX0833, headquartered at Crawford, Nebraska.”

The Hearing took place on September 3, 2008, pursuant to which, in a letter dated September 19, 2008, the Claimant was notified that he was being dismissed from service as a result of his violations of Maintenance of Way Operating Rule 1.15. Duty-Reporting or Absence and Engineering Instruction 22.6.1 of the BNSF Absenteeism and Layoff Policy.

By letter dated November 14, 2008, the Organization appealed the Claimant's dismissal, based on the contentions (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 December 10, 2008, General Director of Labor Relations W. A. Osborn denied the appeal. On April 2, 2009, the Organization again appealed the matter to Osborn, who reaffirmed his decision to deny the appeal on May 1, 2009. 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 asserts 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. The Organization further argues that (1) the Claimant was denied a fair and impartial Hearing (2) the Claimant was treated disparately, and (3) the Claimant was subjected to improper

Rules. 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 it clear that the Claimant was guilty as charged. The record evidence shows that the Claimant engaged in the absenteeism with which he was charged and had been previously warned that such behavior would lead to discipline. Although the Claimant was provided with specific instructions regarding absence-reporting procedures, he nevertheless failed to comply with those procedures. In addition, the Carrier contends that the Claimant was treated properly and fairly. Based on his behavior and his extensive disciplinary record, 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.)

After a thorough review of the case record, the Board found substantial evidence to uphold the Carrier's position in whole. The Board notes that the Carrier afforded the Claimant a fair and impartial Investigation at which it proved that the Claimant engaged in absenteeism, which ultimately led to his dismissal. Based on his prior record of absenteeism, the Claimant had been provided with specific instructions regarding proper absence-reporting procedures, but he failed to comply with those reasonable instructions. The Board also finds that dismissal was appropriate based on the Claimant's transgression as well as his significant disciplinary history. Accordingly, the Board will not overturn the Claimant's termination.

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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 18th day of October 2011.