

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41079
Docket No. MW-41270
11-3-NRAB-00003-100106**

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 [Level S thirty (30) day record suspension] imposed upon Mr. T. Dietrick by letter dated December 30, 2008, for alleged violation of MOW Operating Rules 1.6 Conduct and 1.7 Altercation, in connection with charges of an alleged altercation that caused damage to Room 142 in the Trails Inn Motel in Sheridan, Wyoming on September 9, 2008, was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement [System File C-09-D040-1/10-09-0134(MW) BNR].
- (2) The discipline [Level S thirty (30) day record suspension] imposed upon Mr. C. Pickrel by letter dated December 30, 2008, for alleged violation of MOW Operating Rules 1.6 Conduct and 1.7 Altercation, in connection with charges of an alleged altercation that caused damage to Room 142 in the Trails Inn Motel in Sheridan, Wyoming on September 9, 2008, was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement [System File C-09-D040-1/10-09-0134(MW)].
- (3) As a consequence of the violation referred to in Part (1) above, the Carrier shall now remove all reference to the aforesaid discipline from Claimant T. Dietrick’s records.

- (4) As a consequence of the violation referred to in Part (2) above, the Carrier shall now remove all reference to the aforesaid discipline from Claimant C. Pickrel's records."

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.

Claimants T. Dietrick and C. Pickrel were assigned to traveling Gang TP-11. On September 9, 2008, Room 142 of the Trails Inn in Sheridan, Wyoming, was occupied by M. Smith and Claimant Pickrel. During the morning of September 10, 2008, Pickrel reported to TP-11 Gang Foreman A. Landers that he had been intoxicated the night before and had fallen into the wall, thereby puncturing a hole in it. Foreman Landers instructed Pickrel to contact the hotel and make arrangements to pay for the damages. Pickrel complied with these instructions.

On October 22, 2008, Machine Operator M. Thompson, assigned to Gang TP-11, reported to Roadmaster S. Ellis that an altercation had taken place on September 9, 2008 between Claimants Pickrel and Dietrick, resulting in a hole in the wall of Room 142. Thompson explained that a friendly wrestling match became heated when Pickrel took a "cheap shot" at Dietrick.

By letter dated October 28, 2008, the Carrier directed the Claimants to report for a formal Investigation on November 5, 2008:

"... for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with an alleged altercation that caused damage to room 142 in the Trails Inn Motel in Sheridan,

Wyoming on September 9, 2008 while assigned as a Group 3/4 Machine Operator & Sectionman on Gang TTPX0011, temporarily headquartered at Glendive, Montana. The Carrier first became aware of the alleged violations on October 22, 2008.”

The Hearing took place on December 15, 2008, pursuant to which, in a letter dated December 30, the Claimants were notified that they were assessed Level S 30-day record suspensions as a result of their violation of MOW Operating Rules 1.6 Conduct and 1.7 Altercations, for the altercation that took place in room 142 in the Trails Inn Motel in Sheridan, Wyoming, on September 9, 2008.

By letter dated January 6, 2009, the Organization appealed the decision based on the contentions (1) the Carrier did not meet its burden of proof and (2) the discipline assessed was unwarranted and excessive. On March 3, 2009, Terminal Superintendent M. E. Wirtz denied the appeal. On March 16, 2009, the Organization appealed the matter to General Director of Labor Relations W. A. Osborn, who denied the appeal on May 12, 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 Claimants was unwarranted, harsh, and excessive. The Organization 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. The Organization claims that (1) the Carrier has been arbitrary and capricious in its treatment of the Claimants (2) the Carrier abused its discretion and (3) the Carrier’s determination to discipline the Claimants was based on inconclusive evidence, thus rendering the discipline harsh and excessive. The Organization further contends that there was no direct evidence showing that the Claimants were involved in an altercation. Lastly, it asserts that the Carrier should now be required to overturn the discipline and make the Claimants whole for all losses.

Conversely, the Carrier takes the position that it met its burden of proof. The Claimants were 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 Claimants are guilty as charged. The record evidence shows that the Claimants engaged in an altercation, which led to the damage at the motel. Based on their unacceptable behavior, the Carrier’s assessment of discipline 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 has not found substantial, direct evidence to uphold the Carrier's assessment of discipline. The Carrier failed to prove that the Claimants engaged in the altercation that led to their discipline. Accordingly, the claim will be sustained.

AWARD

Claim sustained.

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 18th day of October 2011.