

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41083
Docket No. MW-41379
11-3-NRAB-00003-100259**

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. M. Aaron for alleged violation of MOWSR 12.8.2 Off Track Mobile Construction Equipment while assigned as a foreman on TSEC 0266, in connection with an incident that occurred on August 18, 2009 at approximately 1400 hours when a front end loader backed into a light pole at the Westmont Station platform, Mile Post 19.4, was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement [System File C-10-D070-1/10-10-0004 BNR].**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant M. Aaron 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 M. Aaron has established and maintained seniority as a Foreman and was assigned as such on Gang TSEC 0266 at the time the instant dispute arose on August 19, 2009. R. Adams was regularly assigned as a Sectionman, but on the date in question was assigned to operate a front end loader, working with Gang TSEC 0266.

On August 19, 2009 Aaron and Adams were working said positions in Westmont, Illinois, where they were removing a pedestrian crossing (concrete pads and asphalt) from two tracks ahead of Tie Gang TP 10. At approximately 2:00 P.M., the Claimant directed Adams' front end loader into a decorative light pole owned by the Westmont Public Works Department, and knocked it over.

By letter dated August 21, 2009, the Carrier directed the Claimant to report for a formal Investigation on September 1, 2009:

“ . . . for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged involvement in the incident that occurred at approximately 1400 hours on August 19, 2009, when a front end loader backed into a light pole at the Westmont Station platform, MP 19.4, while assigned as Foreman and Machine Operator on TSEC0266.”

The Hearing took place on September 3, pursuant to which, in a letter dated September 30, 2009, the Claimant was notified that he was dismissed from service as a result of his violation of Maintenance of Way Safety Rule 12.8.2 - Off Track Mobile Construction Equipment.

By letter dated October 29, 2009, the Organization appealed the decision based on the contention (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 18, 2009 General Manager R. Reilly denied the appeal. On January 4, 2010, the Organization appealed the matter to General Director of Labor Relations W. A. Osborn, who denied the appeal on March 3, 2010. 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 and hearsay, thus rendering the discipline harsh and excessive. The Organization further contends that the Claimant was denied a fair and impartial Hearing. Lastly, 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. According to the Carrier, a review of the transcript developed during the Hearing makes it clear that the Claimant is guilty as charged. The Carrier contends that although some written statements were entered into evidence, direct credible testimony was also presented at the Investigation. The evidence shows that the Claimant engaged in improper behavior, which led to the incident and subsequent discipline. In addition, the Carrier contends that the Claimant was not denied a fair and impartial Hearing. Based on his unacceptable 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 proved that the Claimant engaged in the alleged behavior that led to his dismissal. The Board found substantial evidence to substantiate the Hearing Officer's findings. Further, the Board finds that dismissal was appropriate based on the nature of the transgression coupled with the Claimant's lengthy disciplinary record. Accordingly, 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 18th day of October 2011.