

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41085
Docket No. MW-41406
11-3-NRAB-00003-100284**

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

**(Brotherhood of Maintenance of Way Employes 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 [Level S thirty (30) day record suspension with a one (1) year probation period] imposed upon Mr. D Leach by letter dated September 23, 2009 for alleged violation of FRA Code of Federal Regulations: Track Safety Standards Part 213, Subpart A to F, Class of Track 1-5, Includes Defect Codes, #213.13 Measuring track not under load and #213.53 Gage while assigned as track inspector on Gang TINS0881 headquartered at Casper, Wyoming on July 30, 2009 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File C-09-D040-7/10-10-0001 BNR.)**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant D. Leach 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 D. Leach established and maintains seniority in various classifications within the Maintenance of Way and Structures Department, dating from July 2, 1979. From approximately April 2002 to the time of the circumstances leading to this dispute, the Claimant worked as a Track Inspector on Gang TINS0881, which was headquartered in Casper, Wyoming. On July 29, 2009, a derailment occurred at Mile Post 202.

By letter dated August 3, 2009, the Carrier directed the Claimant to report for a formal Investigation on August 12, 2009:

“ . . . for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to protect track through proper inspections at/or near mile post 202.1 on the Casper Subdivision on July 29, 2009 while assigned as Track Inspector on Gang TINS0881, headquartered at Casper, Wyoming.”

The Hearing took place on September 1, 2009, pursuant to which, in a letter dated September 23, 2009, the Claimant was notified that he was assessed a 30-day Level S record suspension with a one-year probationary period as a result of his violation of FRA Code of Federal Regulations: Track Safety Standards Part 213, Subparts A to F, Class of Track 1-5.

By letter dated October 14, 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 Hearing conducted by Hearing Officer Turnbull was not fair and impartial. On December 1, 2009, General Manager T. Albanese denied the appeal. On December 29, 2009, the

Organization appealed the matter to General Director of Labor Relations W. A. Osborn, who denied the appeal on February 25, 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. 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 further 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 also contends that the Claimant was denied a fair and impartial Hearing based upon the choice of Hearing Officer Turnbull. 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. There were no substantive Agreement due process violations during the Hearing. According to the Carrier, a review of the transcript developed during the Hearing makes it clear that the Claimant is guilty as charged. The evidence shows that the Claimant engaged in the behavior alleged, which led to the derailment. Based on his unacceptable behavior, the Claimant's 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 found substantial evidence to uphold the Carrier's position in whole. The Board notes that the Carrier proved that the Claimant engaged in the behavior that led to the derailment and subsequent discipline. Based on the totality of the record, the Board cannot find that the Claimant was denied a fair and impartial Hearing. Further, the Board finds that a 30-day Level S record suspension and one-year probationary period was appropriate based on the transgression. Accordingly, the Board will not overturn the assessed discipline.

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.