

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41087
Docket No. MW-41451
11-3-NRAB-00003-100240**

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 [Level S record suspension of forty-five (45) days and three (3) years probation commencing October 10, 2008] imposed upon Mr. S. Warburton by letter dated October 9, 2008, for alleged violation of MOW Operating Rules 1.2.5 in connection with charges of alleged failure to report an on duty injury to his supervisor in a timely manner was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File B-M-1924-M/ 11-09-0105 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant S. Warburton 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.

The Claimant, a 12-year employee, was working as a Mechanic between Havre and Glasgow, Montana, on the Montana Division. On August 26, 2008, while attending a scheduled safety meeting, he informed his supervisor, R. Iverson, that he had suffered an on-duty injury to his shoulder. Iverson left the safety meeting and called the Claimant to his office to prepare a personal injury report.

The Claimant's report states that his injury occurred in Saco, Montana, while he was "trying to loosen up the top of a filter housing on a Plasser Stabilizer and I pulled my shoulder out." However, the Claimant was unable to recall the exact date of the injury. At the subsequent Hearing, the Claimant testified that while preparing the personal injury report, Iverson provided the Claimant with a calendar to assist him in determining the date of the injury, and that he last remembered using that shoulder in approximately June. The Claimant wrote on his report that the injury occurred on June 16, 2008, which placed the filing of the report 71 days after the date of the occurrence.

By letter dated August 28, 2008 the Carrier directed the Claimant to report for a formal Investigation on September 5, 2008:

"... for the purpose of ascertaining the facts and determining your responsibility if any, in connection with your alleged failure to comply with Burlington Northern Santa Fe Maintenance of Way Operating Rule 1.1.3 Accidents, Injuries, And Defects, and Burlington Northern Santa Fe Maintenance of Way Operating Rule 1.2.5 Reporting. These violations occurred on August 26, 2008 when you reported to your supervisor that you had been injured while on duty on June 16, 2008."

The Hearing took place on September 11, 2008, pursuant to which, in a letter dated October 9, 2008, the Claimant was notified that he was being assessed a 45-day Level S record suspension and a three-year probationary period for his violation of Maintenance of Way Operating Rule 1.2.5 - Reporting.

By letter dated November 17, 2008, 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 January 13, 2009, General Director of Roadway Equipment J. Upward denied the appeal. On March 10, 2009, the Organization appealed the matter to General Director of Labor Relations W. A. Osborn, who denied the appeal on May 8, 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. 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 further contends that the Claimant was denied a fair and impartial Hearing. 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 is guilty as charged. The evidence shows that the Claimant failed to report an injury in a timely manner as required. 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 did not report his injury in a timely manner. The Board cannot find that the Claimant was denied a fair and impartial Hearing. Further, the Board does not find that the discipline of a 45-day record suspension and a three-year probationary period was inappropriate 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.