

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41144
Docket No. MW-41443
11-3-NRAB-00003-100319**

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 Atchison, Topeka
(and Santa Fe Railway Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (removed and withheld from service by letter dated January 28, 2009 and subsequent dismissal by letter dated March 12, 2009) imposed upon Mr. N. Higginson for alleged violation of Maintenance of Way Operating Rules 1.6, 1.1.2, 1.20 and 6.3.3 in connection with charges of alleged carelessness of the safety of himself or others and alleged failure to be alert and attentive and alleged failure to visually observe all train movements while working as a foreman on TSEC0598 on Main Track 2 at or near Mile Post 304.8, Seligman Sub, on January 23, 2009 was arbitrary, excessive, unwarranted and in violation of the Agreement (System File 170-13S1-091/14-09-0078 ATS).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant N. Higginson shall now receive the remedy prescribed by the parties in Rule 13(f).”**

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. Higginson had established and held seniority as a Foreman for approximately 25 years as a BMW-represented employee.

On January 23, 2009, the Claimant was assigned as a Foreman on a three-man gang, consisting of himself, Laborer E. Francis and Truck Driver D. Benally, working outside of Winslow, Arizona, on Tracks Main 1 and Main 2, which have a speed limit of 70 mph for freight trains. The Claimant prepared the required "Statement of On-Track Safety" form and performed "Lookout" protection on the track. A Lookout warns employees working on a track of an approaching train in order that they can safely clear the track for an approaching train at least 15 seconds before its arrival. On the tracks involved here, in order to provide on-track protection using a lookout, the Rules require a minimum sight distance of 1,980 feet. According to the Carrier, the Claimant had neither the required 1,980 feet of sight distance, nor sufficient time to provide proper warning when the incident involved herein occurred.

According to the Carrier, the Claimant could see only 849 feet into the distance. Additionally, the Claimant was not within close enough proximity to verbally warn his co-workers in order to afford them the opportunity to clear the track at least 15 seconds prior to the arrival of the train. It was also determined that a train pulled onto Main 1 just before the accident, diminishing the distance the Claimant could see around the curve while his gang was working on Main 2.

Laborer Francis was operating a pneumatic spiker and was facing the Claimant. Truck Driver Benally was holding the hose and watching Laborer Francis, with his back to the Claimant. When the Claimant yelled out “hot rail” to warn his gang of the rapidly approaching train, only Laborer Francis, who was facing him, heard the warning. There was not enough time to warn Truck Driver Benally before the train reached the work site. Laborer Francis tried to grab Benally, but he barely had enough time to get out of the way and roll down the embankment himself. Truck Driver Benally was struck by the train and died at the scene of the accident.

By letter dated January 28, 2009, the Carrier directed the Claimant to report for a formal Investigation on February 12, 2009:

“ . . . to develop the facts and place responsibility, if any, in connection with possible violation of Rules 1.6, 1.1.2, 1.20 and 6.3.3 of the Maintenance of Way Operating Rules, effective October 31, 2004, as supplemented or amended, concerning your alleged carelessness of the safety of yourselves or others when you allegedly failed to be alert and attentive and failure to visually observe all train movements while working on Main Track 2 at or near MP 304.8, Seligman Sub, on Friday, January 23, 2009 at approximately 10:25 AM, while working as Foreman and Trackman, respectively on TSEC0598.”

The Hearing took place on February 12, 2009, pursuant to which, in a letter dated March 12, 2009, the Claimant was notified that he was being dismissed based on his failure to be alert and attentive and his failure to visually observe all train movements while working on Main Track 2 at or near MP 304.8 on the Seligman Subdivision on Friday, January 23, 2009 at approximately 10:25 A.M., in violation of Rules 1.6, 1.1.2, 1.20 and 6.3.3 of Maintenance of Way Operating Rules.

By letter dated April 8, 2009, the Organization appealed the decision based on the contention the Carrier failed to meet its burden of proof and, in any event, assessed unwarranted and excessive discipline. On June 3, 2009, General Director of Labor Relations W. A. Osborn denied the appeal. On April 15, 2010, the Organization asked General Director of Labor Relations W. A. Osborn to reconsider his decision. Osborn reaffirmed his denial of the appeal on May 5, 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 that burden has not been met. The Organization 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 asserts that the Carrier should now be required to rescind the discipline and make the Claimant whole for all losses.

Conversely, the Carrier takes the position that it met its burden of proof. According to the Carrier, a review of the transcript developed during the Hearing makes clear that the Claimant is guilty as charged. The Claimant engaged in careless and unsafe behavior that led to the death of another employee. Based on this extremely serious infraction, 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, the Board found substantial evidence in the record to uphold the Carrier's position in whole. The Board notes that the Carrier proved that the Claimant engaged in unsafe behavior in violation of the On-Track Safety Rules that led to the death of a co-worker. Further, the Board cannot find that the discipline of dismissal was inappropriate based on the serious transgression and, accordingly, the Board will not overturn the Claimant's termination.

**Form 1
Page 5**

**Award No. 41144
Docket No. MW-41443
11-3-NRAB-00003-100319**

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 21st day of November 2011.