

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41145
Docket No. MW-41446
11-3-NRAB-00003-100354**

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 thirty (30) day record suspension and a one (1) year probation period] imposed upon Mr. P. Furar by letter dated October 21, 2009, for alleged violation of MOWOR 1.1.2 Alert and Attentive and MOWOR 1.19 Care of Property when, while assigned as track inspector, the vehicle he was operating came into contact with a guard rail along Terry Avenue road crossing in Aurora, Illinois on September 18, 2009 was arbitrary, capricious, unwarranted, excessive and in violation of the Agreement (System File C-10-D040-3/10-10-0036 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant P. Furar 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 P. Furar established and holds seniority as a Track Inspector with more than 33 years as a BMW-represented employee. On September 18, 2009, as part of his assignment in Aurora, Illinois, the Claimant operated a Chevrolet Silverado pickup truck equipped with hi-rail apparatus that would allow him to ride on the track. After he had finished inspecting track that day, the Claimant removed his vehicle from the track and parked between a guard rail and Terry Avenue in order to release his track and time authority.

After releasing his track and time, the Claimant began to turn right into a parking lot so as to turn the truck around to head home. The Carrier contends that before making this turn, the Claimant did not check the distance between the truck and the guard rail. The Claimant collided with the end of the guard rail, damaging the passenger's side of the truck.

By letter dated September 22, 2009, the Carrier directed the Claimant to report for a formal Investigation on September 30, 2009:

“ . . . for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to be Alert & Attentive when the vehicle you were operating, BNSF vehicle #20668 came in contact with a guard rail along Terry Avenue road crossing in Aurora, at approximately 1830 hours on September 18, 2009, while assigned as Track Inspector”

The Hearing took place on October 7, 2009, pursuant to which, in a letter dated October 21, 2009, the Claimant was notified that he was being assessed a 30-day Level S record suspension and a one-year probationary period for his failure to

be alert and attentive when BNSF Vehicle No. 20668 came into contact with a guard rail.

By letter dated December 9, 2009, the Organization appealed the decision, based on the contentions (1) the Carrier failed to meet its burden of proof (2) the Claimant did not receive a fair and impartial Hearing, and (3) the discipline assessed was unwarranted and excessive. On January 13, 2010, General Manager R. Reilly denied the appeal. On January 25, 2010, the Organization appealed the matter to General Director of Labor Relations W. A. Osborn, who denied the appeal on March 24, 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 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 Investigation. The Organization asserts that the Claimant should have received the benefit of the Safety Incidence Analysis Project (SIAP). 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. 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 clear that the Claimant is guilty as charged. The Claimant engaged in inattentive behavior that led to the accident. Further, the Claimant was not entitled to the benefit of SIAP because it is discretionary and not mandatory. Based on the instant 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 of the 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 inattentive behavior alleged that led to the accident. The Board rejects the Organization's contention that the Claimant was entitled to the benefit of SIAP. Finally, based on the incident in question and the Claimant's disciplinary history, the Board does not find that the 30-day Level S record suspension coupled with a one-year probationary period was unreasonable under the circumstances. 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 21st day of November 2011.