

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 41146
Docket No. MW-41447
11-3-NRAB-00003-100355

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 three (3) year probation period] imposed upon Mr. M. Guzman, Sr. by letter dated November 13, 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 backed into a switch stand near Mile Post 13.2 on the Chillicothe Sub on September 28, 2009 was arbitrary, capricious, unwarranted, excessive and in violation of the Agreement (System File C-10-D040-5/10-10-0050 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant M. Guzman, Sr. 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. Guzman established and holds seniority as a Track Inspector with approximately three years of service as a BMW-represented employee. On September 28, 2009, the Claimant was assigned to place red flags for a Form B, and retrieve flags from a previous Form B. At approximately Mile Post 13.2, the Claimant drove his vehicle between a large pile of ballast and a switch stand to look for red flags at that location. After finding the flags, the Claimant began to back up between the pile of ballast and the switch stand. While doing so, he backed into the switch stand, broke the switch stand handle and damaged the passenger side of the truck.

By letter dated October 6, 2009, the Carrier directed the Claimant to report for a formal Investigation on October 12, 2009:

“ . . . for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to be Alert and Attentive, when the BNSF vehicle #14602 you were operating backed into a switch stand near MP 13.2 on the Chillicothe Sub at approximately 0830 hours on September 28, 2009, while assigned as Track Inspector.”

The Hearing took place on October 27, 2009, pursuant to which, in a letter dated November 13, 2009, the Claimant was notified that he was being assessed a 30-day Level S record suspension and a three-year probationary period for his failure to be alert and attentive, when his vehicle backed into a switch stand.

By letter dated December 16, 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 18, 2010, General Manager R. Reilly denied the appeal. On February 1, 2010, the Organization appealed the matter to General Director of Labor Relations W. A. Osborn, who denied the appeal on March 31, 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 argues 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 has not found substantial evidence to warrant upholding 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 does not agree with the Organization's contention that the Claimant was entitled to the benefit of SIAP. However, the Board finds that a three-year probationary period is too severe under the circumstances. While the Board upholds the 30-day Level S record suspension, the three-year probationary period shall be reduced to a one-year probationary period.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 21st day of November 2011.