

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41179
Docket No. MW-41476
11-3-NRAB-00003-110036**

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. S. Robles by letter dated December 23, 2009 for alleged violation of MOWOR 6.50.2 Approaching Road Crossing while assigned as a track inspector on Gang TINS1510, a privately owned vehicle struck his vehicle on November 24,2009, at/or near Mile Post 39.29 on the Valley Subdivision was arbitrary, capricious, unwarranted, excessive and in violation of the Agreement (System File C-10-D040-12/10-10-0146 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant S. Robles 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 S. Robles established and held seniority as a Maintenance of Way employee for more than 19 years, including 15 as a Track Inspector. On November 24, 2009, the Claimant was working as a Track Inspector on the Valley Subdivision in western Nebraska. At about 2:15 P.M., the Claimant's hi-rail vehicle was operating in the on-rail mode, traveling westbound and approaching the County Road 15 crossing. The crossing was protected by cross-bucks only, with no signals or gates. Although the Claimant stopped short of the crossing when he saw a northbound vehicle on the highway, the rear driver's side of the hi-rail vehicle was struck by the northbound vehicle. The driver of the northbound vehicle was issued a citation by the investigating officer from the Scotts Bluff County Safety Office.

By letter dated November 30, 2009, the Carrier directed the Claimant to report for a formal Investigation on December 8, 2009:

“ . . . for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to yield the right of way to vehicular traffic, while hy-railing westbound, resulting with a northbound privately owned vehicle striking your vehicle at approximately 1415 hours on November 24, 2009, at/or near MP 39.29, on the Valley Subdivision, while assigned as Track Inspector on gang TINS 1510, headquartered at Scottsbluff, NE.”

The Hearing was postponed and eventually held on December 9, pursuant to which, in a letter dated December 23, 2009, the Claimant was notified that he was assessed a Level S 30-day record suspension and a three-year probationary period for failure to yield the right-of-way resulting in a northbound privately owned vehicle striking his vehicle.

By letter dated January 6, 2010, the Organization appealed the decision based on the contentions (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 March 4, 2010, General Manager T. C. Albanese denied the appeal. On March 23, 2010, the Organization appealed the matter to General Director of Labor Relations W. A. Osborn, who denied the appeal on May 21, 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 assessed 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 further contends that the Claimant was denied a fair and impartial Hearing. 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 and that 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 evidence shows that the Claimant's carelessness led to the accident. Based on his transgressions, 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 warrant upholding the Carrier's position in whole. The Board finds that the Carrier proved that the Claimant was careless in his behavior, which led to the accident. We note that the Claimant's 30-day Level S record suspension coupled with a three-year probationary period was reasonable for his violation. 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 December 2011.