

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41180
Docket No. MW-41477
11-3-NRAB-00003-110053**

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 commencing December 4, 2009] imposed upon Mr. D. Sabala by letter dated December 22, 2009, for alleged violation of MOWOR 1.1.2 Alert & Attentive in connection with alleged failure to be alert and attentive and causing damage while operating a ballast regulator that struck the Potash Bridge tearing the wing tip off the regulator on October 6, 2009, while assigned as GP 3/4 ballast regulator operator on Gang TSCX0428 was arbitrary, capricious, excessive, on the basis of unproven charges and in violation of the Agreement (System File C-10-D040-13/10-10-0145 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant D. Sabala 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 D. Sabala, who has more than 15 years of service as a Maintenance of Way employee, established and holds seniority as a Group 3/4 Ballast Regulator Operator.

On October 6, 2009, the ballast regulator which he was operating struck the Potash Bridge on Track 101 at approximately Mile Post 364.99. The collision caused damage to the wing of the regulator and the walkway of the bridge. The damage to the wing was significant, causing the wing to become inoperable. A plank was torn from the bridge walkway leaving the bridge with a large hole in the walkway area. The ballast regulator sustained \$3500.00 in damage and was out of service for two days.

By letter dated October 8, 2009, the Carrier directed the Claimant to report for a formal Investigation on October 20, 2009:

“ . . . for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to be alert & attentive and causing damage while operating Ballast Regulator when you struck the Potash Bridge tearing the wing tip off the regulator on October 6, 2009 at approximately 1030 hours, while assigned as GP 3/4 Ballast Regulator Operator working at/or

**near MP 364.99 on the Butte Subdivision on gang TSCX0428,
headquartered at Alliance, Nebraska.”**

The Hearing was postponed and eventually held on December 4, pursuant to which, in a letter dated December 22, 2009, Claimant was notified that he was assessed a Level S 30-day record suspension and a three-year probationary period for failure to be alert and attentive and causing damage to the ballast regulator, as well as the Potash Bridge.

By letter dated January 6, 2010, the Organization appealed the decision based on the contentions (2) 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 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 and that the Claimant was treated disparately. 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 record evidence shows that the Claimant’s carelessness led to the

accident. In addition, there was no disparate treatment proven by the Organization. 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, leading 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 penalty.

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.