

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32934
Docket No. MW-34040
98-3-97-3-577**

The Third Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Burlington Northern Santa Fe Railway (former
(Burlington Northern Railroad)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The discipline (entry of censure and dismissal from service) imposed upon Construction Gang Foreman D. A. Zaiser for alleged violation of BNSF Safety Rules and General Responsibilities for all Employees Rules 1.1 and 1.1.1 and BNSF Operating Rule 6.3.1 on March 29, 1996 was unwarranted, without just and sufficient cause and on the basis of unproven charges (System File C-96-D070-11/MWA960903AB BNR).**
- (2) As a consequence of the aforesaid violation, the Claimant shall receive the benefit of the remedy prescribed by the parties in Rule 40G."**

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.

On March 29, 1996, Claimant used a speed swing to pull an 80 foot long rail across a field crossing. Claimant did not obtain authority to foul the track. However, he heard the Dispatcher give another employee authority to occupy the track after a particular train had passed. Claimant observed a train pass his location and assumed that it was safe to proceed. However, another train came, struck the rail and derailed.

On April 1, 1996, Claimant was notified to appear for an Investigation on April 8, in connection with the incident. The Investigation was postponed to and held on April 22. On May 14, Claimant was notified that he had been dismissed from service.

Our review of the record leads us to find that Carrier proved Claimant's responsibility by substantial evidence. Indeed, Claimant himself admitted that he had made a mistake by relying on the authority given to a different employee to occupy the track and by assuming that the train which had just passed him was the train referred to in the grant of authority to the other employee.

It is also clear from the record that Claimant did not willfully violate Carrier's safety rules and that Claimant admitted his mistake and demonstrated remorse for his misconduct. Furthermore, the Gang Roadmaster testified that he had had no prior problems with Claimant, that Claimant had always done everything he was asked to do, always reported to work on time and always had a good attitude.

Under the particular circumstances in this case and without minimizing the seriousness of the offense or the seriousness of the accident, we find that the penalty of dismissal was excessive. Claimant should be given one last chance to show that he can be a safe, productive employee, although he need not be given that chance as a Foreman. We shall order that Claimant be reinstated with seniority and benefits unimpaired, but that he need not be reinstated to a Foreman's position and that he shall receive no backpay or other monetary compensation.

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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 23rd day of November 1998.