

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 39002
Docket No. MW-39538
08-3-NRAB-00003-060323
(06-3-323)

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers 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 dismissal of Mr. D. Smiglewski on December 27, 2004 in connection with charges of allegedly being out of track authority at approximately 1019 hours on November 23, 2004 on the Hanley Falls Subdivision, Mile Post 26.4, while assigned as a track inspector and alleged violation of BNSF Maintenance of Way Operating Rule 6.3.1, was arbitrary, capricious, unwarranted, on the basis of unproven charges and in violation of the Agreement (System File T-D-2863-B/11-05-0115 BNR).
- 2) As a consequence of the violation referred to in Part (1) above, Mr. D. Smiglewski shall now ‘. . . be reinstated to his position, paid for all time lost (including overtime), made whole for any and all benefits, and his record cleared of any reference to any of the discipline set forth in the December 27, 2004 letter from Douglas D. Perry, Division Engineer.’”

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.

By notice dated November 24, 2004, the Claimant was directed to attend a formal Investigation and Hearing on charges that the Claimant allegedly violated Carrier Operating Rules by being outside his track authority. The Investigation was conducted, as scheduled, on December 1, 2004. By notice dated December 27, 2004, the Claimant was informed that as a result of the Investigation, he had been found guilty as charged and was being dismissed from the Carrier's service. The Organization thereafter filed a claim on the Claimant's behalf, challenging the Carrier's decision to discharge him. The Carrier denied the claim.

The Carrier initially contends that the record clearly supports its position that the Claimant violated Operating Rule 6.3.1, and that the Claimant received the appropriate punishment.

The Carrier argues that despite the Organization's attempt to cloud the issues and focus on tangential matters, the central issue in this case is safety. The Carrier is obligated to provide and maintain a safe work environment, and its employees are obligated to follow the Rules put in place for their own safety and well-being, as well as the safety of others. The Carrier asserts that the Claimant chose to disregard the Rules and exceed his authority on the track.

The Carrier maintains that the tracking data from the Carrier's global positioning system, HLCS, clearly demonstrates that the Claimant exceeded his authority on the track. The Carrier points out that the Claimant agreed with the basic speed, distance, and direction of the HLCS tracking information. The Carrier emphasizes that the only difference, according to the Claimant, is that when the Claimant neared the vicinity of his limits, he left the track and proceeded on a gravel road alongside the track.

Addressing the Claimant's assertion that the HLCS indicated that he still was on the track because the sensor was out of position and that a lengthy gap in the HLCS data shows that he set off the track, the Carrier contends that it is physically impossible for the Claimant's account of events to have occurred. The Carrier points out that faced with the impossibility of the Claimant's defense, the Organization attempted to shift the blame to the HLCS by alleging that the system did not alert the Claimant to the approach of the track authority limits. The Carrier insists that HLCS merely supplements the multiple physical markers on the railroad. The Carrier maintains that there is no dispute that the operator of the vehicle bears sole responsibility for staying within the authority.

The Carrier argues that neither the Claimant nor the Organization can assert that the Claimant was unsure or confused as to his surroundings. Instead, the evidence demonstrates that the Claimant knew this particular subdivision very well. The Claimant, in fact, acknowledged that he was very familiar with the territory. The Carrier contends that the record clearly shows that the Claimant did violate his track authority, and he properly was disciplined.

The Carrier goes on to assert that the Organization severely distorted the applicable burden of proof here. The Carrier maintains that the correct burden of proof is substantial evidence, not the "beyond a shadow of a doubt" standard proposed by the Organization. The Carrier argues that in this case, the evidence shows not only that the Claimant violated his track authority, but also that the Claimant's version of the facts is impossible. The Claimant also testified that he had intended to hi-rail past MP 26. As for the Organization's argument that circumstantial evidence is insufficient to meet the required level of substantial evidence, the Carrier points out that the Board has recognized that the fact that evidence is circumstantial does not decrease its probative value. The Carrier therefore maintains that although it did not physically see the Claimant violate his track authority, the evidence clearly shows that the Claimant was guilty of doing so.

As for the Organization's assertion that the discipline was not justified and should be set aside, the Carrier argues that there is no more serious offense against safety Rules than trying to enter track without proper authority. Such violations lead to derailments, collisions, injuries, and, in some cases, death. The Carrier insists that such an offense falls within the category of "serious" offenses under the Carrier's disciplinary policy. Violation of such a major Rule justifies a major

penalty, dismissal, even for a first offense. The Carrier points out, however, that this is not the Claimant's first offense; a 30-day suspension was imposed upon the Claimant for the same offense less than nine months before the incidents at issue. The Claimant's negligence is all the more inexcusable in light of his admitted familiarity with the territory and his understanding of the rules relating to track authority.

The Carrier maintains that the Organization essentially is reduced to asking for leniency, but the Carrier points out that leniency is solely within the Carrier's prerogative, not the Board's.

The Carrier then asserts that the Organization attempted to confuse the issue by asserting a myriad of charges, including an assertion that the Carrier failed to provide a complete and thorough record of the investigation because the transcript contains notations of "inaudible" comments. The Carrier emphasizes that most of these inaudible notations occurred during side comments, and none of them removed a portion of testimony that would impact the Claimant's right to a fair and impartial Hearing. As for the Organization's assertion that the conducting officer was not the one who signed the discipline letter, the Carrier points out that the Board has dealt with this issue on a number of occasions with the same result, that this does not automatically deprive a claimant of his or her due process rights. The Carrier insists that there has been no showing that the Claimant was prejudiced or denied a fair and impartial Investigation.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Organization initially contends that because the Carrier views this circumstance as "serious," the burden of proof on the Carrier necessarily must be greater than substantial. The Organization argues that the Carrier must meet the clear and convincing level of proof.

The Organization asserts that the Carrier's disciplinary decision in this case was not made by the Hearing Officer. The Organization additionally maintains that no valid credibility determination was possible, and the Carrier failed to meet either the substantial evidence burden of proof or the clear and convincing standard required for a "serious" charge. The Organization insists that the Claimant's

version of events clearly was more credible than the Carrier's. The Carrier's decision to discipline the Claimant was arbitrary, capricious, unwarranted, and on the basis of unproven charges. The Organization contends that the Carrier failed on the merits as well as procedurally, so the instant claim should be sustained in full.

The Organization emphasizes that the Carrier used the Claimant's prior record to reach its guilty verdict. The Organization points out, however that the Carrier cannot validly use the Claimant's prior disciplinary record until after it had first met its burden of proof; it is a fundamental tenet that prior records may be used to determine the quantum of discipline after guilt has been established, but such prior records may not be used to determine guilt. The Organization insists that the Carrier failed to meet its burden of proving the Claimant's guilt, but if the Claimant's record of more than 29 years of exceptional service is to be considered, the Claimant should be given the benefit of the doubt.

The Organization then points to a number of Board Awards holding that discipline violates due process where, as here, a conflict in testimony occurred. The Organization argues, in addition, that there is no dispute that the Carrier's decision was made by someone who was not present at the Hearing to observe the demeanor of the witnesses. The Organization insists that under these circumstances, no valid credibility determinations were possible. The Organization asserts that because of the clear conflict in the testimony at the Hearing, the Carrier's discipline decision was improperly reached and violated the Claimant's contractual rights to due process.

The Organization goes on to emphasize that because of the many glitches and miscommunications associated with the HLCS, the Carrier's failure to call its manager for this system constituted a failure to grant the Claimant his due process right to cross-examine his accuser. The Organization insists that the Carrier's failure to call this manager renders its decision fatally flawed.

The Organization additionally argues that the Carrier failed to furnish a complete transcript. The Organization maintains that a significant body of arbitral authority has held that a failure to provide a complete transcript denies an employee his contractual rights to due process. The Organization asserts that this failure is one more nail in the coffin that was the Carrier's case. The Organization

emphasizes that the Carrier's due process failures should vitiate its decision to dismiss the Claimant even before the Carrier's failure to meet its burden of proof.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The parties being unable to resolve their dispute, this matter came before the Board.

The Board reviewed the evidence and testimony in this case, and we find that there is sufficient evidence in the record to support the finding that the Claimant, while assigned as a track inspector on November 23, 2004, exceeded the limits of his authority by four-tenths of a mile, and the violation lasted for approximately six minutes and 15 seconds. The record reveals that the global positioning system device that the Carrier has installed in its vehicles verifies the Claimant's position at the time. There is no question in this record that the Claimant violated Maintenance of Way Operating Rule 6.3.1 on the date in question.

Once the Board has determined that there is sufficient evidence in the record to support the guilty finding, we next turn our attention to the type of discipline imposed. The Board will not set aside a Carrier's imposition of discipline unless we find its actions to have been unreasonable, arbitrary, or capricious.

The record in this case reveals that the Claimant has accumulated more than 29 years of seniority with the Carrier. Although the Board recognizes how serious the Claimant's wrongdoing was in this case, at the same time, we realize that the Claimant's 29 years of abiding by Carrier Rules and performing work for the Carrier should have been given more consideration when the Carrier was making the decision as to what discipline to assess to the Claimant. The Board finds that the Carrier acted unreasonably and arbitrarily when it terminated the Claimant's employment in this matter. Therefore, we order that the Claimant be reinstated to service, but without backpay. The period of time that the Claimant was off work shall be considered a lengthy disciplinary suspension for his clearly proven wrongdoing.

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 27th day of March 2008.