

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41792
Docket No. MW-42086
13-3-NRAB-00003-130005**

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference**

PARTIES TO DISPUTE: (

(Pan Am Railways/Springfield Terminal Railway Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed by letter dated January 30, 2012 upon Mr. W. Murphy, Jr. for alleged violation of NORAC Operating Rules 90, 166 and 800 in connection with allegations that he was on the wrong track without proper authority on October 14, 2011 was arbitrary, capricious, without just cause and in violation of the Agreement (Carrier’s File MW-12-03).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant W. Murphy, Jr. shall now be returned to work, have his record cleared of the charges and be compensated for all lost wages and benefits as a result of the Carrier’s improper discipline.”**

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 letter dated October 27, 2011, the Claimant was directed to report for a Hearing concerning an incident that occurred on October 14, 2011 wherein it is alleged that he was negligent in the performance of his duties by high water patrolling with a track car on the wrong track without proper authority, in violation of NORAC Operating Rules 90, 166 and 800, which provide, in part, that employees must read and comply with Form D and must not delay trains. A Hearing was conducted on January 19, 2012 and, by letter dated January 30, 2012, the Claimant was found guilty of all charges and dismissed from employment.

The evidence presented at the Investigation establishes that the Claimant - a 25-year employee - has been an I&R Foreman since 1992. It is undisputed that on the night in question, he was assigned to conduct high water patrol in an unfamiliar area with a fellow employee, and that due to his failure to accurately maintain the Special Instructions and Bulletins updating his Timetable (which changed the line number designations with respect to this section of track), when he received a Form D for movement on Track No. 2 from the Train Dispatcher, he mistakenly went on Track No. 1. The Claimant realized his mistake when he saw an oncoming train and conversed with the Train Crew, and the matter was reported to the Train Dispatcher. Luckily, there was no accident or incident caused by the Claimant's mistake, other than a 33-minute delay of an Amtrak train. The Claimant readily admitted his mistake, took 100 percent responsibility for his actions, and was very upset with the fact that someone could have been hurt as a result of his actions. He claimed to have asked unsuccessfully for a new Timetable due to fact that pages were falling out of his, but acknowledged that he filled the missing pages with inaccurate information from an old Timetable, resulting in the incident in question, and that it was his responsibility to maintain an up-to-date Timetable.

The Carrier argues that the Claimant received a fair and impartial Investigation, and that there was substantial evidence in the record to support the charges, especially in light of the Claimant's admissions. It asserts that this was a very serious incident that could have negatively affected his and a co-worker's safety, and that the Claimant's length of service and position as Foreman are aggravating factors, rather than mitigating ones, because he should have known the

importance of keeping his Timetable updated. The Carrier contends that the discipline was neither arbitrary nor capricious due to the nature of the violation and the Claimant's past record, which includes a reprimand, as well as five and 35-day suspensions.

Conversely, the Organization contends that dismissal was arbitrary, capricious and excessive for a 25-year employee with a good service record, which should be considered mitigating factors, rather than aggravating ones. It notes that the Claimant (1) did not intentionally violate the Rules, (2) asked his supervisor for an updated tack chart, but was not given one, and (3) was candid and honest and accepted full responsibility for his mistake. The Organization maintains that the purpose of discipline is to rehabilitate - not punish - citing Third Division Awards 19037, 21760, 22237, and 26584, and asserts that dismissal in this case does not serve that purpose and is not warranted by the facts.

After careful review of the record, the Board is of the opinion that the Claimant received a fair and impartial Hearing, and that the Carrier met its burden of proving that he was guilty of the charges by substantial evidence. Because there is really no dispute about the facts in this case, the sole issue is whether the penalty assessed was arbitrary, capricious or excessive under the circumstances. The Board can find no fault with the Carrier's conclusion that this was a very serious infraction that could have had catastrophic safety implications, and that the need to maintain an updated and current Timetable is an important function, especially for a Foreman who is responsible for the safety of others. However, under the circumstances, the Board is convinced that the Claimant understands the serious implications of his failure to keep his Timetable updated, and that his acceptance of responsibility for his actions, honesty and length of service are mitigating factors that militate against the imposition of the penalty of dismissal in this case. Thus, the Board finds the Claimant's dismissal to be excessive, and directs that he be reinstated to his position without loss of seniority or benefits in accordance with the terms of the parties' Agreement, but without backpay. His personal record should reflect the substitution of a long-term suspension for the dismissal.

AWARD

Claim sustained in accordance with the Findings.

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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 17th day of December 2013.