

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 43121
Docket No. MW-43716
18-3-NRAB-00003-160493

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

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

PARTIES TO DISPUTE: (

(Indiana Harbor Belt Railroad Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed on Mr. M. Goldstine by letter dated September 28, 2015 for his alleged violation of NORAC Operating Rules 130, 131 and 141 on May 28, 2015 for activities related to roadway worker protection being provided under NORAC Operating Rule 141 was without just and sufficient cause and in violation of the Agreement (System File 15-079 IHB).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant M. Goldstine shall now be reinstated to service and be compensated ‘... for all lost time and wages restoring all rights and benefits and expunge his personel (sic) record removing assessed discipline and any and all reference of this issue from the record.’”

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.

After Investigation completed on September 15, 2015 and by letter dated September 28, 2015, the Claimant – an employee in the Carrier’s service since May 2006 – was dismissed for allegedly violating NORAC Operating Rules #130, #131 and #141 while engaged in activities related to roadway worker protection on May 28, 2015.

On May 28, 2015, the Claimant was assigned by Track Foreman E. Vorce (whose discipline from this event is discussed in Third Division Award No. 43122 to perform flagging duties protecting a work limit east of the Halsted Street Bridge in the Carrier’s Blue Island terminal.

The Claimant’s flagging assignment was to prevent transportation crews from entering the work limit without permission. At 11:24 a.m., a train entered the work limits without permission.

A video from the train that entered the work area which recorded the incident was played at the Investigation. Day 1 Tr. 120 (“... video was played”). Senior Road Foreman M. Carter testified as the video was played at the Investigation and described the video showing that as the train approached the work limit, the Claimant “... moved the flag from one hand to the other.” Day 1 Tr. 131. Further, according to Carter, the video showed that “[t]he train was stopped and restarted ... [a]nd there was not an attempt to stop it once it restarted.” Day 1 Tr. 162.

According to Assistant Supervisor of Production E. Ritter who also testified at the Investigation about the video, “[a]s the video continues the Conductor gets back on the locomotive and starts through the working limits right by the flagman Mark Goldstine, who does absolutely nothing to stop the train and protect his men’s safety.” Day 1 Tr. 179. Further, according to Carter (Day 1 Tr. 161):

“A ... I don’t think either one of the - - Mr. Vorice or Mr. Goldstine did everything they could do to stop the locomotives. Their guys were in danger.”

The Claimant testified that the Conductor got off the train to operate a switch; the Claimant asked him where he was going; and the Conductor looked and signaled the Engineer to sound the horn. Day 2 Tr. 141-142.

However, according to the crew member who threw the switch (Day 2 Tr. 207):

“Q Okay. And again, just for the record, no attempt by the flagman to stop you?

A None.

Q Did you make note of him when you were lining the aforementioned?

A When I walked towards the switch, I noticed him standing there doing nothing and paying no attention to me really at all.”

The Claimant further testified that the Conductor did not respond to him. Day 2 Tr. 154. According to the Claimant, the video shows that “I am waving the flag back and forth and talking on the radio at the same time” which indicates “[s]top.” Day 2 Tr. 149. The Claimant then testified (Tr. 154):

“Q So you had a radio on you that day?

A Yes.

Q Was there any attempt to contact the crew or yardmaster via radio to find out why the crew was going through there?

A I just froze up that day.”

The Board has viewed the video that was supplied with the record. The testimony of Carter and Ritter along with the train crew member quoted above is consistent with our viewing of the video. The video shows the train stopping; a switch being thrown; and then the train begins to move passing the Claimant who is holding a flag in his right hand near waist-level; the Claimant moves the flag from his right hand to his left hand; and then the Claimant makes a brief gesture with his right hand.

The relevant rules provide:

PROTECTION OF TRACKS

130. Flag Protection

* * *

b. Flag Protection against Trains on Adjacent Tracks

... Employees equipped with flagging equipment must

* * *

3. Give a Stop Signal to approaching trains that may be affected.

* * *

131. Take Action if Safe Passage is Endangered

If an event occurs that would interfere with the safe passage of trains, the employee must take immediate action to stop trains by radio communication to trains and the Dispatcher. If protection cannot be immediately ensured, or if communications fail, flag protection must be immediately provided....

* * *

See also, Rule 13(3) governing hand signals (“[a]ny object waived violently by anyone on or near the track is a signal to stop.”).

Substantial evidence shows that the Claimant did not comply with the above-quoted rules. The evidence shows that as the train entered the work area, the Claimant merely moved his flag from one hand to the other; made a gesture; and failed to attempt to make radio contact as the train went by him. Indeed, our view of the video shows that the Claimant's gesture appears to be motioning to the train to proceed through the established work zone rather than to stop as the Claimant watched the train proceed by him. The Claimant's testimony shows the violation. In the Claimant's words, he made no effort to use his radio to contact the crew or the Dispatcher and "I just froze up that day." Day 2 Tr. 154. We find that the totality of the evidence shows that the Claimant simply was not paying attention.

Dismissal was not arbitrary. The Claimant's past record shows a number of disciplinary entries with multiple suspensions including two 30-day suspensions. The demonstrated violation was serious as employees in the work area could have been injured. Progressive discipline has been applied.

The Organization's procedural arguments have been considered and do not change the result.

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 30th day of May 2018.