

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43122
Docket No. MW-43717
18-3-NRAB-00003-160500**

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 [thirty (30) day suspension] imposed on Mr. E. Vorice 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 operating 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 E. Vorice shall now be compensated ‘... for all lost time and wages restoring all rights and benefits and expunge his personnel 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 for approximately eight years – was issued a 30-day suspension for allegedly violating NORAC Operating Rules #130, #131 and #141 while engaged in activities related to roadway worker protection on May 28, 2015.

The incident in this matter is the same event described in Third Division Award No. 43121 which occurred at a work limit east of the Halsted Street Bridge in the Carrier’s Blue Island terminal. On the date of the incident – May 28, 2015 – the Claimant held a Track Foreman’s position and was the Employee-in-Charge of the work area that was entered by a train after the employee performing flagging duties in Third Division Award No. 43121 took no action to prevent that entry. As discussed in that Award, the Board upheld the dismissal of that employee for his inaction.

The Claimant assigned the employee in Third Division Award No. 43121 to perform flagging duties on the date of the incident. Day 2 Tr. 174-175. The Claimant confirmed that as the Employee-in-Charge, he did not give the train crew permission to come into the work area. Day 2 Tr. 167.

The video taken by the train that entered the work area does not show the Claimant’s activities throughout the entire relevant period of the incident. The Claimant testified that from a location that was outside of the train camera’s range, he attempted to flag the train after it entered the work area. Day 2 Tr. 160. The Claimant also asserts that while he had a view of the Conductor, the Claimant tried to stop the train – “I tried just waiving him down.” Day 2 Tr. 163-164. The Claimant also testified that although he had a radio with him, he attempted to contract the train crew and Yardmaster by using a Carrier cell phone. Day 2 Tr. 183-184.

The train crew testified that in addition to having no contact with the flagger, they had no contact with the Claimant and did not see or hear anyone attempting to stop them from proceeding. Day 2 Tr. 195, 204-207.

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.”).

The burden in this case is for the Carrier to show by substantial evidence in the record that the Claimant engaged in the charged misconduct in violation of the above-cited rules. Although the evidence in Third Division Award No. _____ [Docket 43716] clearly demonstrated that the employee assigned to perform flagging duties engaged in conduct in violation of the above rules – indeed, the employee in that case effectively admitted to the misconduct and the video clearly demonstrated the misconduct – this case is quite different.

While the video in Third Division Award No. 43121 showed the employee’s misconduct, with respect to the Claimant in this case, the video does not show all of

the Claimant's activities. The Claimant testified that outside of what was captured on the video, he attempted to stop the train by waving at it and using a Carrier-issued cell phone – without success. Those assertions have not been effectively refuted by the Carrier.

The fact that the train crew was unaware that the Claimant attempted to stop them does not show that the Claimant did not attempt to do so. That testimony only shows that the crew did not see or hear the Claimant.

But what really is unanswered here by the Carrier's arguments is why would the Claimant – the Employee-in-Charge who had the authority to grant permission to enter the work area – simply stand idly by and watch the train go by the flagger who effectively did nothing with respect to flagging and do so without taking action thus placing employees in the work area in danger? While the employee in Third Division Award No. 43121 was not paying attention (or, as the employee testified, "I just froze up that day"), the evidence in this case shows that the Claimant was paying attention. Again, why would the Claimant as Employee-in-Charge simply let the train go by without attempting to stop it? There is no answer to that question. However, in order to meet its burden, that is a question the Carrier must answer. The Carrier has not suggested a persuasive answer to that question.

The Carrier has not met its burden. The claim shall be sustained. As a remedy, the discipline shall be removed from the Claimant's record and the Claimant shall be made whole in all respects.

In light of the result, the Organization's procedural arguments are moot.

AWARD

Claim sustained.

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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 30th day of May 2018.