

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43555
Docket No. MW-44839
19-3-NRAB-00003-180333**

The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens 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 [ninety (90) day suspension] imposed on Mr. M. Calderon by letter dated March 30, 2017 for his alleged violation of GCOR Operating Rules 1.11 and 1.6 and Roadway Worker Rules 3907, 3924 and 3901 when, on February 23, 2017, while on duty assigned as the employee in charge of a gang was found working on live tracks without the proper protection was without just and sufficient cause and in violation of the Agreement (Carrier’s File 2017-028 IHB).**
- (2) As a consequence of the violation referred to in Part (1) above, the Carrier must now make Claimant M. Calderon whole, compensating him 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.

At the time of the discipline at issue herein, the Claimant was working as a Track foreman in the Carrier's Maintenance of Way Department, having entered the Carrier's service on June 13, 2011. The Claimant was served with a Notice of Investigation on February 24, 2017, regarding the following charge:

"This will serve as your notification to attend a formal hearing...for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged violation(s) of GCOR Operating Rules 1.1.1, 1.6, and Roadway worker Rules 3907, 3924, and 3901 when on February 23, 2017 at approximately 14:00 hours while on duty you were assigned as the Foreman and the employee in charge of a gang that was found working on live tracks without the proper on track protection."

After an investigation, the Claimant was found guilty of violating GCOR Operating Rules 1.11 and 1.6 and Roadway Worker Rules 3907, 3924, and 3901. The Claimant was assessed a 90 calendar days' actual suspension.

On February 23, 2017, the Claimant was assigned as the employee in charge of a gang ordered to replace ties on the middle lead near the 25th Avenue bridge. The Claimant used a single flagman to protect the gang's working limits. The flagman was positioned at one entrance approximately 45 feet from the back-hoe operator and gang on the middle lead. The other entrance to the working limits was not protected. Supervisor Ritter testified that he came upon the gang with only one flagman for protection and that when he asked the Claimant if he was properly protecting the gang, the Claimant replied "no." Ritter testified that the Claimant told him that his previous supervisor told him this practice was acceptable, but he knew it was wrong.

The Claimant testified that he admitted only that he had assigned a single flagman to protect the working limits. The Claimant said that he had a flagman on one end and that he had called the dispatcher and the 720 job to let them know that his gang would be out on the middle lead working. The Claimant said it was his intention to protect both ends of his working limits with a single flagman. The Claimant said that

he had previously questioned working with only one flagman and was told that a supervisor said that doing so conformed to the rule.

The Carrier contends that the Claimant left the gang unprotected and in immediate danger when he made the decision to only protect one entrance to his working limit with a flagman. The Carrier contends that the Claimant was required to make the track physically inaccessible, which he did not do. Further, the Carrier contends that the Claimant knew it was wrong but did it anyway.

The Organization contends that the Claimant did not violate any rules because the rule explicitly provides that a “flagman” must be assigned to hold trains and equipment clear of the working limits, and the Claimant assigned a flagman, with radio contact and clear sight lines, to protect the working limits. The Organization contends that the Claimant protected his work zone according to the rules as written, and that other supervisors have confirmed that this is proper.

The Board sits as an appellate forum in discipline cases. As such, it does not weigh the evidence de novo. Thus, it is not our function to substitute our judgment for the Carrier’s judgment and decide the matter according to what we might have done had the decision been ours. Rather, our inquiry is whether substantial evidence exists to sustain the finding against the Claimant. If the question is decided in the affirmative, we are not warranted in disturbing the penalty absent a showing that the Carrier’s actions were an abuse of discretion.

The Claimant admitted during the investigation on property that he used only one flagman to protect his working limits, leaving the second entrance unprotected. Where there is an admission of guilt, there is no need for further proof. This Board finds that sufficient evidence exists to support the findings against the Claimant. Furthermore, we find no support for the allegations that the Claimant was not afforded a fair and impartial hearing. The Claim is denied.

AWARD

Claim denied.

Form 1
Page 4

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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 27th day of June 2019.