

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43612
Docket No. MW-44549
19-3-NRAB-00003-170750**

The Third Division consisted of the regular members and in addition Referee Michael Capone when award was rendered.

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

PARTIES TO DISPUTE: (

(National Railroad Passenger Corporation (AMTRAK)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed upon Mr. W. Robinson by letter dated May 8, 2017 was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File NEC-BMWE-SD-5510D AMT).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant W. Robinson shall be reinstated to service with seniority unimpaired, his record cleared of the charges leveled against him and he shall be made whole for all lost wages and benefits resulting from his improper termination.”**

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.

The Claimant, William Robinson, has been employed by the Carrier for approximately 3 years and held the position of Foreman when he was charged with violating the Carrier's Standards of Excellence pertaining to Safety, Attending to Duties, and Professional and Personal Conduct; Northeast Operating Rules Advisory Committee ("NORAC") Operating Rules B, N, 140-S1, 140-S2, and 716-S2; Roadway Worker Protection ("RWP") Rules 315, 318, and 339; and Cardinal Rule 10: Failure to comply with applicable RWP Procedures. The charges are based on the allegation that on April 3, 2016, the Claimant released foul time for track under his supervision without insuring that the area was clear of employees and equipment performing ballast remediation work. The Carrier alleges that the Claimant's actions caused a collision between a train and backhoe equipment on the same track, resulting in the death of two employees and causing \$2,200,000 of damage.

On April 25, 2016, the Carrier issued a notice directing the Claimant to report for a hearing and investigation on May 2, 2016. Upon the Claimant's return from a leave of absence the hearing was held on April 26, 2017. On May 8, 2017, the Claimant was notified that the Carrier found him guilty of the charges and he was dismissed from service. The record indicates that the Carrier denied subsequent appeals by the Organization and rendered its final decision on July 19, 2017. The Organization rejected the Carrier's decision and filed its notice of intent with the Third Division. The claim is now properly before the Board for adjudication.

The Carrier maintains that the Claimant was responsible to insure on-track protection for track maintenance employees working under his supervision. It argues that the record contains substantial evidence that the Claimant made numerous errors throughout his shift regarding the improper removal of foul time from tracks without insuring the safety of the employees and equipment still on the tracks. The Carrier alleges that the Claimant failed to hold proper on-track safety briefings and did not use supplemental shunting devices ("SSDs") and "whistle boards", which would have given tower dispatchers and train crews advance notice that work was being performed on the tracks in the area. The Carrier asserts that the Claimant's actions violated numerous safety rules and federal regulations.

The Organization claims that the Carrier failed to provide the Claimant with a fair and impartial investigation. It maintains that the hearing officer exhibited a bias toward the Claimant during the hearing, thereby denying him due process. It alleges

that the Carrier failed to produce relevant and material witnesses.

The Organization argues that the Carrier failed to insure that the necessary “safety culture” was in place by assigning an inexperienced foreman - five months in the position - to supervise a major project. It avers that supervising managers and responsible Carrier officials failed to provide proper training, guidance, and equipment to insure workplace safety. The Organization contends that the Claimant is a “scapegoat” for the errors of others and the absence of adequate safety policies and procedures.

In discipline cases, the burden of proof is upon the Carrier to present substantial evidence and, where it does establish such evidence, that the penalty imposed is not an abuse of discretion. Upon review of all the evidence adduced during the on-property investigation, the Board here finds that the record contains credible and reliable evidence that the Claimant violated the rules and regulations cited in the charges.

We first address the procedural objections made by the Organization and find that none are fatal flaws that prevent us from addressing the merits of the claim. The Organization’s claim that the Carrier’s hearing officer failed to provide the Claimant with a fair and impartial hearing is unsupported by the record. The record establishes that the Carrier fulfilled its obligation to present material witnesses. It made a reasonable effort to summon witnesses, and without the ability to issue subpoenas, cannot be accountable if non-employee witnesses refuse or fail to appear. Further, there is nothing in the Agreement or the “Consent Decree” that requires the hearing officer to call all witnesses requested by the Organization where a valid offer of proof is not provided and there is no discernable basis to conclude that the prospective witnesses can provide material evidence related to the charges. There is no indication that the hearing officer was arbitrary in rejecting the Organization’s offer of proof regarding the witnesses it was requesting. The Board does not find merit to any of the other procedural objections.

The documentary evidence and witness testimony in the record establishes that the Claimant failed to follow the requisite safety rules and procedures on April 3, 2016. We find that the testimony of Frank Kruse, Assistant Division Engineer, was credible and reliable in describing the necessary safety protocols that need to be followed to insure track safety. The Carrier’s credibility determinations of witnesses who testified during the hearing and investigation are not to be disturbed absent substantial evidence that its conclusions are arbitrary. A review of the documentary evidence and testimony

does not provide a basis to ignore the Carrier's assessment of the witnesses' testimony. It is well established by arbitral precedent that the Board sits in review of the Carrier's findings made on the property and does not make *de novo* findings. Here, there is no basis to replace the Carrier's credibility determinations with our own.

Despite the Organization's valiant attempt to cast blame on others for the cause of the collision, Mr. Kruse's testimony and the related evidence establishes that the Claimant failed to follow proper on-track safety briefings when the backhoe was brought to the work area. He also establishes that the Claimant removed foul time from Tracks 1, 3, and 4 without insuring that employees and equipment were cleared from the tracks. The record indicates the Claimant improperly relied on the foreman who relieved him to obtain the necessary foul time.

The record does not support the Organization's strenuous argument that the Claimant was made the "scapegoat" for the collision. Mr. Kruse's testimony, corroborated through the National Transportation Safety Board's ("NTSB") interview of the Claimant and its subsequent report, clearly establishes that his failure to use SSDs when fouling the track and to "ensure that all personnel and equipment were clear of all affected tracks prior to relinquishing foul time back to the Train Dispatcher" were the main cause of the collision. While the Organization points to other contributing factors unrelated to the Claimant's conduct that may have played a role in what occurred on April 3, 2016, the quantum of evidence establishes that the Claimant's failures created an unsafe work area and led to the tragic event.

Having found that the record contains substantial evidence in support of the Carrier's findings, we find that there is ample arbitral precedent upholding dismissals for serious violations of safety rules and regulations. Awards from this Board and legions of others have deemed termination from employment as appropriate irrespective of the prior disciplinary record or the length of service where it was determined that the claimant's actions created a hazardous work area with life-threatening consequences. We find no basis in the record here to stray from the reasoning of those awards.

In summary, we have reviewed and carefully weighed all the arguments and evidence in the record and have found that it is not necessary to address each facet in these Findings. We find that the Carrier has established with substantial evidence that the Claimant violated the applicable rules and regulations on April 3, 2016.

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 17th day of May 2019.