

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 43648
Docket No. MW-44433
19-3-NRAB-00003-170510

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: (

(BNSF Railway Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed upon Track Inspector W. Lauderdale by letter dated May 26, 2016 for alleged violation of MWOR 1.13 Reporting and Complying with Instructions in connection with his alleged failure to comply with instructions from Division Engineer Brian Ferencak ‘... to walk the frogs on the tracks you traversed when you were observed hy-railing....’ on April 4, 2016 was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File C-16-D070-11/10-16-0269 BNR).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant W. Lauderdale shall be reinstated to service with seniority and all other rights and benefits unimpaired, his record cleared of the charges leveled against him and he shall be made whole for all wage loss suffered including loss of wages to attend the investigation.”

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 established and held seniority in the Carrier's Maintenance of Way Department. At the time of the events giving rise to this claim, he was assigned as an assistant foreman. On April 6, 2016, the Claimant was given notice of an investigation:

“for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to follow instructions when you [were] observed hrrailing through the Lisle Control Point at approximately 1120 hours on Monday April 4th 2016 without walking the frogs on the tracks that you where traversing as previously instructed by Division Engineer Brian Ferencak.”

After a formal investigation on April 28, 2016, the Claimant was found in violation of MWOR 1.13 Reporting and Complying with Instructions and was dismissed from the Carrier's service.

The Organization filed a claim on June 22, 2016, which was declined by the Carrier on August 16, 2016. The matter was progressed on-property, but the parties were unable to resolve the claim. It is now properly before this Board for final adjudication.

At a meeting on March 23, 2016, Division Engineer Ferencak gave verbal instruction to all Chicago Subdivision track inspectors to physically walk the frogs in order to verify whether the frogs were of quality to run a Class 4 operation. On April 4, 2016, the Claimant was observed hrrailing, rather than walking, the tracks. The Claimant admitted that he did not walk the frogs, citing safety concerns.

MOWOR 1.13—Reporting and Complying with Instructions, states:

“Employees will report to and comply with instructions from supervisors who have the proper jurisdiction. Employees will comply with instructions issued by managers of various departments when the instructions apply to their duties.”

The Carrier contends that the Claimant was given clear instructions which he has admitted to failing to comply with. The Carrier contends that none of the Organization’s arguments should distract from the Claimant’s admitted violation.

The Organization contends that Claimant was not afforded a fair and impartial hearing, and that the Carrier has failed to meet its burden of proof. The Organization contends that the Claimant held a safety briefing with his co-employee and they decided it was not safe to walk the frogs at that precise location. The Organization also challenges the penalty imposed as harsh and excessive.

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.

The Claimant admitted that he rode a hyrail to inspect the frogs, despite instruction from Division Engineer Ferencak to physically walk the frogs while inspecting them. 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.

However, the Organization also challenges the penalty of dismissal, contending that it is harsh and excessive. The Claimant’s failure to follow instructions was prompted by his reasonable belief that he could not safely walk the tracks. Due to the unique circumstances of this case, this Board finds that the penalty of dismissal is excessive. However, we cannot ignore the fact that the Claimant failed to perform his track inspector duties as instructed. Therefore, the Claimant will be returned to the Carrier’s service and the discipline will be reduced to time served. Furthermore, the

Claimant will not be eligible to serve as a Track Inspector for one year after he is returned to the Carrier's service.

AWARD

Claim sustained in accordance with the Findings.

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 May 2019.