

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43718
Docket No. MW-44140
19-3-NRAB-00003-170105**

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp 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 [Level S thirty (30) day record suspension and a three (3) year review period] imposed upon Machine Operator D. Baranyai by letter dated July 7, 2015 for alleged violation of MWOR 6.3.2 in connection with his alleged failure to obtain proper protection prior to fouling the track on June 2, 2015 was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File B-M-2878-E/11-15-0497 BNR).**
- (2) The discipline [Level S forty-eight (48) day actual suspension and a three (3) year review period] imposed upon Machine Operator D. Baranyai by letter dated July 21, 2015 for alleged violation of MWOR 6.3, MWOR 15.2 and MWOR 11.4 in connection with his alleged failure to obtain proper protection prior to fouling the track on June 4, 2015 was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File B-M-2876-E/11-15-0496).**
- (3) As a consequence of the violation referred to in Part (1) above, Claimant D. Baranyai shall have his record cleared of the charges leveled against him and he shall be made whole for all wage loss suffered.**

- (4) As a consequence of the violation referred to in Part (2) above, Claimant D. Baranyai shall have his record cleared of the charges leveled against him and he shall be made whole for all wage loss suffered.”

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.

This Claim arises from two separate incidents, on June 2 and June 4, 2015, in which the Claimant, Daniel Baranyai, allegedly failed properly to obtain authority before occupying or fouling track. On June 2, 2015, the Claimant was working as a Machine Operator in the Winslow Yard. On June 2, 2015, the Claimant's gang was preparing to move equipment in the Yard from Tracks 7 and 8 to Track 9. Mr. Baranyai took part in the morning's job briefing. The Roadmaster, Keenan Beachum, went over to Track 9, where the Claimant was working. Beachum noticed a ramp car "coming up and going down." He then surveyed the switch for Track 9 and noticed that it was not tagged or locked, a fact the Claimant was unaware of. As Beachum approached the Claimant, he noticed the Claimant leaning against a flat car, which Mr. Baranyai does not dispute. The Claimant did not have authority to be foul of the track.

On June 4, 2015, at the direction of his supervisor, the Claimant was operating a backhoe on Main Track 2, digging a hole for an undercutter. He was foul of Track 1. For some reason, the Claimant's name was not on the Form B used to alert employees working on track in the area of an impending train coming through the area. Fortunately, the Claimant heard the warning on another employee's radio and was able to clear the track before the train came through. When the Claimant was asked why he

was on the track, he responded that he did not know that he was not supposed to be on it.

For the June 2, 2015, incident, the Carrier charged the Claimant with violating Maintenance of Way Operating Rule 6.3.2, Protection on Other Than Main Track. For the June 4, 2015, incident, he was charged with violating MWOR 6.3, Track Occupancy, MWOR 15.2, Protection by Track Bulletin Form B, and MWOR 11.4, Job Briefings. Following investigation, the Carrier concluded that the Claimant was guilty as charged. He was assessed a 30-day record suspension with a three-year review period for his actions on June 2, 2015. For the June 4, 2015, incident, he was assessed a 48-day actual suspension with a three-year review period.

According to the Carrier, the record establishes that the Claimant committed the offenses with which he was charged; in fact, he admitted his guilt during the investigatory hearing. The seriousness of those charges cannot be overstated. Occupying track without protection demonstrates the utmost disregard for the Claimant's safety and that of those around him. In this case, there is no corroborative testimony or evidence that would absolve the Claimant of responsibility. The Carrier proved the Claimant's guilt with substantial evidence. Moreover, the level of discipline was appropriate, given the Claimant's extensive prior disciplinary history.

The Organization contends that the Carrier has failed to meet its burden of proof. Relative to the June 2, 2015, incident, the Employee in Charge (EIC) of the gang that day was running late and did not participate in the job briefing. It was the EIC's responsibility to make sure gang members were protected, and the Claimant reasonably assumed that he was. On June 4, 2015, the Claimant should have been on Foreman Tully's Form B, but he was not, for unknown reasons. At all times, the gang had the proper protection to be on the track, but the Claimant was not notified of the oncoming train because his name was not on the Form B. In any event, the mistake was not his.

Safety while working on and around tracks is critical for Maintenance of Way employees, who cannot simply assume that they are protected. While the evidence does establish some irregularities regarding track protection at levels above the Claimant, ultimately, employees need to ensure their own protection as well. The evidence in the record here is sufficient to conclude that the Carrier has met its burden of establishing that the Claimant violated the Rules as charged. The Claimant had prior discipline for serious offenses, as a result of which the level of penalty assessed for the incidents on June 2 and on June 4, 2015, was appropriate.

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 18th day of June 2019.