

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43845
Docket No. SG-44913
19-3-NRAB-00003-180373**

The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens when the award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Railroad Signalmen
(BNSF Railway Company

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the BNSF Railway Company:

Claim on behalf of A.D. Pries, for reinstatement to service with compensation for all time lost, including overtime pay, with all rights and benefits unimpaired, and with any mention of this matter removed from his personal record, account Carrier violated the current Signalmen’s Agreement, particularly Rule 54, when it issued the harsh and excessive discipline of dismissal against the Claimant, without providing a fair and impartial Investigation and without meeting its burden of proving the charges in connection with an Investigation held on January 13, 2017. Carrier’s File No. 35-17-0003. General Chairman’s File No. 17-005-BNSF-154-TC. BRS File Case No. 15783-BNSF. NMB Code 173.”

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.

Claimant held the position of Signal Maintainer in the Carrier's service. On January 3, 2017, the Claimant was given notice of an investigation in connection with the following charge:

"An investigation has been scheduled...for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to properly perform 30 day switch tests in accordance with FRA and BNSF rules and regulations, which subsequently resulted in the falsification of FRA documents. This incident happened at Control Point 44th AVE, MP 13.70, line segment 25 on the Staples Subdivision at approximately 0215 hours on January 3, 2017."

After a formal investigation on January 13, 2017, the Claimant was found in violation of MWOR 1.6 Conduct and was dismissed from the Carrier's service.

On January 3, 2017, the Claimant was performing switch obstruction tests when he was observed by two supervisors performing operational tests. At the 44th Avenue Control Point, the supervisors observed the Claimant place his 3/8-inch obstruction gauge into the open point in the normal position and use the lever to operate the switch up against the gauge. The Claimant then placed his other 3/8-inch switch obstruction gauge into the open switch point and used the lever to operate the switch to ensure that the slide bar was striking the lock rods. The Claimant removed his gauges and locked the switch back up before continuing to the remainder of his tasks.

Supervisor Skarhus testified that he observed the Claimant failing to remove the cover of the switch machine to verify that the LED lights on the switch machine were functioning properly. He also said that the Claimant failed to remove the pin to the Delaware rod when performing the switch obstruction test. During the on-property investigation, the Claimant admitted that he did not perform either of these tasks. The Carrier's switch log indicates that the Claimant spent less than one minute performing this test. According to Skarhus, this is not enough time to complete the

testing. After the Claimant's testing was finished, he listed the Delaware switch as functioning in both the normal and reverse positions in his FRA inspection report.

The Carrier contends that it correctly determined that the Claimant was careless and negligent while performing the switch obstruction test and was dishonest in reporting his FRA inspections. The Carrier contends that the Claimant admitted not removing the switch machine cover and not removing the pin on the Delaware rod. The Claimant admitted that he did not perform the switch obstruction test as outlined in the TP382 test procedure.

The Carrier contends that this was the Claimant's second serious violation in the review period, so dismissal was warranted under BNSF's Policy for Employee Performance Accountability (PEPA).

The BNSF Obstruction Test Procedures state, in part:

Test Procedure:

- “1. Place a 3/8-inch obstruction gage between the reverse switch point and stock rail 6 inches from the end of the point. M23/M22 Switches configured with a Delaware rod have a pin which must be removed only to perform TP-382. When the test is completed replace the pin (This test does not apply to Model SH, SF, and 5G style switch machines).
2. Operate (hand crank, ratchet, or hand throw as appropriate) the switch machine to the reverse position and ensure the switch machine does not lock. If the machine locks, the lock rod must be adjusted. ECC machine: Point Detected and Point Locked LEDs are Red and Indication Output is dark.
3. Remove the 3/8-inch obstruction gage.
4. Repeat steps 1-3 above for the normal position. Restore and record switch position as required.”

The Organization contends that the Carrier has failed to provide substantial evidence that Claimant was in violation of MWOR 1.6. The Organization contends that the Claimant fulfilled the purpose of the switch obstruction test by testing in his own manner. The Organization concedes that the Claimant did not remove the pin

from the Delaware rod and did not open the switch cover but contends that failure to do so does not constitute negligence or careless action so as to endanger others. The Organization contends that the Claimant used his nine years of experience to conduct the test in a more accurate manner. The Organization contends that the Claimant did not falsify the FRA documents because he did, in fact, perform the test.

The Organization also contends that the penalty of dismissal is harsh, excessive, and unwarranted. The Claimant's minor misinterpretation of TP 382 was not a serious violation, especially as the integrity of the test was not affected.

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.

This Board has reviewed the evidence and testimony and finds that there is substantial evidence in the record to support the finding that the Claimant was guilty of failing to properly perform the switch obstruction test which led to the improper completion of his FRA inspection report. The Claimant admitted that he did not remove the pin from the Delaware rod and did not lift the lid to verify the switch lights. Where the conduct is admitted, there is no need for further proof.

The Claimant's belief, even if in good faith, that his method of conducting the test was sufficient does not change the fact that he did not follow the test procedure set forth in TP 382, and, therefore is not a mitigating factor. The Claimant had previously been assessed a serious violation in the review period. Under the Carrier's PEPA, dismissal was the next penalty to be imposed. Therefore, we cannot find that the Carrier's penalty is arbitrary or unreasonable. Thus, the claim is denied.

AWARD

Claim denied.

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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 4th day of September 2019.