

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 43846  
Docket No. SG-44938  
19-3-NRAB-00003-180390**

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

**(Brotherhood of Railroad Signalmen  
PARTIES TO DISPUTE: (  
(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 T.P. Johnson, for compensation for all time lost, including overtime, 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 a Level S, 30-day record suspension, with a 3-year review period to 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 17, 2017. Carrier’s File No. 35-17-0005. General Chairman’s File No. 17-011-BNSF-119-D. BRS File Case No. 15784-BNSF. NMB Code No. 119.”**

**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 held the position of CTC Maintainer in the Carrier's service. On December 12, 2016, 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 obtain track authority on Main 2, on December 10, 2016, at/or near MP 25.9 on the Orin Subdivision, resulting in the train with engine identification BNSF9260 going into emergency stop application, while assigned as a CTC Maintainer on Headquartered gang SMTR0929."**

**After a formal investigation on January 17, 2017, the Claimant was found in violation of MWOR 6.3.3 Visual Detection of Trains and MWOR 6.21 Precautions Against Unusual Conditions and was assessed a 30-Day Record Suspension and a Three Year Review Period.**

**On December 10, 2016, the Claimant received a call to Mile post 25.9 on the Orin Subdivision to examine a switch on main track 3. The Claimant obtained track authority to be on main track 3 at approximately 1:30 PM. While examining the switch on main track 3, the Claimant noticed a fire on main track 2, which was outside his authority. Nonetheless, the Claimant acted immediately, notifying the dispatcher and using his fire extinguisher to extinguish the fire.**

**In the meanwhile, BNSF 9260 was traveling at 40 MPH down main track 2 toward the Claimant. The train crew on BNSF 9260 put the train into emergency stop. The Claimant briefed with the locomotive crew asking if he had caused them to go into emergency stop. When they replied in the affirmative, he said, "I apologize for that. I had a hell of a tie fire right there at that switch...."**

**The Carrier contends that the Claimant was properly charged with violation of MWOR 6.3.3, Visual Detection of Trains, and 6.21, Precautions Against Unusual Conditions,**

**Protect trains, engines and on-track equipment against any known condition that may interfere with their safety. Advise the train dispatcher of such conditions by the first available means of communication.**

**The Carrier contends that the Claimant fouled the track while putting out the fire and as a result, caused BNSF 9260 to go into emergency stop to avoid injuring or killing the Claimant or the train crew. The Carrier contends that the Claimant put himself in danger by failing to obtain track authority before attempting to put the fire out.**

**The Carrier concedes that incidental fouling is permitted but contends that the Claimant was not simply walking across or adjacent to the track on which he did not have authority. The Carrier contends that it considered the circumstances that led to the Claimant fouling the track when it exercised leniency and did not dismiss the Claimant but issued only a 30-day suspension with a three-year review period.**

**The Organization contends that the Claimant's right to a fair and impartial hearing was impaired when the Carrier refused to produce the train Engineer and Conductor of Engine 9260, who could have provided non-biased eyewitness testimony regarding what occurred.**

**The Organization contends that the Carrier has failed to prove with substantial evidence that the Claimant was in violation of the charged rules. The Organization contends that the Claimant was complying with MWOR 1.28, Fire, which states,**

**Employees must take every precaution to prevent loss and damage by fire.**

**Employees must report promptly to the train dispatcher any fires seen on or near the right of way, unless the fires are being controlled. If there is danger of the fire spreading to a bridge or other structure, crew members must stop their train and help extinguish the fire.**

**Cause of fire, if known, must be promptly reported.**

**The Organization contends that the Claimant testified that he did not foul the track while extinguishing the tie fire. The Organization points out that the only evidence to the contrary presented at the hearing was the Trainmaster's testimony that while on a train ride, he saw "an orange object in the middle of the track" which**

he believed to be the Claimant's jacket. The Organization contends that without the testimony of the remainder of the train crew, there was no way to resolve the contradiction in testimony between the Claimant and the Trainmaster.

Finally, the Organization contends that the disciplinary penalty was harsh and excessive, in light of the fact that the Claimant's actions were taken to extinguish a fire on the track at the switch.

The initial burden of providing substantial evidence in support of its charge is on the Carrier. Here, the Trainmaster said that he saw an orange object on the track as the train approached, but the Claimant testified that he was careful not to foul the track. There is an irreconcilable conflict between this testimony.

The Organization objected to the Carrier's failure to bring two eyewitnesses to the investigation so that their accounts could corroborate either that of the Trainmaster or of the Claimant, and asks this Board to draw an adverse inference against the Carrier with respect to the evidence they would have provided.

The omission of these witnesses is fatal to the Carrier's case. The Trainmaster's testimony standing alone, was insufficient to show that the Claimant actually fouled the track or to overcome the Claimant's sworn denials. Therefore, the Carrier has not met its burden of proof. The Carrier has not provided substantial evidence that the Claimant, in fact, fouled the track while extinguishing the fire on the track. The discipline cannot stand when the Carrier has failed to prove its case.

**AWARD**

**Claim sustained.**

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**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 4th day of September 2019.**