

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43890
Docket No. SG-45385
20-3-NRAB-00003-190108**

The Third Division consisted of the regular members and in addition Referee Patricia T. Bittel when 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 J.F. Donatucci, 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 September 27, 2017. Carrier's File No. 35-17-0045. General Chairman's File No. 17-075-BNSF-121-T. BRS File Case No. 15960-BNSF. NMB Code No. 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.

On September 5, 2017, the Claimant and J. I. Smith were called out to test the gate mechanism at the Holmes Road Crossing on the Silsbee Subdivision. While they were working, two BNSF Special Agents approached and questioned them on an unrelated matter. At the time, BNSF General Director Line Maintenance Matt Hammond and Assistant Vice President Engineering Denver Gilliam were driving by and stopped. They allegedly observed the Claimant, Smith and the two BNSF Special Agents standing between the railroad ties and the crossing arm at the Holmes Street Crossing. Hammond claimed he warned the Claimant and Smith that they were fouling the track. He said Smith replied he believed he was standing two feet away from the track while the Claimant disagreed. The Carrier determined that both had fouled the track in violation of MWOR 6.3.

The record shows that the hearing officer for the investigation was David Mooney, though the Notice of Discipline was issued October 24, 2017 from Director of Administration Kimberlee Saucedo. It argues that this case hinges on a credibility decision, and the hearing officer is the only one in a position to make credibility decisions, yet Mooney did not issue the discipline. The Board is not persuaded by this argument. We are not persuaded that each and every credibility decision made by someone who did not serve as the hearing officer in the case must be automatically discounted. Rather, we believe that any such credibility decision must be reviewed to ascertain whether or not it rests on adequate evidence of record.

The Organization contended the Carrier's failure to provide the Special Agents as witnesses at the investigation was detrimental to its ability to provide a defense. It maintained there were two conflicting accounts, yet Carrier Officer Sisario, who did the initial interview and investigation in the case, relied on a single, uncorroborated statement as his evidence. The Organization averred that the Claimant was not foul of the track. It supports this position not only with the Claimant's testimony, but also with co-worker J. I. Smith's. Additionally, it pointed out that no work was being performed on or near the track. In its assessment, the Claimant was working eight feet from the nearest rail. The Organization further asserted that the Claimant had performed a job briefing with work groups to the north and south of his location, which areas were out of service and impassable due to wash outs. Hence, even if Carrier's allegations had merit, there was no danger or unsafe condition present.

The Carrier countered that briefing does not confer track authority. It noted that MOW Rule 6.3 provides options for being on track, and the Claimant failed to meet the

criteria for any of them. It views the incident as serious, noting that only three and-a-half months prior, he was issued a Level S for violating the exact same rule.

The record in this case adequately supports the Carrier's conclusion that Hammond's testimony should be credited over the Claimant's. After the incident occurred, Hammond preserved his memory by way of a statement that provided as follows in pertinent part:

"Joe Smith and John Donatucci standing adjacent to the tracks, just barley [sic] off the end of the railroad ties. * * * Both employees were standing side by side, facing "railroad West" talking with two special agents. All four people were positioned between the railroad tracks and the signal crossing arm. * * *

When I asked them if they had any track authority both employees stated they did not. When I asked them how far away from the nearest rail of the mainline they were working, Joe estimated two feet; John would not provide an estimate but stated he felt he was a safe distance."

Hammond's testimony at the investigation was entirely consistent with his initial statement. He explained that he was able to easily distinguish BNSF employees as opposed to the special agents by the difference in their attire; one of the special agents wore a more formal uniform. He not only confirmed that Claimant Smith estimated he was standing only two feet from the track, but also visually confirmed the accuracy of this estimate.

"So uh his estimate was two feet. That is uh almost exactly what I would have estimated it at from my observation both on a northbound view and an eastbound view as I drove right by them on Holmes Road before I parked. (TR 17) "

By contrast, at the investigation the Claimant testified as follows:

"NICHOLAS KUCERA: Did one or both of the BNSF Special Agents were was one or both of those BNSF Special Agents in foul of track stopped at any point?

JOHN DONATUCCI: Uh for a short period of time. Uh one of them was and we made I made a comment and he

continued to walk a little closer to the to the mechanism.

NICHOLAS KUCERA: Was Mr. Smith in foul of track during this moment?

JOHN DONATUCCI: No, Mr. Smith was never in foul of the track.

NICHOLAS KUCERA: Did you or Mr. Smith inform the Special Agents to get away from foul of track uh at any point?

JOHN DONATUCCI: Can you repeat your question?

NICHOLAS KUCERA: Did you or Mr. Smith tell the Special Agent to get clear of of foul of track?

JOHN DONATUCCI: Yes. (TR 39)”

Hammond’s testimony at the investigation was entirely consistent with his initial statement. As such, it was reasonably deemed reliable. By contrast, it appears Claimant Donatucci attempted to introduce a new scenario wherein Hammond became confused and placed the special agents next to the track Claimants Donatucci and Smith had been observed. The Board is fully aware that both Smith and Donatucci testified to this changed scenario whereby it was the special agents, not the charged employees, who were foul of the track. Significantly, neither employee made this assertion when they spoke to Hammond immediately following the incident. Certainly, had it been the agents and not the Claimants who were foul of the track, this would have been pointed out at the time.

We deem changed testimony to be a red flag which gave the Carrier grounds to call into question the testimony of the two Claimants. By contrast, Hammond had no perceptible reason to fabricate facts. He was readily able to distinguish special agents from other employees by their attire. In providing Hammond’s testimony, the Carrier has supplied substantial evidence of a rule violation. Furthermore, Claimant Donatucci was not consistent in his description of events. The Board finds the Carrier reasonably concluded that Hammond’s testimony constituted substantial evidence of a rule violation.

BNSF did attempt to obtain statements from the Special Agents on the scene, but was rebuffed. Deputy Chief of Police Kevin Anderson responded to the request by saying that the agents in question were not familiar with the applicable rules and that they would not be providing any statements. This good faith attempt by BNSF contravenes any negative inference which might otherwise be taken.

The Carrier acknowledges that track was out both north and south of the Claimant's location; no trains could come by. However, it notes that repair equipment could travel on track at the Claimant's location, concluding that he was far from being in a safe situation. We find this argument reasonable. In view of these facts, we find that the Claimant fouled the track in violation of applicable rules.

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 28th day of January 2020.