

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43892
Docket No. SG-45387
20-3-NRAB-00003-190127**

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.I. Smith, for 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 September 27, 2017. Carrier's File No. 35-17-0046. General Chairman's File No. 17-076-BNSF-121-T. BRS File Case No. 15961-BNSF. NMB Code No. 106.”

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. F. Donatucci were called out to test the gate mechanism at the Holmes Road Crossing on the Silsbee Subdivision. While the Claimant and Donatucci were working, they were approached by two BNSF Special Agents who questioned them on an unrelated matter. At that time, BNSF General Director Line Maintenance Matt Hammond and Assistant Vice President Engineering Denver Gilliam were driving by. They stopped and Hammond advised the group that they were standing between the railroad ties and the railroad crossing arm, and he believed they were fouling the track. The Claimant acknowledged being two feet away from the track, though Donatucci disagreed. Following investigation, the Carrier determined that the Claimant had indeed fouled the track and issued the discipline here concerned.

The record shows that the hearing officer for the investigation was David Mooney, though the Notice of Discipline was issued on October 24, 2017 from Director of Administration Kimberlee Saucedo. The Organization 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. In its view, the credibility decision must therefore be decided in favor of the Claimant. 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 a 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 relied on a single, uncorroborated statement as his evidence. Additionally, the Organization pointed out that no work was being performed on or near the track. In its assessment, the Claimant was working on a relay in the gate mechanism, eight feet from the nearest rail. The Organization further asserted that a job briefing with work groups to the north and south had taken place, which areas were out of service and impassable due to wash outs. Hence, even if the Carrier's allegations had merit, there was no danger or unsafe condition present.

The Carrier replies that briefing does not confer track authority. It notes that MOW Rule 6.3 provides options for being on track, and the Claimant failed to meet the criteria for any of the options. 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.

As a defense, the Organization and the Claimant allege that Hammond was mistaken, and it was actually the BNSF Special Agents who were fouling the track. However, the record in this case supports the Carrier's conclusion that Hammond's testimony should be credited over this assertion. 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 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. As such, it was reasonably deemed reliable. By contrast, it appears Claimant Smith attempted to introduce a new scenario wherein Hammond became confused and mistakenly placed the Claimants close to the track when in fact the special agents were standing there. 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. In providing Hammond's testimony, the Carrier has supplied substantial evidence of a rule violation. Furthermore, Claimant Smith 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.

The Organization's argument regarding the withholding of witness testimony warrants serious consideration. 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. The Carrier's good faith attempt absolves it from any negative inference which might otherwise apply.

In view of these facts, we find the Carrier was within its rights to make a credibility decision in reliance on Hammond's version of events. The Carrier also appropriately determined that a job briefing did not take the place of track authority. We find 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.