

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44244
Docket No. MW-45468
20-3-NRAB-00003-190297**

The Third Division consisted of the regular members and in addition Referee Patricia T. Bittel when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division
(IBT Rail Conference**

PARTIES TO DISPUTE: (

**(BNSF Railway Company (Former Burlington Northern
(Railroad Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed upon Mr. G. Brooking, by letter dated October 24, 2017, for violation of MWOR 6.50 Movement of On-Track Equipment in connection with his alleged failure to ensure a switch was properly lined for movement while operating a company vehicle was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File B-M-3058-E/11-18-0126 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant G. Brooking shall be reinstated to service with seniority and all other rights and benefits unimpaired, have his record cleared of the charges leveled against him and he shall be compensated for all wage loss suffered including lost overtime, expenses and benefits as described in the initial claim.”**

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 19, 2017, the Claimant was unable to stop within half the range of vision of a switch that was lined improperly. As a result, he impacted the switch and derailed his vehicle.

MWOR 6.50 requires that on-track equipment move at a speed that will allow stopping within half the range of vision short of specifically enumerated items including an improperly lined switch. During investigation, the Claimant admitted it was his responsibility to stop short of the switch. This was his third active Level S violation. His dismissal resulted.

In the Organization's assessment, Rule 40 controls. It reads as follows in pertinent part:

"RULE 40. INVESTIGATIONS AND APPEALS

- A. An employe in service sixty (60) days or more will not be disciplined or dismissed until after a fair and impartial investigation has been held. Such investigation shall be set promptly to be held not later than fifteen (15) days from the date of the occurrence, except that personal conduct cases will be subject to the fifteen (15) day limit from the date information is obtained by an officer of the Company (excluding employes of the Security Department) and except as provided in Section B of this rule.

* * *

- C. At least five (5) days advance written notice of the investigation shall be given the employe and the appropriate local organization representative, in order that the employe may arrange for representation by a duly authorized representative

or an employee of his choice, and for presence of necessary witnesses he may desire. The notice must specify the charges for which investigation is being held. Investigation shall be held, as far as practicable, at the headquarters of the employee involved.

* * *

- G. If it is found that an employee has been unjustly disciplined or dismissed, such discipline shall be set aside and removed from record. He shall be reinstated with his seniority rights unimpaired, and be compensated for wage loss, if any, suffered by him, resulting from such discipline or suspension.

* * *

- J. If investigation is not held or decision rendered within the time limits herein specified, or as extended by agreed-to postponement, the charges against the employee shall be considered as having been dismissed.”

The Organization cites a number of mitigating circumstances that, in its view, render the penalty of dismissal excessive. Grievant had recently been switched to Smart Mobile Client, a platform which has resulted in a doubling of track authority violations. He did not receive adequate training. In addition, track inspectors are being asked to do eight to ten hours of work in six hours. The Organization maintains the Board must conclude that the discipline was excessive.

We are not persuaded that use of the Smart Mobile Client platform constitutes a mitigating circumstance for the Claimant’s case. We also are not persuaded that the Claimant’s training was inadequate. He specifically had training on the Smart Mobile Client on December 8, 9 and 12 of 2016. At the time of the incident, the Claimant was working with a new dispatcher who did not line the switch for him as other dispatchers had done. He admitted it was his mistake. We understand that habit might have been a factor in the case, but are not persuaded that assumptions about the likely actions of unfamiliar personnel are acceptable. It was the Claimant’s responsibility to stop before reaching the misaligned switch, and he failed to do so. We find the Claimant committed a serious safety violation in this instance by exceeding a speed which would have permitted a timely stop and avoided a derailment.

Unfortunately, the Claimant's record does not support mitigation. His second serious violation was handled with moderation. He has not demonstrated a likelihood of improvement with further progressive discipline.

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 23rd day of October 2020.