

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 44251
Docket No. MW-45667
20-3-NRAB-00003-190650

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

**(Brotherhood of Maintenance of Way Employes 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 [thirty (30) day record suspension and a one (1) year review period] imposed upon Mr. R. Remington, by letter dated May 9, 2018, for violation of MWOR 11.3 Fouling the Track in connection with his alleged being foul of the main track without proper authority on “October 12, 2017 was on the basis of unproven charges, excessive and in violation of the Agreement (System File C-18-D040-24/10-18-0229 BNR).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. Remington’s personal record shall be cleared of the charge leveled against him.”

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 October 12, 2017, Manager of Engineering Certification Doreen Powers, while examining a frog, allegedly observed the Claimant standing to her east in the foul of the track. Powers instructed the Claimant to get off the track then asked why he was fouling the track. The Claimant responded by asking Powers if she would provide lookout protection for him in accordance with MWOR 6.3.3. Powers denied the Claimant's request and explained to him that he had just committed a serious rule infraction by failing to have proper authority before occupying or fouling the track. Powers then pulled the Claimant from service and scheduled an investigation.

The Claimant affirmatively testified that he was not in the foul of the main track but was standing on the long ties of an elevator track, well over four feet away from the nearest rail of the main track. He testified that the FRA inspector did not take any exception to where he was standing. The Organization contends that Powers' opinion about what she thought she saw is nothing more than speculation and conjecture, as it is undisputed that Powers was not at the same location as the Claimant and the FRA inspector. The Organization emphasizes that the Claimant had 41 years of service with the Carrier. It maintains the discipline is excessive because it fails to take this mitigating circumstance into consideration.

Powers submitted a contemporaneous statement confirming that she saw the Claimant foul of the track. When she advised him of this infraction, she described his response as follows; "Rick said well can you look out for me." She said her reply was no because there had been no briefing or form. At the investigation, the Claimant was not asked whether or not he made this statement. Powers' testimony at the investigation was consistent with her statement. Unfortunately, no contemporaneous statement was made by the Claimant, and the FRA inspector made no statement either. Nothing in the record indicates the inspector's statement was requested. the Claimant's assertion that the inspector at no time took issue with his location stands unrebutted.

The question before the Board is whether or not Powers' statement and congruent testimony constitute substantial evidence that the Claimant fouled the track. There was no contemporaneous statement from the Claimant or from the FRA Inspector, nor was there any indication that statements from them were requested. However, the Claimant did testify at the investigation, and requests for statements from non-BNSF employees are notoriously ignored. Given these considerations, no adverse inference will be made based on the lack of contemporaneous statements.

At the end of the day, the Carrier must rest its case solely on the testimony of D. Powers. The Organization insists the failure of the FRA Inspector to call out the Claimant is concrete evidence that there was no fouling of the track. But this supposition ignores the possibility the Inspector was either too involved in analyzing the frog problem, or alternatively chose not to insert himself in an internal BNSF disciplinary matter that was already the focus of supervisory attention. We are not persuaded that the lapses in statement procurement by the Carrier undermine the veracity of Powers. We find the Carrier was acting reasonably when it relied on her rendition of the facts. It is indisputable that the nature of the offense here concerned is serious.

This brings us to the issue of mitigation by way of long service. The Claimant had worked for fully 41 years at the time of this incident. He had received four prior suspensions for serious violations, meaning he only committed an infraction on the average of once every ten years. We find this record to be quite adequate to serve as a mitigating circumstance. The Claimant was issued a 30-day record suspension with a 12-month review period. We find the choice of a 12-month review period to be reflective of an effort by the Carrier to mitigate the penalty. However, the effort is, in our view, inadequate in view of the extensive service involved. The length of the suspension was not reduced at all. We find this to be unduly harsh under the circumstances. The length of the record suspension shall be reduced to 10 days.

Claim sustained in accordance with the Findings. The Claimant shall be compensated for any time or benefits lost as a result of the excessive suspension.

AWARD

Claim sustained in accordance with the Findings.

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 23rd day of October 2020.