

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44282
Docket No. MW-45793
20-3-NRAB-00003-200034**

The Third Division consisted of the regular members and in addition Referee I. B. Helburn when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
(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 as well as a forfeited foreman seniority date with restriction from bidding or bumping to foreman for a period of one (1) year] imposed upon Mr. M Petersen, by letter dated August 10, 2018, for violation of EI 23.1.2 Foremans Roles, Responsibilities and Expectations in connection with his alleged failure for installing and not properly protecting known FRA defects on May 16, 2018 was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File C-18-D040-30/10-18-0362 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant M. Petersen shall have his record cleared of the charges leveled against him and he shall be compensated for all wage loss suffered including lost overtime.”**

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.

By letter dated May 25, 2018, the Claimant was informed that:

“An investigation has been scheduled at 0900 hours, Wednesday, June 6, 2018 at the BNSF Depot, 1801 Hwy 75 North, Sioux City, IA, 51105, for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure for installing and not properly protecting known FRA defects, while installing panel at railroad grade crossing 9th street in Oakland, NE MP 60.6 on the Sioux City Sub on May 16, 2018. The date BNSF received first knowledge of this alleged violation is May 23, 2018.”

After a mutually agreed to postponement, the investigation was held on July 11, 2018 at 0900 hours at the BNSF Railway Depot in Freemont, NE. By letter dated August 10, 2018, the Claimant was informed of the Carrier’s conclusion that he had violated EI 23.1.2 Foreman’s Roles, Responsibilities and Expectations and was being assessed a Level S 30 Day Record Suspension with a one (1) year review period. In addition, the Claimant’s foreman seniority date was forfeited and he was restricted from bidding or bumping to Foreman for one (1) year.

On September 26, 2018 the Organization filed the above-noted timely claim on Mr. Petersen’s behalf. The claim was properly progressed on the property without resolution and was referred to the National Railroad Adjustment Board for final adjudication.

The Carrier asserts that the claim should be denied because it has procured the required substantial evidence to prove the allegation. The Claimant’s admission is sufficient. The Claimant received a fair and impartial hearing and was not prejudged, nor has the Organization proved that alleged procedural errors prejudiced Mr. Petersen. The Carrier issued a timely, properly-detailed Notice of Investigation. The discipline is in accordance with the Policy on Employee Performance Accountability (PEPA). In essence, the Organization asks for leniency, which is within the Carrier’s discretion, but not the Board’s. The Board is not to substitute its judgment for that of management.

The Organization insists that the claim be sustained without consideration of the merits because the Carrier violated Rules 40.A and 40.D. On May 23, 2018 Manager Welding Hiatt and System Welding Supervisor Shipp were at the above-noted location and observed the alleged defect. The investigation was originally scheduled for June 6, 2018, twenty-one (21) days from the date the panel was installed, which is when Roadmaster Ihde knew of the alleged FRA defects. After the investigation was conducted, the decision to discipline was not delivered to the Claimant until thirty-three (33) days later. As for the merits, Mr. Petersen did not receive the required fair and impartial investigation because Roadmaster Ihde was not called as a Carrier witness even though he supposedly had first-hand knowledge. Neither were Carrier officials Hiatt and Shipp called as witnesses, thereby depriving the Claimant of the right to face his accusers. Article 40.C was violated because EI 23.1.2 was not entered into evidence during the investigation.

The Carrier did not provide the required substantial evidence because the EI allegedly violated was not referenced and Manager Pachak could not personally verify the evidence he entered into the record. The discipline was punitive rather than corrective.

This Board has carefully considered the record and has determined that the Carrier has not met the burden of proof that it must bear in this case.

AWARD

Claim sustained.

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.