

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44343
Docket No. SG-45548
21-3-NRAB-00003-190325**

The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens 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 G.R. Jones, 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 February 14, 2018. Carrier’s File No. 35-18-0010. General Chairman’s File No. 18-013-BNSF-119-D. BRS File Case No. 15994-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.

The Claimant held the position of Signal Maintainer in the Carrier's service, headquartered at Pikes Peak Subdivision, Denver, Colorado. On January 31, 2018, the Claimant's Supervisor, Shawn Premo, arrived at Milepost 4 on the Pikes Peak Subdivision, where he observed Claimant performing a crossing test.

According to Supervisor Premo, while the Claimant performed the test, he was fouling the track. When the supervisor asked the Claimant if he had authority or protection to be fouling the track, the Claimant responded that he was working as a lone worker. When the supervisor asked to see his On-Track Safety Form, the Claimant stated that he had not filled one out. In his written statement, Claimant stated that he "forgot to fill out statement of On-Track Safety Form and Job Safety Form."

On February 1, 2018, the Claimant was given notice of an investigation in connection with the following charge:

"An investigation has been scheduled...for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to establish protection on track other than main track on January 31, 2018."

After a formal investigation on February 14, 2018, the Claimant was found in violation of MWOR 6.3.2, Protection on Other Than Main Track, and was dismissed from the Carrier's service.

In a letter dated May 1, 2018, the Organization appealed the Carrier's discipline. The Carrier responded to and denied the appeal. Following discussion of this dispute in conference, the positions of the parties remained unchanged, and this dispute is now properly before the Board for adjudication.

The Carrier contends that it has provided substantial evidence that the Claimant violated MWOR 6.3.2, which states,

"6.3.2 Protection on Other Than Main Track

The employee in charge must ensure that equipment and employees do not occupy or foul the track until protection is established.

....

If any of these items cannot be utilized, a method of on-track safety must be established.”

The Carrier contends that the record clearly shows that the Claimant did not have protection while observed fouling the track. In order to comply with MWOR 6.3.2, the Claimant needed to establish some method of on-track safety or have track authority, but he had neither. While the Claimant said he was a lone worker, he had not filled out the proper forms, either.

The Carrier contends that to the extent that the Claimant now claims he was in the bungalow and not fouling the track, this dispute in facts was best reconciled by the Hearing Officer, who observed the witnesses’ testimony.

The Carrier contends that the penalty of dismissal was neither harsh nor excessive, as the Claimant already had a previous Level S on his record when he was foul of the track without proper authority.

The Organization contends that the Carrier has failed to meet its burden of proving with substantial evidence that the Claimant was in violation of MWOR 6.3.2. The Claimant testified that he was not foul of the track but was in the bungalow when the supervisor approached him. If the Claimant was not fouling the track, he did not need track authority.

The Organization contends that the penalty of dismissal was harsh, excessive, and unjust.

The Claimant’s supervisor testified that he observed the Claimant foul of the tracks and then determined that the Claimant did not have proper authority. the Claimant’s written statement did not deny these facts; he said he “forgot.” In the Claimant’s testimony, he denied being foul of the track and said that he was in the bungalow when the supervisor approached him.

The Board sits as an appellate forum in discipline cases. As such, it does not weigh the evidence *de novo*. Thus, it is not our function to substitute our judgment for the Carrier’s judgment and decide the matter according to what we might have done had the decision been ours. Rather, our inquiry is whether substantial evidence exists to

sustain the finding against the Claimant. If so, this Board is not warranted in disturbing the penalty unless we can say that the Carrier's decision was an abuse of discretion.

The Hearing Officer heard the conflicting testimony and reviewed the evidence. Resolution of credibility questions and conflicting testimony is the province of the Hearing Officer, who has heard the testimony and observed the witnesses first-hand. As an appellate tribunal, the Board must defer to such judgments so long as there is substantial evidence to support the Hearing Officer's findings. This Board finds that the Carrier presented substantial evidence to support the charges against the Claimant.

This was the Claimant's second serious violation in the active review period. As a result, the penalty of dismissal was not arbitrary or excessive.

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 6th day of January 2021.