

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 44664  
Docket No. MW-46249  
22-3-NRAB-00003-200821**

**The Third Division consisted of the regular members and in addition Referee Michael Capone 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. J. Davis, by letter dated June 5, 2019 for violation of MWOR 6.51 Maintaining a Safe Braking Distance, MWOR 6.52 Spacing of On-Track Equipment and MWOR 6.50 Movement of On-Track Equipment on April 29, 2019 was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File C-19-D070-8/10-19-0237 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Davis ‘... shall be reinstated to service with all seniority rights restored and all entitlement to, and credit for, benefits restored, including vacation and health insurance benefits. The Claimant shall be made whole for all financial losses as a result of the violation, including compensation for: 1) straight time for each regular work day lost and holiday pay for each holiday lost, to be paid at the rate of the position assigned to the claimant [sic] at the time of removal from service (this amount is not reduced by earnings from alternate employment obtained by the claimant while wrongfully removed from service); 2) any general lump sum payment or retroactive general wage increase provided in any applicable agreement that became effective while**

the claimant was out of service; 3) overtime pay for lost overtime opportunities based on overtime for any position claimant could have held during the time claimant was removed from service, or on overtime paid to any junior employee for work the claimant could have bid on and performed had the Claimant not been removed from (sic) service; 4) health, dental and vision care insurance premiums, deductibles and co-pays that he would not have paid had he not been unjustly removed from service. All notations of this dismissal should be removed from all carrier records, due to the Carrier's arbitrary, capricious, and excessive discipline leading to the Claimant being improperly dismissed."

**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, Joseph Davis, is a Machine Operator employed by the Carrier since August 2, 2004. On May 1, 2019, the Claimant was notified of a hearing and investigation to be held on May 7, 2019 for failing to operate his equipment properly causing him to strike a rail heater on April 29, 2019. After a postponement the hearing was held on May 10, 2019. On June 5, 2019, the Claimant was notified that he was dismissed from service after the Carrier found him guilty of the charges. The record indicates that the Carrier denied subsequent appeals by the Organization and rendered its final decision on October 30, 2019. The Organization rejected the Carrier's decision and moved to have the matter adjudicated before this Board.

In discipline cases, as the one before the Board here, the burden of proof is upon the Carrier to prove its case with substantial evidence and, where it does establish such evidence, that the penalty imposed is not an abuse of discretion. Upon review of all evidence adduced during the on-property investigation, the Board finds that the Carrier has met its burden of proof that the Claimant did not operate at a safe braking distance while operating his spike machine which resulted in his colliding with another piece of equipment. However, the Board finds the penalty of dismissal excessive.

The documentary evidence and testimony of Assistant Roadmaster Michael Glidden confirms the Claimant violated Maintenance of Way Operating Rule 6.50, Movement of On-Track Equipment, Rule 6.51, Maintaining a Safe Braking Distance, and Rule 6.52, Spacing of On-track Equipment. The Claimant did not dispute that he committed the infractions. As such, the Carrier has met its burden of proof and the Board need not go further in our review of the merits or the procedural objections.

The Organization's valiant claim that mitigating circumstances contributed to the incident is rejected. Nothing in the record supports such a conclusion. It also argues that the Claimant did not commit an intentional act and his work record is exceptional. It cites arbitral precedent in support of its argument that the Carrier's penalty for the alleged misconduct is unjust.

It is well established in the industry that leniency is reserved to the Carrier where there is no abuse of discretion. Upon our review of the record and the Claimant's satisfactory disciplinary history, the Board finds the penalty of dismissal excessive. His disciplinary record over 15 years of service contains two infractions, only one of which involved a suspension. While the Board recognizes the seriousness of the charges, and that his previous Investigation Waiver contains a "last chance" provision, we find that based on his overall record and length of service, the Claimant should be afforded an opportunity to keep his job. The Claimant shall be reinstated with his seniority unimpaired and without back pay, whereby the time out of service constitutes an appropriate penalty.

In summary, we have reviewed and carefully weighed all the arguments and evidence in the record and have found that it is not necessary to address each facet in these Findings. We find the Carrier has provided substantial evidence that the Claimant violated its rules, but the discipline imposed is excessive.

**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 28<sup>th</sup> day of January 2022.