

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44672
Docket No. MW-46432
22-3-NRAB-00003-200738**

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 [Standard Formal Reprimand and a one (1) year review period] imposed upon Messrs. R. Zarraga and C. Duvall, by letters dated March 1, 2019, for violation of MWOR 6.19 Flag Protection was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File C-19-D040-16/10-19-0171 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimants R. Zarraga and C. Duvall shall have their records cleared of the charges leveled against them in accordance with Rule 40 of the current Agreement.”**

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, Gang Trackman Rogelio Zarraga, has been employed by the Carrier since May 4, 2015. The Claimant, Maintenance Welder Chris Duvall, has been employed by the Carrier since March 6, 2006. The Claimants were assessed a Standard Formal Reprimand and a one-year review period on March 1, 2019, for violating the Maintenance of Way Operating Rule (“MWOR”) 6.19, Flag Protection, on January 24, 2019, following an Investigation held on February 6, 2019. The Carrier alleged that the Claimants violated Rule 6.19 when they failed to follow proper flag safety procedures while working on the track.

Before reaching the merits of the dispute, the Board addresses the Organization’s procedural objection alleging that the hearing officer failed to ensure the Claimant was afforded a fair and impartial hearing. A review of the record does not support the Organization’s allegations.

In discipline cases, 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 the Carrier has met its burden of proof that the Claimants violated the applicable rules when they failed to use a red flag. Rule 6.19, in pertinent part, reads as follows:

B. Use of a Flagman for Protection on Tracks where Trains or Engines are Required to Stop within One-Half the Range of Vision

Where trains or engines are required to move at restricted speed or under the provisions of Rule 6.28 (Movement on Other Than Main Track), flag protection may be provided by a single flagman at the location to be protected. The flagman must remain at the location to be protected to watch for approaching movements. When a movement approaches from either direction, the flagman must go toward the approaching movement signaling stop with:

- A red flag by day
- A white light or fusee by night.

An employee functioning as a flagman for any purpose (emergency or otherwise) must not engage in any task not associated with flagging duties.

Manager of Signals Jay Ramsdell and Roadmaster Russell Nabors provide reliable testimony and documentary evidence that the Claimants were working on the main track and that Claimant Duvall, as the flagman, did not have in his possession a red flag as required. Both Carrier officials assert that Mr. Zarraga claimed he and Mr. Duvall were applying “lookout protection”, which was determined to be improperly documented or applicable. Based on the testimony provided and a plain reading of the rule, Mr. Duvall was required to have a red flag to go toward any approaching movement and according to a plain reading of the rule, was not to engage in any task not associated with flagging duties.

The Organization maintained the red flag was at “arm’s length” from Claimant Duvall. However, when testifying he queries, “. . . how long would it have taken me to get that red flag out of the box?” His testimony reveals that the red flag was not readily available as the Organization asserted. We must conclude that where flagman protection was required, neither of the Claimants complied with Rule 6.19.

The Carrier has a reasonable expectation that a flagman has a flag in his possession to perform the function properly to protect its employees. The Board cannot replace the Carrier’s intended application of a rule where doing so would create an ambiguous interpretation of a critical safety procedure. Based on the foregoing, we do not find a formal reprimand and one-year review period 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 28th day of January 2022.