

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 44746  
Docket No. MW-46527  
22-3-NRAB-00003-210276**

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

**(Brotherhood of Maintenance of Way Employees Division –  
(IBT Rail Conference**

**PARTIES TO DISPUTE: (  
(BNSF Railway Company**

**STATEMENT OF CLAIM:**

- “(1) The discipline (dismissal) imposed upon Mr. J. Clinton, by letter dated September 11, 2019, for violation of MWOR 8.2 Position of Switches and MWOR 8.3 Main Track “Switches was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File B-M-3341-S/11-20-0081 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Clinton: ‘... must be reinstated and immediately paid for his lost time from being pulled from service including any and all overtime also the day to attend the investigation, including any and all overtime paid to the position he was assigned to be working, any expenses lost, difference in pay, and we also request that Mr. Johnson (sic) be made whole for any and all benefits, and his record cleared of any reference to any of the discipline set forth in the letter received by the Organization on September 11, 2019 letter from Bill Shulund. 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 including weekends, lost and holiday pay for each holiday lost, to be paid at the rate of the position assigned to the claimant 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 service; 4) health, dental and vision care insurance premiums, deductibles and co-pays than (sic) he would not have paid had he not been unjustly removed from service. 5) Any 401K he had to use and the payment for match and match that he would have been making during this time.”

**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.

**FACTUAL BACKGROUND:**

The Carrier removed the Claimant from service and informed him to attend an investigation in connection with an alleged critical decision failure when the hand-operated switch at Bowbells, North Dakota was left lined and locked in the reverse position on August 10, 2019 resulting in a run through switch on the Crosby Subdivision while assigned as a track inspector.

Controlling here is Rule 40 of the Agreement which, in pertinent part, reads:

**“RULE 40. INVESTIGATIONS AND APPEALS**

- A. An employee in service sixty (60) days or more will not be disciplined or dismissed until after a fair and impartial investigation has been**

held. Such investigation shall be set promptly to be held not later than fifteen (15) days from the date of the occurrence, except that personal conduct cases will be subject to the fifteen (15) day limit from the date information is obtained by an officer of the Company (excluding employees of the Security Department) and except as provided in Section B of this rule. \* \* \*

- D. A decision shall be rendered within thirty (30) days following the investigation, and written notice thereof will be given the employee, with copy to 5 | Page “local organization’s representative. If decision results in suspension or dismissal, it shall become effective as promptly as necessary relief can be furnished, but in no case more than five (5) calendar days after notice of such decision to the employee. If not effected within five (5) calendar days, or if employee is called back to service prior to completion of suspension period, any unserved portion of the suspension period shall be canceled.
- E. The employee and the duly authorized representative shall be furnished a copy of the transcript of investigation, including all statements, reports, and information made a matter of record. \* \* \*
- G. If it is found that an employee has been unjustly disciplined or dismissed, such discipline shall be set aside and removed from record. He shall be reinstated with his seniority rights unimpaired, and be compensated for wage loss, if any, suffered by him, resulting from such discipline or suspension.”

**Position of Organization:**

The Organization maintains the Carrier violated Rule 40 in that it failed to specify the charges being made against the Claimant. In its view, the Rule was further violated in that the hearing officer failed to conduct the hearing in an impartial manner.

The dismissal decision was made by Division Engineer W. Shulund, who had discussed the case prior to Investigation with the Claimant’s representative and who also had made the decision to remove the Claimant from service. In the Organization’s view, this made him incapable of being fair and impartial, yet he wrote the letter of Dismissal.

As the Organization sees it, the Conducting Officer also demonstrated unfairness by presenting his own testimony.

The Organization notes that the Carrier exonerated all three trainmen, and laid the entire fault on the track inspector. The existence of prejudgment is undeniable. The August 19, 2019 investigation was held just to confirm that previous hasty determination. The Claimant was denied any right of a fair and impartial investigation.

**Position of Carrier:**

On August 10, 2019, the Claimant had a track warrant and inspected two switches. When he came to the third, he threw the switch but left the area without lining it. There is no evidence that anyone operated the switch after him. A train did come along later that day, hit the emergency brakes and ran through the switch without damage. In the Carrier's view, the conclusion that the Claimant was responsible was entirely reasonable.

**Analysis:**

We do not find a fatal due process error in this case. The contractual requirement is as follows:

- C. At least five (5) days advance written notice of the investigation shall be given the employee and the appropriate local organization representative, in order that the employee may arrange for representation by a duly authorized representative or an employee of his choice, and for presence of necessary witnesses he may desire. The notice must specify the charges for which investigation is being held. Investigation shall be held, as far as practicable, at the headquarters of the employee involved.

The charging letter stated:

An investigation has been scheduled at 0900 hours, Friday, August 23, 2019, at the Gavin Yard Conference Room, 6400 4th Ave NE, Minot, ND, 58703, for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged CRITICAL

**DECISION FAILURE** when the hand-operated mainline switch at Bowbells, ND was left lined and locked in the reverse position resulting in a run-through switch on the Crosby Subdivision while assigned Track Inspector.

We find this to be quite adequate in putting the Claimant and the Organization on notice of the charges to be investigated.

As to the conduct of the hearing officer, though certainly it left much to be desired, we do not find that the Claimant's case was prejudiced by the demeanor of the Hearing Officer. In addition we are not persuaded by the argument that Shulund prejudged the case. The decision to remove an employe from service pending Investigation should be a function of the allegations being made, and therefore does not indicate prejudgment of the facts. Statements made to Union representatives should not be a basis for resolving a claim because this would have a chilling effect on the ability of the parties to talk to each other.

The facts of record give the Carrier a substantial basis for concluding that the Claimant was responsible for the switch being left unlined. There is no evidence to support any other conclusion. At the time of this incident, the Claimant was under a review period for fouling the track without authority. It follows that the Carrier's selection of penalty was proper.

**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 6<sup>th</sup> day of May 2022.