

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44760
Docket No. MW-46450
22-3-NRAB-00003-210305**

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

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

PARTIES TO DISPUTE: (

(Indiana Harbor Belt Railroad Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed upon Mr. R. Parres, III by letter dated August 18, 2020, for alleged violation of GCOR 1.6, 1.1.3, 1.1.1, Roadway Worker 3004 and Title 49 CFR 213.135 in connection with allegations that on July 22, 2020, while assigned as a welder and the employee in charge of his work group he left a track defect in the 17 Switch at the south end of the Michigan Avenue Yard located in East Chicago, Indiana was arbitrary, excessive and in violation of the Agreement (Carrier’s File 20-113 IHB).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. Parres, III shall now be made whole by ‘... restoring all rights and benefits and compensate him for all lost straight time, overtime and double hours denied beginning July 23, 2020 and continuing until such time he is restored to active duty. Additionally, the Organization requests the Carrier expunge the charges from his personnel record and otherwise make him whole.’”**

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.

After investigation held August 4, 2020 and by letter dated August 18, 2020, the Claimant – an employee in the Carriers service for four years – was dismissed for alleged improper grinding of a switch discovered by the Carrier on July 22, 2020.

On July 17, 2020, the Claimant was a Welder and was assigned by Supervisor of Material J. Lemmon to grind and adjust the 17 switch at the south end of the Carrier's Michigan Avenue Yard. On July 22, 2020, Supervisor Lemmon and Production Engineer E. Ritter observed that the 17 switch at issue was freshly ground, but the gap point was left open and not adjusted after the grinding operation with the gap measuring at 3/16 of an inch. The track was then taken out of service. Tr. 27-28.

On July 23, 2020, Supervisor Lemmon spoke with the Claimant and asked for the list of maintenance items which showed that the Claimant ground the right-hand point on the 17 switch in issue and the Claimant stated that he did the grinding. Tr. 28. According to Lemmon (Tr. 28-29):

- A. I asked him if he adjusted it after he ground it. He said, no, and that he didn't see any exception to the points. I then informed Mr. Parres that the point was gapped in excess and it had the potential for derailment. I also informed him that it had to be removed from service.**

Switch points must have a secure fit to the stock rails. ...

Supervisor Lemmon testified that according to FRA rules, there is to be no gap and there must be a secure fit with tension on the switch stand which, upon inspection, was not present on the switch worked on by the Claimant. Tr. 30-31;

Investigation Exhibits 5 and 6 (photographs showing the section ground and the gap). According to Lemmon, the Claimant did not adjust the switch after the grinding operation and there was an opening which was unsafe leaving a potential for a derailment. Tr. 33-34.

Welder Helper Garcia worked with the Claimant on the switch serving as a Watchman. According to Garcia, after the Claimant finished grinding, Garcia operated the switch and there was tension on the switch stand. Tr. 51. However, according to Garcia, he did not observe whether there was a gap as it was not his job to do so. Tr. 52.

The Claimant testified that he did grinding work on the 17 switch at the south end of the Michigan Avenue Yard. Tr. 80-82. According to the Claimant, the grinding work was performed on July 22, 2020 during the morning and he ground the right-hand stock point at the switch “very lightly because the overflow was almost non-existent” and, upon completion of that task, he asked Garcia to operate the switch and then “I went and stood over the switch point that I ground and I did not see any discrepancies whatsoever.” Tr. 83, 85. According to the Claimant, when he completed working on the switch, it did not look like the photographs introduced by the Carrier which showed the gap. Tr. 84. Moreover, according to the Claimant, after Garcia operated the switch, Garcia did not indicate there was a problem with tension on the switch stand. Tr. 87.

Substantial evidence supports the Carrier’s position that the Claimant did not properly grind the 17 switch at the south end of the Carrier’s Michigan Avenue Yard as charged. The Claimant admits that he performed the grinding during the morning of July 22, 2020 and the evidence sufficiently shows that by the afternoon there was a gap on the newly ground switch discovered by Supervisor Lemmon and Production Engineer Ritter. There is no reasonable explanation other than an improper grind to show how the gap could appear within a matter of a few hours. Under a substantial evidence standard, that is enough for the Carrier to meet its burden.

The Claimant’s prior record shows that in his short term of employment with the Carrier and just from 2018, the Claimant was assessed a serious offense in July 2018 (one training day); a serious offense in July 2019 (one training day); a serious offense in October 2019 (five-day suspension); and a major offense in November 2019 (30-day suspension). Given that disciplinary record for this short-term employee, dismissal was progressive and therefore not arbitrary.

The Organization makes a series of procedural arguments that we find to be without merit. With respect to one of its arguments, however, the Organization asserts that the Claimant was denied his due process right to confer with an Organization representative before providing a written statement. There is insufficient evidence in the record to demonstrate that the Claimant was denied that ability so as to change the result in this case.

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 29th day of July 2022.