

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44839
Docket No. MW-47100
23-3-NRAB-00003-220179**

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:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [five (5) day actual and twenty-five (25) day Level S record suspension with three (3) year review period] imposed upon Mr. A. Balen, by letter dated August 20, 2020, for alleged violation of MWOR 6.51 Maintaining a Safe Breaking Distance was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File T-D-6517-J/11-20-0537 BNR).**
- (2) The appeal* as presented, by letter dated December 15, 2020, to General Director Labor Relations Joe Heenan shall be allowed as presented because said claim was not disallowed by Mr. Heenan in accordance with Rule 42.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant A. Balen shall have his record cleared of the charges leveled against him and he shall be compensated for all wage loss suffered.**

***The initial letter of claim will be reproduced within our initial submission.”**

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 asserts Carrier Manager J. Fluck observed Claimant less than 300 feet behind another piece of equipment in violation of MWOR 6.51 Maintaining a Safe Braking Distance. Following investigation, Claimant was found to have violated MWOR 6.51 and was issued a five-day actual and twenty-five-day Level S record suspension with a three-year review period. The Organization has protested the propriety of this disciplinary action, and the claim has been processed through the grievance procedure to hearing before the undersigned Board.

Position of Organization:

The Organization disputes the credibility of the Carrier's witness, contending that he has been caught lying before. It cites Award 42618 where he was found to have testified to dates that were not true after being under oath. The Organization concludes that the Carrier cannot meet its burden of proof.

Position of Carrier:

Carrier Manager J. Fluck set up an "operations test" at or near MP 223 on the Staples Subdivision by measuring out the distance of 300 feet from a track mile post marker. From his vantage point on a bridge overpassing the rail, he observed the machine consist pass through the area. As Claimant's machine came into view, Fluck observed Claimant's machine traveling within 300 feet of the machine in front of his. This was in violation of the rules regarding maintenance of a safe braking distance.

It further notes that the conducting officer is the sole judge of the credibility of witnesses, and his/her judgement of credibility is not to be second-guessed by an arbitration board.

Analysis:

We are not persuaded that witness Fluck was lying. The testimony referenced in Award 42618 was in a trial before the U. S. District Court, District of Minnesota. The Board in that case stated:

When the individual questioning Roadmaster Fluck said "Monday morning, the 6th," that individual misspoke, since Monday was actually August 5, 2013. Roadmaster Fluck's sworn testimony establishes the Carrier's first knowledge of an alleged violation regarding overtime as August 5 rather than August 6, 2013."

The misstatement indicating that August 6th was a Monday does not establish a lack of credibility. Confusion about the day of the week is not readily discernible as a falsehood spoken to sway the result of the Investigatory Hearing. This type of mistake is not sufficient to destroy the credibility of a manager for the rest of his service.

Fluck testified that he measured the distance to verify his observations. His testimony was credited by the Hearing Officer, and was sufficient to supply the Carrier with substantial evidence of a rules violation.

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 10th day of March 2023.