

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 45147
Docket No. MW-47721
24-3-NRAB-00003-221123**

The Third Division consisted of the regular members and in addition Referee Diego Jesús Peña 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:

- (1) The discipline (dismissal) imposed upon Mr. H. Matson, by letter dated July 9, 2021, for alleged violation of MWOR 1.1.2 Alert and Attentive in connection with his alleged failure to be alert and attentive resulting in running his machine through a switch that was not properly lined at/near Mile Post 360.3 on the Akron Subdivision on May 18, 2021 was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File C-21-D070-16/10-21-0235 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant H. Matson shall now be reinstated to service, have his record cleared of the charges leveled against him and he shall be compensated in accordance with Rule 40G of the 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.

Factual Background

Claimant Howard Matson held the position of Machine Operator in the Carrier's Maintenance of Way Department for approximately 27 years prior to being dismissed for failing to be alert and attentive when he ran a regulator machine through a switch that was not properly lined for movement.

On May 18, 2021, Claimant was working with a surfacing gang just outside Haigler, Nebraska. He was operating a regulator machine. As the work progressed towards MP 360 on the Akron Subdivision, the surfacing gang foreman informed the Claimant that the switch in his regulator's path may not be lined for the machine to travel safely. Despite being notified, the Claimant proceeded to operate his machine through the switch, and the regulator came off the siding. No one was injured, and there was no damage to the regulator, the track or the switch.

The gang foreman immediately contacted their supervisor, Roadmaster Michael Paz, who drove from McCook, Nebraska to the accident site more than 75 miles away. The Claimant admitted to Mr. Paz that the gang foreman told him about the switch might not be properly lined for travel, but he proceeded anyway. When asked why, the Claimant said it appeared to him the switch was properly lined. Later that same day, the Carrier issued a notice of investigation.

The Carrier conducted an investigation on June 11, 2021 in McCook, Nebraska, to determine if the Claimant failed to be alert and attentive when he operated his machine through a switch that was not properly lined. Maintenance of Way Operating Rule (MWOR) 1.1.2, Alert and Attentive states:

Employees must be careful to prevent injuring themselves or others. They must be alert and attentive when performing their duties and plan their work to avoid injury.

On July 9, 2021 the Carrier dismissed the Claimant for violating MWOR 1.1.2. The dismissal notice states that the Carrier considered the Claimant's discipline record. The Claimant's discipline history reflects that since 2011, he has been suspended or reprimanded 6 times for failure to be alert and attentive and failure to operate equipment properly that resulted in damage to railroad property.

Carrier's Position

The Carrier argues that it has satisfied its burden of proof and there is substantial evidence supporting the dismissal of the Claimant. The evidence clearly established that the Claimant failed to make sure the switch was properly lined for movement. His gang foreman warned him that the switch was not lined, but the Claimant proceeded through regardless.

The Carrier also maintains that discipline was properly assessed. While the Carrier acknowledges that the Claimant was a long-time employee, it is also true that the Claimant had a history of failing to be attentive when operating machinery. He had also received a Level S Suspension with a 36-month review period on May 13, 2021 with a last chance leniency. The Claimant knew that any additional serious violations committed within this 36-month period could subject him to dismissal.

Position of Organization

The Organization believes the Carrier failed to satisfy its burden of proof. It maintains that the Claimant's decision to proceed through the switch was not an act of recklessness or negligence. Additionally, the Organization points out that there were other mitigating circumstances that the Carrier failed to consider, specifically, that it was raining at the time of the incident. It is also important to note that no one was injured. Another important factor is that the gang foreman told the Claimant that it might not be lined. When considering all these other circumstances, the Organization believes dismissal was too harsh a penalty and excessive on these facts. The Organization asks that this long-term employee be restored and made whole.

Analysis

The Board sits as an appellate review forum in discipline cases. As such, it does not weigh the evidence *de novo*. The Board's function is not to substitute its judgment for that of the Carrier, nor decide this matter in accord with what the Board believes should have been decided had it been the Board's decision to make. Rather, the Board's inquiry is to determine whether sufficient evidence exists to sustain the discipline imposed by the Carrier. If there is sufficient evidence supporting the Carrier's decision, then the Board cannot disturb the penalty unless the record reflects that the Carrier's decision was unjust, unreasonable or so arbitrary as to constitute an abuse of discretion.

In discipline cases, the burden of proof is on the Carrier to establish that substantial evidence supports the investigating officer's decision to impose discipline. The degree of proof required is substantial evidence, which is more than a mere scintilla but less than a preponderance.

The Board has reviewed the record carefully. The Board finds that there is substantial evidence supporting the Carrier's determination that the Claimant violated MWOR 1.1.2. The Claimant was advised that the switch might not be properly lined, but he proceeded anyway. The Board also reviewed the record for mitigating circumstances and finds that none of the situations alleged by the Organization was significantly sufficient to mitigate against dismissal.

In reviewing a Carrier's decision to discipline a long tenured employee, the Board always scrutinizes the record and the claimant's history with the Carrier. While the Claimant had 29 years of service, unfortunately he also had a history of failing to operate machinery carefully and safely. Over the years, the Carrier had shown the Claimant patience, culminating in a last chance suspension with a 36-month review period commencing 2 months prior to the incident in this case. And while no one was injured in this incident, it became clear to the Carrier that it could no longer trust the Claimant to operate machinery safely or attentively.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 22nd day of February 2024.