Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
THIRD DIVISION

Award No. 45453
Docket No. MW-48314
25-3-NRAB-00003-240074

The Third Division consisted of the regular members and in addition Referee Michael Capone when award was rendered.

(Brotherhood of Maintenance of Way Employes 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 [seventy-five (75) day suspension] imposed on Mr. J. Battreall by letter dated December 20, 2022 for his alleged violation of General Code of Operating Rule (GCOR) 1.6 when, on November 23, 2022, while working near Mile Post 13 on Carrier main line track and while assigned as a welder he refused to perform his duties as a welder after his good faith challenge report was resolved was imposed [sic] without a fair and impartial investigation, without "the Carrier meeting its burden of proof, in violation of/conflict with the Agreement and was without merit (Carrier's File 22-146 IHB).

(2) As a consequence of the violation referred to in Part (1) above, Claimant J. Battreall shall now '… be immediately reinstated, made whole for any lost time including overtime, and that any mark made into his personal file for the Carrier's assessment of discipline be removed for a protected activity under the BMWED's CBA.'"

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, James Battreall, was employed by the Carrier on September 16, 2010 and currently holds a Welder Helper position. On December 12, 2022, he was assessed a 75-day suspension for allegedly violating the General Code of Operating Rule 1.6, Conduct; (3) Insubordination, for refusing to perform his duties as a welder after his good faith challenge to a safety concern was resolved. The Claimant filed a Good Faith Challenge Form (hereinafter referred to as the "GFC") on November 23, 2022, asserting that the Carrier was not in compliance with the On-Track Safety Manual Rule 3600, Adjacent Controlled Track and Rule 3504, "Stationing watchmen and advance watchmen". After his challenge was addressed by the Carrier, the Claimant refused to work and was removed from service for insubordination.

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. The Board does not find any procedural error in the record that would negate a review of the merits.

Upon a careful review of the evidence and testimony of the witnesses, we find substantial evidence in the record to establish that the Claimant violated the General Code of Operating Rules ("GCOR") 1.6. The Claimant refused to perform the assigned thermite welding after Carrier officials investigated his claim of an unsafe condition and found no violation of the applicable rules. The documentary evidence and testimony of Carrier officials and the Claimant's co-workers establishes that there was no need or requirement to provide adjacent track protection, and that the Claimant could have performed his duties.

On November 23, 2022, Carrier officials met with the Claimant and explained that Safety Rule 3600 and 3603(2) did not require "an adjacent controlled track" when a rail puller was being used to perform a "minor correction". The Claimant did not disagree but continued to refuse to work then claiming he was entitled to an

inspection report for the rail puller used to join rail when welding. Nothing in the record indicates the Carrier was required to produce an inspection report.

The record also indicates that the Claimant was previously told by Manager of Production David Flores, on November 10, 2022, that adjacent track protection was

not required. The Claimant had asked Mr. Flores to contact the Federal Railroad Administration ("FRA"). The FRA Track Inspector confirmed that adjacent track protection was not needed. The Claimant performed his job on November 10 and was told he could call the inspector, if necessary, which he did not do.

We find no basis to ignore the Carrier's conclusion that the Claimant's testimony is unreliable and unsupported by the record. Arbitral precedent maintains that the Board sits in review of the Carrier's credibility determinations made on the property and does not make *de novo* findings.

The Claimant testified he was told by an FRA inspector that thermite welding was a "major correction" that would require adjacent track protection. However, the record indicates that the Claimant did not speak with the same FRA inspector who reviewed the issue with Mr. Flores. Instead, he spoke with a different FRA official who when contacted by Mr. Flores explained that the Claimant provided him with different information and therefore, based on discussion with Flores on January 17, 2023, the official agreed that the thermite welding that was to be performed by the Claimant was a "minor correction" and did not require adjacent track protection. Moreover, the record confirms that the Claimant did not have the discussion with the FRA until after he was removed from service on November 23, 2022 and therefore did not have a credible basis to claim he was entitled to track protection. Moreover, he could not cite a rule which required such protection.

During the hearing and investigation, the Claimant changed his original basis for the GFC when he claimed the rail puller and truck boom had the potential to foul the adjacent main line track 2. The Claimant produced no evidence to support his affirmative defense. He also claimed his long legs could potentially foul the adjacent track. However, the undisputed evidence was that the main line track 2 was approximately eight feet from where the welding was taking place. Nothing in the record supports the Claimant's assertion.

The record further confirms he was not responsible for using the rail puller and that his co-workers operated the equipment on November 23, 2022 without

fouling the adjacent track and without incident. In addition, his co-workers stated on the GFC form that they were "OK to work" indicating they did not have a safety concern.

We do not concur with the Organization's assertion that the Carrier violated Rule 44 – <u>Safe Work Environment</u>. It argues that the Carrier violated the rule when

it removed the Claimant from service for refusing to work due to an unsafe condition. The Organization argued that the Claimant "believes" he had a legitimate safety concern in violation of the rules and regulations. It maintains that where the dispute over the Claimant's belief is not resolved, the employee is not to be penalized until the "Safety Dispute Panel" has made a determination. Rule 44, in pertinent part reads as follows:

> **Management agrees to ensure that all applicable local, state, and federal laws or regulations and carrier safety rules are properly applied. It shall not be a violation of the agreement or any company rule for an employee or employees to refuse to start work, return to work, or continue working when an employee believes that a condition exists that violates an applicable local, state or federal law or regulation or carrier safety rule. Any employee exercising this right will not be subject to discharge or to any form of discipline.**
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> *** * ***
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> **Disputes which cannot be resolved shall be documented as to time, location, persons involved and the rules and applications at issue, and referred to the Safety Dispute Panel for prompt review and resolution. The safety [sic] Dispute Panel shall consist of the following:**
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> **1. An available Local Representative designated by the BMWE**
>
> **2. If necessary, the designated BMWE Assistant General Chairman having jurisdiction**
>
> **3. The IHB Chief Engineer's designated representative**
>
> **The safety Dispute Panel will examine disputes referred to it for resolution including review of documentation and other information needed to make a determination.**

The Claimant did not provide any evidence "that a condition exists that violates an applicable local, state or federal law or regulation or carrier safety rule." The record confirms that on November 23, 2022, he was informed the rules he cited in his GFC form were not applicable and that Rules 3600 and 3603 governed the matter. The

Claimant did not dispute these findings but instead raised other concerns without citing a violation of an applicable law, regulation, or safety rule. The testimony of his supervisors and Welder Jorge Garcia confirmed that there was no risk to fouling the adjacent track on November 23, and therefore no violation existed, which resolved the dispute. Given the foregoing, we conclude there was no violation of Rule 44.

Lastly, we reject the Organization's strenuous argument that the FRA's subsequent change in its interpretation of what constitutes a "minor correction" and "major correction" when operating certain on-track equipment as sufficient grounds to dismiss the charges and related discipline. The FRA did not change its position until February 2, 2023. The instant matter occurred approximately three months earlier when the FRA verified adjacent track protection was not needed since the work being performed was a "minor correction", which confirms that the Claimant did not have grounds at that time to refuse to work.

Having found that the record establishes the Claimant's culpability, we move to our review of the discipline assessed and find it is not excessive. The Claimant has a less than stellar disciplinary record which contains numerous serious violations, some of which resulted in suspensions from service. Moreover, insubordination is a serious infraction which arbitral precedent has found to be grounds for severe discipline up to and including dismissal. As such, we do not find the discipline imposed to be 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 3rd day of April 2025.

LABOR MEMBER'S DISSENT
TO
AWARD 45453, DOCKET MW-48314

(Referee Michael Capone)

It is unfortunate that the price the Claimant had to endure for improving safe working conditions for bargaining unit employes with this Carrier was a seventy-five (75) days suspension without pay.

The roadway workgroup the Claimant belonged to was tasked with performing thermite welding utilizing a rail puller on twenty-five (25) mile per hour double main track, in a curve (Tr.P.121), with 13'8" track centers (Tr.P.123). The work was located on the south rail of Track 1, closest to Track 2 (Tr.P.121). The Claimant believed that it was unsafe to perform this work without advanced watchman, track out of service or foul time (Tr.P.120) as he would be operating equipment and performing work between Tracks 1 and 2. The Claimant challenged a Carrier directive which otherwise instructed his workgroup to work and operate equipment with the potential to foul the adjacent track without adjacent track protection, as stated by the Claimant in testimony as follows:

Tr.PP.134&135:

"Q Mr. Battreall, why did you fill out a good faith challenge form?

A I filled out the good faith challenge form because I felt unsafe to get a high rail vehicle on a main track and unload the rail puller onto that track that I was on.

Q Why did you feel unsafe to do that work?

A Because I had a potential to foul the adjacent track.

Q What had the potential to foul the adjacent track, sir?

A The truck boom, as well as the rail puller that is attached to the truck boom. The rail puller is attached to the truck boom which is attached to the truck on track."

The Carrier disagreed based upon its belief that the work challenged constituted a minor correction, which according to the Carrier allowed for an exception to the adjacent track protection rule. As such, the Carrier charged and found the Claimant in violation of GCOR Rule 1.6 Conduct, (3) Insubordination due to the Claimant's alleged refusal to perform work which he believed to be unsafe. In connection therewith, the Claimant was assessed a Seventy-Five (75) days suspension to be served from November 23, 2022 through and including February 5, 2023.

At the outset, it is important to clarify the meaning of a minor correction exception to adjacent track protection under Federal regulations. Title 49 CFR § 214.336 On-track safety procedures for certain roadway groups and adjacent tracks defines minor correction as follows:

> *"Minor correction* means one or more repairs of a minor nature, including, but not limited to, welding, spiking, anchoring, hand tamping, and joint bolt replacement, that are accomplished with hand tools or handheld, hand-supported, or hand-guided power tools. The term does not include machine spiking, machine tamping, or any similarly distracting repair." (Emphasis in Italics in original)

Following the Carrier's assessment of discipline, the Organization contacted the Federal Railroad Administration (FRA) for guidance on this matter. The FRA provided the definition of a *Minor correction* and wrote per e-mail dated Tuesday, January 31, 2023 (Attachment No. 1 to Employes' Exhibit "A-4") that the work involved did not constitute a minor correction and therefore adjacent track protection was required under § 214.336 due to a distraction element. Specifically, the FRA stated:

> "FRA includes welding as an example of 'minor correction.' However, any welding operations taking place where the roadway work group would foul an adjacent track for any reason are already required to establish on-track safety on that adjacent track under the existing RWP regulations, even in the absence of §214.336's requirements. The exceptions noted in § 214.336(e) do not affect this existing requirement for on-track safety.
>
> One keynote is if the welding process requires the use of a crane or other similar devices, adjacent track protection would be required during the times the machine was in use if all the other aspects of adjacent track protection were present (reference 214.336(a)). For example, if the welder uses the boom of the welding truck to unload a rail puller while on track. This would create the distraction element which was a major factor in developing the adjacent track rule; FRA would not consider this minor correction, since it does not align with the minor correction definition. (emphasis added)

All other evidence regarding what the FRA may or may not have said was derived solely from alleged phone conversations between Carrier officials who removed the Claimant from service and FRA officials, as was testified to by a Carrier official at the Claimant's hearing. The only direct written evidence from the FRA was the e-mail dated Tuesday, January 31, 2023. Consequently, by Friday of that very week the Carrier changed its policy to reflect the forecited language in compliance with the FRA's interpretation of § 214.336. Specifically, the Carrier's policy was revised, as follows:

> "Engineering Team,

As of 2/2/2023 FRA has given more stringent guidance on minor correction as it pertains to Adjacent Controlled Track Protection. Effective 2/2/2023 Engineering Employees operating on track equipment, equipped with a crane, need to provide Adjacent Controlled Track Protection before the crane is taken out of its cradle. The protection will need to stay applied until the boom is positioned back in the cradle safely. If there are any questions, please feel free to reach out to the IHB Safety Department.

Sincerely,

IHB Safety Department"

Nevertheless, the Carrier insisted on continuing to punitively discipline the Claimant with a seventy-five (75) days suspension continuing through February 5, 2023, despite FRA guidance and the Carrier's policy change effective February 2, 2023.

The collectively bargained for process outlined within Rule 44 allows for the above to occur without the imposition of a seventy-five (75) days suspension. Rule 44 – SAFE WORK ENVIRONMENT states in, relevant part:

"(a) Management agrees to make every reasonable effort to provide a safe and healthful work environment, free from intimidation and harassment, that meets or, where possible, exceeds all applicable local, state and federal safety standards and to ensure compliance with management's safety rules. Management agrees to ensure that all applicable local, state, and federal laws or regulations and carrier safety rules are properly applied. It shall not be a violation of the agreement or any company rule for an employee or employees to refuse to start work, return to work, or continue working when an employee believes that a condition exists that violates an applicable local, state or federal law or regulation or carrier safety rule. **Any employee exercising this right will not be subject to** discharge or to **any form of discipline**." (emphasis added).

There is no question that the Claimant believed the Carrier was asking him to work in an unsafe manner. In the event an employe believes that a condition exists that violates an applicable local, state or federal law or regulation or carrier safety rule, the employe has the right *to refuse to start work, return to work, or continue working*. There is no requirement derived from Rule 44(a) that the employe cite the applicable local, state or federal law or regulation or carrier safety rule. The fact that the Claimant may have cited a different operating rule on a Carrier created good faith challenge form (Transcript Exhibit No. 2) does not change the fact that the Carrier's application of its policy was later determined by federal regulators to be unsafe. Nor does it change Rule 44's clear and unambiguous mandate that any employe exercising this right will not be subject to discharge or any form of discipline. In the event that an employe believes a condition exists that violates an applicable local, state or federal law or regulation or carrier safety rule, there is a bargained for process outlined within Rule 44(b) which is triggered, as follows:

"(b) Should there be a dispute on the application of safety rules, employees must specifically state their concerns. The employee in charge will discuss appropriate actions to resolve such concerns. If no resolution can be found, the employee(s) who dispute the application will have the right to not commence the assignment, without fear of retribution or retaliation. The next level of supervision shall immediately be contacted to mediate and resolve the dispute. Disputes which cannot be resolved shall be documented as to time, location, persons involved and the rules and applications at issue, and referred to the Safety Dispute Panel for prompt review and resolution. The safety Dispute Panel shall consist of the following:

1. An available Local Representative designated by the BMWE

2. If necessary, the designated BMWE Assistant General Chairman having jurisdiction

3. The IHB Chief Engineer's designated representative

The safety Dispute Panel will examine disputes referred to it for resolution including review of documentation and other information needed to make a determination. The panel will provide the employee and supervisor written findings regarding their determination which shall be binding on the parties. A copy shall also be provided the Chief MW Engineer."

Finally, in the event the Carrier believed that the Claimant was abusing or misapplying the workplace safety provisions, Rule 44(c) provides that such allegations shall be referred to the Safety Dispute Panel for investigation. Rule 44(c), states, as follows:

"(c) Abuse or misapplication of the workplace safety provisions of this agreement shall be referred to the Safety Dispute panel for investigation. The panel shall recommend actions to address such matters to the Chief Engineer and General Chairman, or Assistant General Chairman if the General Chairman is not available."

This incident was not referred to the Safety Dispute Panel for resolution or investigation. Instead, the Claimant was improperly removed from service and disciplined for insubordination. The Claimant's manager testified that he was unsure if the on-track safety issue had been resolved with the Claimant (Tr.P.56). The manager's director [who also happened to remove the Claimant from service (Tr.P.140)] testified that he believed the on-track safety matter had been resolved with the Claimant. The Claimant maintained that the matter was not resolved (Tr.PP.115,117,119,120,121,137,139&140) and that he needed advanced watchman, track out of service or foul time to do his job safely (Tr.P.120). Specifically, the Claimant testified:

<u>Tr.PP.139&140:</u>

"Q Mr. Battreall, in testimony it's heard you have talked to numerous IHB supervisors.

At the end of the discussion were you clear with all IHB supervisors that were involved that you were still unhappy with resolution?

A Yeah. Yes. Yeah. I told them I am unsafe.

Q What happened next, sir?

A I got pulled out of service then.

Q Why did you get pulled out of service?

A For insubordination, when I told them I feel unsafe, I don't feel safe."

The Claimant clearly stated that he believed it was unsafe to perform the disputed work. Furthermore, the fact that the Claimant had correctly deemed the work to be unsafe further supported his assertion in this regard. Consequently, this matter should have been referred to the bargained for Safety Dispute Panel for prompt review and resolution and the Claimant should not have been *subject to discharge or to any form of discipline* pursuant with Rule 44 under the circumstances. The Claimant's actions changed Carrier policy and improved safe working conditions for bargaining unit employes with this Carrier. For all the foregoing reasons, the majority's opinion to uphold a punitive seventy-five (75) days suspension under the facts and circumstances of this record elicits my respectful dissent.

Respectfully submitted,

John Schlismann
Labor Member