

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37359
Docket No. MW-37655
05-3-02-3-791

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

(CSX Transportation, Inc.
PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employees

STATEMENT OF CLAIM:

“Pursuant with Rule 25, Section 3 of the June 1, 1999
BMWE/CSXT CBA, please consider this an appeal in behalf of
R. Y. Harbison (782992), Albany Service Lane.

Date of Hearing: September 11, 2002

Date of Discipline: September 27, 2002

Discipline Assessed: ten (10) days actual suspension

* * *

I respectfully request the discipline assessed Harbison be
expunged from his person (sic) file, he be cleared of any
wrongdoing, and be made whole for his losses if assessed
discipline is served.’[BMWE FILE: Discipline\HarbHA.012]”

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.

At the time of the incident on August 9, 2002, Claimant R. Y. Harbison had established and held seniority as a Track Inspector. He was assigned to the Buffalo Terminal Subdivision at Buffalo, New York, and was working under the supervision of the Assistant Regional Engineer Track J. S. Thoman. The Claimant had accumulated 31 years of unblemished service with the Carrier.

On August 9, 2002, a GRMS inspection car noted alignment deviation on Track No. 2 between Mile Posts 0.4 and 0.7 on the Buffalo Terminal Sub. On August 12, 2002, Foreman A. J. Dukes supervised the surfacing of track at various locations on Track No. 2 between Mile Posts 0.4 and 0.7. The surfacing work required that a speed restriction be placed on the newly worked track until a certain amount of tonnage passed over the track to stabilize it. Rather than place multiple speed restrictions in close proximity to each other, Foreman Dukes simply reduced the speed limit to 25 m.p.h. over the entire section of Track No. 2 between Mile Posts 0.2 and 0.7. On August 13, 2002, the Train Dispatcher contacted the Claimant and informed him that the tonnage requirements had been met and requested that the track be inspected and the slow order removed. The Claimant inspected the freshly worked area and determined that conditions no longer warranted the speed restriction and approved the track for the recommended timetable speed of 30 m.p.h.

On August 13, 2002, the same section of track was inspected by Federal Railroad Inspector R. L. Anderson and Assistant Roadmaster H. Heinz, without notation. At approximately 10:30 A.M., on August 14, 2002, Federal Railroad Inspector Anderson contacted Assistant Regional Engineer Track Thoman and informed him that there was insufficient ballast on Track No. 2, Buffalo Terminal Sub, between Mile Posts 0.4 and 0.7. Thoman inspected the .3 mile of track in question and determined that of the over 1580 feet of track, two areas consisting of a total of approximately 273 feet of that track were shy of ballast.

On August 30, 2002, the Claimant was directed "... to attend a formal hearing on Wednesday, September 11, 2002 ... to determine the facts and responsibility in connection with your improper removal of a slow order on Track No. 2, Buffalo Terminal Sub, Buffalo, New York on August 13, 2002, between mile post 0.2 to mile

post 0.7, as well as your failure to recognize track defects during your subsequent track inspection of this specific track on August 13, 2002. Existing track conditions did not merit removal of the existing slow order. . . .”

The Organization claims that the discipline imposed upon the Claimant was unwarranted, harsh and excessive. It contends that the burden of proof in a discipline matter such as this is on the Carrier and that burden has not been met. First, the Organization claims that a required appeal conference was not held as scheduled. Although the Carrier asserted that an appeal conference was held on October 28, 2002, the Organization denies that said conference ever took place. In addition, even if the Board rejects the Organization’s procedural argument, the Carrier was nonetheless unable to prove the charges against the Claimant. According to the Organization, there is no way that the Carrier can sustain its burden in this matter. The Carrier should now be required to clear the Claimant’s record of any mention of the incident, to compensate him for all lost wages, including lost overtime, and to make him whole for vacation, holidays and seniority.

Conversely, the Carrier takes the position that it met its burden of proof. The Claimant was afforded a fair and impartial Investigation in accordance with the requirements of the Agreement. The Carrier considers the Claimant guilty as charged. According to the Carrier, a review of the transcript developed during the Investigation reveals substantial evidence that the Claimant was responsible for the incident and violated the relevant Rules. In addition, the Carrier contends that the Claimant received a fair and impartial Hearing in this matter.

In discipline cases, the Board sits as an appellate forum. We do not weigh the evidence *de novo*. As such, our function is not to substitute our judgment for the Carrier’s, nor to decide the matter in accord with what we might or might not have done had it been ours to determine, but to rule upon the question of whether there is substantial evidence to sustain a finding of guilty. If the question is decided in the affirmative, we are not warranted in disturbing the penalty unless we can say it appears from the record that the Carrier’s actions were unjust, unreasonable or arbitrary, so as to constitute an abuse of its discretion. See Second Division Award 7325 and Third Division Award 16166.

The Board finds substantial evidence in the record to uphold the Carrier’s position. It proved that the Claimant acted inappropriately when he removed the slow

order. The Claimant should have recognized the track defects before removing the slow order. In addition, the Claimant received a proper Hearing in this matter.

The penalty assessed was reasonable and we will not disturb it. Thus, the claim is denied.

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 24th day of February 2005.