Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 33046
Docket No. MW-33514
99-3-96-3-990

The Third Division consisted of the regular members and in addition Referee Nancy F. Murphy when award was rendered.

(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Level 2 Discipline assessed Track Inspector J. A. Henson, Jr. for his alleged failure to properly inspect track under his jurisdiction on June 6 and 7, 1995 was without just and sufficient cause, unfair, discriminatory and excessive punishment (System File D-233/960014).

(2) Track Inspector J. A. Henson shall now have his record cleared of the charges related to the June 20, 1995 letter of charges and hearing held on June 29, 1995."

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.

J. A. Henson (Claimant) has established seniority in the Track Subdepartment as a Sectionman, Track Foreman and Group 7 Track Inspector. At the time of this dispute, the Claimant was assigned as a Track Inspector and was working as such under the supervision of Manager Track Maintenance J. Asmussen.

On June 20, 1995, the Carrier sent the Claimant the following directive:

> "Please report to the Office of the Manager of Track Programs, Nampa, Idaho, on Thursday, June 29, 1995, at 1 p.m. for investigation and hearing on charges to develop the facts and place responsibility, if any, on charges that you allegedly failed to properly inspect track under your jurisdiction on June 8 and 9, 1995. Specific to, but not limited to, loose, missing and rattled out bolts, indicating a possible violation of Rules 1.1, 1.13, 46.1, 1.6(2) and Chief Engineering Instructions Bulletin 91-002-G, Pages 7 and 8 of 22."

The Investigation was held as scheduled. The Claimant subsequently received a letter informing him that he had been found guilty of the charges against him, and as a result, his record was assessed Level Two (2) discipline, for which he was ". . . required to attend one (1) day of alternative assignment with pay to develop a Corrective Action Plan, to be scheduled for a later date."

The Organization protested the discipline premised upon the following:

1. The Carrier deprived the Claimant of his contractual right to due process as contemplated by the Agreement. The hearing was a "gross miscarriage" of due process as defined within Rule 48, and the instant claim is sustainable on such basis alone.

2. The Carrier failed to meet its burden of proving the charges leveled against the Claimant prior to the hearing and during the hearing. He did not violate the Carrier rules for which he was charged, i.e., because having loose, missing and rattled out bolts was a "common occurrence."

3. The discipline assessed the Claimant was arbitrary, capricious, unwarranted and in violation of the Agreement. The instant claim should be allowed.

In denying the claim, Carrier Manager Engineering Resources asserted that:

"There was an error on the date of charges and was noticed on the date of the investigation, so Mr. Larsen and Mr. Henson were advised of the typographical error and given several opportunities for recess or postponement of the investigation to prepare themselves for the typo error. Mr. Larsen refused any time or postponement so we continued with the investigation.

I held investigation and listened to all testimony offered by Manager Asmussen and Track Inspector Henson and sufficient avenues to obtain bolts and Claimant had used bolts with him on his inspections but failed to exercise those avenues and install bolts to Union Pacific standards. Mr. Henson was relying on new bolts to correct exceptions while bolts were on order and had not been received. Mr. Henson is a veteran at this and had been counseled before about his performance and, in particular, about excessive bolts missing. It is my contention that charges be sustained, and Mr. Henson held accountable for his non-compliance of our Company standards."

At the outset, the Organization alleges that the Carrier violated Rule 48(c) of the Agreement which provides, in pertinent part, that:

"Prior to the hearing, the employe alleged to be at fault shall be apprised in writing of the precise nature of the charge(s) sufficiently in advance of the time set for the hearing. . . ."

Specifically, the Organization refers to the Carrier's original Notice of Formal Investigation in which the charge dates were listed as June 8 and 9, 1995, rather than June 6 and 7, 1995. According to the Organization, the Claimant's entire defense rested upon the fact that he was on vacation on June 8 and 9, 1995, and therefore could not be

held accountable for the "loose, missing and rattled out bolts" on those specific dates. However, prior to the onset of the Investigation the Hearing Officer offered the Organization additional time to prepare the Claimant's defense due specifically to the insertion of the dates of June 8 and 9 rather than June 6 and 7, 1995, an offer which the Organization repeatedly refused. We cannot find that the Carrier's typographical error constitutes a fatal procedural flaw. Any arguable claim of disadvantage was waived when the Claimant and his Representative declined repeated offers of adjournment and proceeded with the scheduled Investigation.

Turning to the merits of the dispute, on June 8 and 9, 1995, Manager Track Maintenance Asmussen conducted an inspection of the area of track for which Track Inspector Henson was assigned responsibility. During the course of the inspection, Manager Asmussen found an "inordinate and unacceptable" number of bolts missing from the joints. At the outset, the Claimant contended that "on several occasions" he had requested new bolts which he deemed necessary to perform the maintenance at issue. Manager Asmussen did not dispute the Claimant's assertion, but stated that he had instructed Mr. Henson to use "readily available" second hand bolts which the Manager deemed sufficient in the interim.

In that connection, the following testimony from Manager Asmussen is not disputed:

> "What I found on the inspection was numerous bolts that had rattled out and had been out for quite some time. There was no shiny marks or marks of recent movement of the nut or the washer or anything else. Most of the bolts, which I reused, were rusted and just laying beside the joints. Some of the nuts were filled with dry mud that I had to actually knock out before I could start the threads on the bolts, indicating they had been there for quite some time.
>
> On the first day, there was a total of 24 defects. Of the 24, 12 of them were simply rattled out bolts that I was able to put back in myself with no problem. On the second day, there was a total of 21 defects. Of the 21, 14 were simply rattled out bolts that just simply slid back in by hand and tightened back up."

Upon further questioning, Manager Asmussen admitted that bolts are a "continuous problem", but went on to state that: "The alarming part to me was the amount of bolts out that appeared to have been out for quite some time."

Based on Manager Asmussen's undisputed testimony, we conclude that the Carrier sustained its burden of proof that the Claimant was negligent in performing his assigned duties on at least two dates in June 1995. The Claimant's argument that unavailability of bolts prevented him from performing the repairs, is effectively refuted by the facts. Manager Asmussen testified that, he was able to "simply slide the bolts back in by hand and tighten them up."

Finally, with respect to the quantum of discipline assessed, there is no dispute that the Claimant received counseling on at least one prior occasion regarding the amount of bolts missing on his territory. In that connection, Manager Asmussen testified:

> "On the last inspection trip I made, there were many, many bolts noted out. On that trip, there was two Federal Railroad Administration inspectors, myself, and a lady from, I believe, the Idaho PUC. The Federal Inspector made 'several' comments about the excessive number of bolts out. I spoke with Mr. Henson to let him know how the inspection went, and told him that the Federal inspectors were especially concerned with the amount of bolts found out."

Therefore, we do not find the Carrier's assessment of Level 2 discipline to be arbitrary, capricious or otherwise inappropriate in all of the circumstances. Based on all of the foregoing, this 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 1999.