

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41594
Docket No. MW-41783
13-3-NRAB-00003-110421**

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company (former Chicago
(and North Western Transportation Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier disqualified Mr. J. Rickert from a track supervisor position as of April 21, 2010 and continuing (System File B-1019C-102/1539043 CNW).**
- (2) As a consequence of the violation referred to in Part (1) above, the aforesaid disqualification shall be removed from Mr. J. Rickert’s record and he shall be reinstated to the track supervisor position and compensated for any wage losses incurred as a result of said disqualification beginning April 22, 2010 and continuing.”**

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 Organization filed the instant claim on behalf of the Claimant alleging that the Carrier violated the parties' Agreement when it disqualified the Claimant from a Track Supervisor position as of April 21, 2010.

The Organization contends that the claim should be sustained in its entirety because (1) the Carrier's improper disqualification of the Claimant was a form of discipline and the Carrier failed to prove the allegations against the Claimant (2) the Carrier failed to afford the Claimant a fair and impartial hearing into these unsubstantiated allegations, and (3) the Carrier's decision to disqualify and remove the Claimant from his Track Supervisor position was unjust, improper, and a direct violation of the Agreement. The Carrier counters that the claim should be denied in its entirety because (1) the Carrier did not violate the Agreement when the Claimant was disqualified as a Track Supervisor (2) this matter did not involve discipline so no hearing was required under Rule 19 (3) the Organization failed to meet its burden to prove that a violation of the Agreement occurred, and (4) the remedy sought by the Organization is excessive.

The Board reviewed the record evidence and finds that the Organization has not met its burden to prove that the Carrier violated the Agreement when it disqualified the Claimant from his Track Supervisor position as of April 21, 2010.

The record reveals that the Claimant marked nine ties during an inspection at MP 31.4 on the Milwaukee Subdivision. Moreover, once he marked those ties, he failed to properly issue a slow order or document the section in the Track Maintenance Planner. Once the marked ties with the defects were discovered by supervision, the track was immediately slowed to ten miles per hour and the defects were corrected later that day. The Claimant clearly failed to deal with the safety situation that he himself had discovered and marked.

It is fundamental that the Carrier has the managerial right to determine the qualifications of its employees. The Carrier properly determined that although the

Claimant had marked defective ties, he failed to log them properly in the book and he failed to issue a slow order. Given that serious failure on the Claimant's part to live up to his responsibilities as a Track Supervisor, the Board cannot find that the Carrier acted in violation of the Agreement when it determined that the Claimant could no longer work that position and disqualified him from it. Therefore, the claim must be 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 18th day of March 2013.

LABOR MEMBER'S DISSENT
TO
AWARD 41594, DOCKET MW-41783
(Referee Meyers)

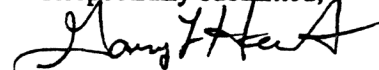
The Majority erred in this case, and thus has wrought a grievous injustice upon the Claimant because the Claimant was disqualified without any showing of a rational basis to do so. While the Majority found that the Carrier was justified in disqualifying the Claimant for failure to properly issue a slow order or to document the section of track in the Track Maintenance Planner, it failed to take into account what should have been a key fact: **During the entire handling of this case, the Carrier never once identified an Federal Railroad Administration (FRA) tie defect at the location involved here.**

The mere fact that nine (9) ties in succession were marked by someone does not prove that a tie defect existed. First, the ties may have been marked for any number of reasons, not only for replacement. Second, FRA Tie Standards require a minimum number of non-defective ties in any thirty-nine (39) linear feet of track. Typically there are twenty-one (21) to twenty-three (23) ties in thirty-nine (39) feet and in Class IV track (such as at this location) no fewer than twelve (12) of those ties must be non-defective. However, in this case, the Carrier never established that any of the nine marked ties were defective under the FRA Standards. Moreover, ties marked for replacement are not always "defective" under the FRA standards, but they may simply be worn and may be replaced as a matter of good maintenance practice.

Notwithstanding that the Carrier failed to show that there was any FRA tie defect at the location, it is also important to note that an FRA Track Inspector inspected the area in question a mere four (4) days before the incident leading to the Claimant's disqualification and found no tie defect at the location involved. The Claimant had inspected the track but found no FRA tie defect and, so, placed no slow order. Then a Carrier officer who was NOT qualified to inspect track per FRA Track Safety Standards happened upon the location and, essentially, panicked when he saw marks on some ties and reflexively placed a ten (10) mph slow order. Without inspecting the area himself, the Manager of Track Maintenance (MTM) sent some of his employees to the location to "repair" the supposed defect (without himself inspecting the area). The two (2) Track Foremen who were sent to take off the slow order and who were both qualified to inspect track per FRA requirements both submitted signed statements attesting to the fact that there was no FRA defect at the location.

To summarize: four (4) FRA qualified track inspectors inspected the location involved and found no FRA tie defect. One (1) unqualified Carrier Officer saw some markings that he did not understand and panicked. The Carrier failed to show a rational basis to disqualify the Claimant. The Majority erred in denying the claim and, as a result, an injustice is perpetuated against the Claimant. I emphatically dissent.

Respectfully submitted,



Gary L. Hart
Labor Member