

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42829
Docket No. MW-43376
17-3-NRAB-00003-160009**

The Third Division consisted of the regular members and in addition Referee I. B. Helburn when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Springfield Terminal Railway Company**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [one (1) day suspension] imposed upon Mr. A. Bussell by letter dated January 9, 2015 in connection with his alleged responsibility ‘. . . that you did not fulfill your duties and responsibilities as an Inspection and Repair (I&R) Foreman. As a result of this the Carrier received Violations from the FRA, which will result in a monetary fine to the company.’ Was arbitrary, capricious, excessive, on the basis of unproven charges and in violation of the Agreement (Carrier’s File MW-15-04 STR).**
- (2) As a consequence of the violation referred to in Part (1) above, the Carrier shall now remove all reference to the aforesaid discipline from Claimant A. Bussell’s record and he shall be compensated for all losses suffered including overtime.**

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, with 15 years' tenure and no prior discipline, worked as an I&S Track Foreman from October 27-31, 2014, but was working as an Equipment Operator on November 6, 2014 when the FRA cited the Carrier for multiple violations following an FRA track inspection. Following a January 5, 2015 hearing, the Claimant was given a one day suspension without pay and a timely claim followed.

The Carrier argues that substantial evidence shows the Claimant's responsibility for not finding the defects for which the FRA levied fines. Claimant's October 31, 2014 inspection of the Class 1 track uncovered no defects. The Carrier was not required to list specific rules allegedly violated in the hearing notice. Reference to Etna, ME rather than actual locations where the alleged violations occurred did not prejudice the Claimant's ability to defend himself, as he was aware of the territory involved. Both the hearing notice and the discipline notice were proper despite the absence of rules allegedly violated in the discipline notice. In light of the Claimant's training and experience, the suspension cannot be said to have been arbitrary, capricious, or excessive.

The Organization asserts that the Claimant was denied his due process rights because the hearing notice mistakenly indicated Etna, ME as the location of the eight FRA violations. The Carrier cannot prove that the violations occurred while the Claimant was working as an I&R Track Foreman. Another inspector inspected the track between November 1, 2014 and the November 6, 2014 FRA inspection and found no defects. Because track defects can occur at any given moment, the Carrier cannot show laxity on the Claimant's part.

The Board finds no diminishment of the Claimant's due process rights. Article 26.1 requires that the hearing notice include "date time, location, assignment and occupation of the employee at the time of the incident" (Carrier's Exhibit H-1). It does not require inclusion of the rule(s) allegedly violated. In essence, the Carrier is simply required to provide sufficient detail about the incident that will be the focus of the hearing so that the Claimant is clear about what must be defended against.

The Carrier has committed a technical violation of Article 26.1 by locating the incident in Etna, ME, although it became clear at the hearing that the track defects resulting in a Carrier fine were not in Etna. The Carrier's failure to be more precise about the location did not mislead the Claimant or prevent him from responding to the Carrier's concerns/allegation. Because the technical violation did interfere with the Claimant's due process rights, the Board sees no reason to set aside the discipline on a technicality.

Turning to the matter of the allegedly faulty inspection, the Claimant last inspected the relevant section of track on October 31, 2014, six days before the November 6, 2014 FRA inspection that identified that gage issue and the seven missing bolts. While the Board acknowledges the testimony that bolts may simply fall off, in the absence of any specific explanation for the FRA findings, it is difficult to accept the Organization's contention that seven bolts fell off in less than a week over a relatively short span of track. The Carrier has provided "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" *Richardson v. Perales*, 402 U.S. 389, 401 (1971). The uncontested FRA inspection report provides substantial evidence that on October 31, 2014 the Claimant failed to fulfill the duties and responsibilities of his I&R Foreman position.

In this particular case, the absence of a specific rule does not justify setting aside the discipline. The general rule is that employees must be informed of the applicable rules before the rules can be enforced, but there are limited exceptions. As an I&R Foreman, having qualified as a Foreman and having also successfully completed the FRA 213 class, the Claimant knew without a specific rule that he was to "patrol track, look for any defects and make sure there's safe passage for any freight or anybody that's going over the line, especially the public". The Carrier simply asked the Claimant to perform competently in a critical position for which he received appropriate training and in which he was experienced. For whatever reason, on October 31, 2014, he fell short of the standard that he acknowledged. Substantial evidence shows that the suspension was warranted.

AWARD

Claim denied.

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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 12th day of December 2017.