

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 42830
Docket No. MW-43377
17-3-NRAB-00003-160010

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

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

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [disqualification as an I&R Foreman and two (2) days suspension] imposed upon Mr. J. Cureton by letter dated November 21, 2014 in connection with alleged findings that ‘. . . you did not fulfill your duties and responsibilities as an Inspection and Repair (I&R) Foreman in Rumford Yard. As, (sic) a result of this the Carrier received a Violation 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-14-32 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 J. Cureton’s record and he shall be compensated for all losses suffered.”

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 28 years' tenure and no prior discipline was working as an Inspection & Repair (I&R) Track Foreman in Rumford Yard at times relevant. On October 6, 2014, an FRA track inspection found multiple violations for which the Carrier was fined. This led to an investigation on November 14, 2014, after which the claimant was disqualified from the I&R Track Foreman position and given a two - day suspension without pay. A timely claim followed.

The Carrier contends that substantial evidence supports the charges as the Claimant found no defective ties for track 7 during his September 8, 2014 inspection, although defects were found for other tracks in the yard. He was FRA qualified and knew what a tie defect was. On October 6, 2014, the FRA track inspector found 11 consecutive defective ties. Cars were on the track when the Claimant last inspected, but he neither had the cars moved to facilitate the inspection nor spiked out the track, which was taken out of service and repaired the day after the FRA inspection. Clearly the Claimant's failure to properly inspect was the cause of the FRA finding of defects. No procedural defects or Organization defenses require modification of the discipline. The hearing notice did not have to specific rules allegedly violated, evidence supporting the charges was adduced, and the discipline properly followed. Questions related to the FRA 213 regulations were appropriate and answers indicated that the Claimant had the knowledge, training, and experience to properly perform his duties. The Claimant agreed with the FRA inspection report. Questions from the Hearing Officer were proper and the inadvertent omission of the hearing exhibits from the transcript did not prejudice the Claimant or the Organization in the filing of an appeal. The disqualification was a legitimate disciplinary measure and was not labeled "permanent" or "infinite." All things considered, the discipline was reasonable and appropriate.

The Organization contends that the hearing was not fair and impartial because the hearing notice and the discipline notice omitted any alleged rules violations. The hearing was not conducted in a fair and impartial manner because at times the Hearing Officer added testimony. The timely transcript was not full and accurate because copies of all exhibits were not attached as requested and were not provided after the omission was pointed out to the Carrier. The allegations remain unproven because the Carrier cannot show that the ties actually were

defective and reference to FRA 213 regulations is irrelevant as ex post facto justification. The discipline was arbitrary, capricious and without merit given the Claimant's tenure and unblemished record. The discipline was imposed only because of the FRA violations and the fine, not because Carrier rules were violated. The Claimant did not intend to disregard track conditions.

The Board finds that the Claimant received a fair hearing. 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 Exhibit K-1). It does not require mention of the rule(s) allegedly violated. Therefore, the absence of allegedly violated rules in the hearing notice cannot be said to have prejudiced the Claimant. Nor does the Board find that the conduct of the hearing rendered it unfair. The omission of the exhibits from the transcript has not been found to have prejudiced the Claimant in this particular case, but the Board restricts the conclusion to this case. The Claimant saw the exhibits at the hearing and, in fact, agreed with the FRA inspection report.

The Carrier's decision not to introduce rules at the hearing requires more extended consideration. When just cause for discipline is considered, the general guideline is that the employer may not discipline for rules of conduct that have not been conveyed to the employees. However, there are limited exceptions relating to conduct that is obviously so detrimental within the workplace as to need no prior caution. The Claimant has been charged with failure to fulfill his duties and responsibilities or, in other words, failure to do his job. The Claimant acknowledged his successful completion of the Foreman class and that he was FRA 213 qualified. Given his training and experience, the Board finds that the Carrier had a right, without stating an explicit rule in this case, to hold the Claimant to the training he had received and to a standard of fulfilling his duties and responsibilities.

The Claimant agreed with the FRA inspection report that found 11 consecutive defective ties on Track 7 in the Rumford Yard. There is no dispute that there were cars on Track 7 that prevented the Claimant's last inspection before the October 6, 2014 FRA inspection that identified the defects. The record shows that the Claimant had the option of having the cars moved so that a proper inspection could take place or take the track out of service until it could be properly inspected. He did neither and therefore failed to fulfill his duties and responsibilities as an I&S Foreman. The Carrier has provided substantial evidence to prove the charge.

Finally, in assessing whether the suspension and disqualification constituted an appropriate response to the violation, the Board has taken the Carrier at its word, based on the on-property correspondence and the submission, that the disqualification has not been labeled as permanent.

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 12th day of December 2017.