

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 42837  
Docket No. MW-43667  
17-3-NRAB-00003-160441**

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 [sixty (60) day suspension] imposed upon Mr. A. Lawrence by letter dated September 23, 2015 for alleged violation of FRA CFR 214.319, Norac Rule 4. Norac Rule 133 Part F, Pan Am Railways On-Track Protection Manual all areas relating to the 'Employee Responsible for On-Track Protection' and Safety Rules PGR-A, PGR-D and PGR-J and for allegedly being negligent in his duties when he purportedly relayed a message that a Form D Line 4 was cancelled without making sure a signal crew was clear of the tracks on August 12, 2015 was without just and sufficient cause and in violation of the Agreement (Carrier's File MW-15-41 STR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant A. Lawrence shall be compensated for all losses suffered as a result of the Carrier's improper discipline.”**

**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 was an Equipment Operator in the Maintenance of Way Department on August 12, 2015 and was cutting brush along a right-of-way with a signal department crew nearby clearing away wires. Foreman R. Gilliland, the Employee Responsible for On-Track Protection (EROP) had obtained track protection. That afternoon Foreman Gilliland cancelled the protection after alerting some of the crew and visually confirming that none were foul of the track. The Claimant had been directly alerted, thus he cleared the track and motioned to the Signal crew to clear as well, which they did. A Signal crew member thereafter complained that he had not personally received a job briefing about the cancelled protection. After a September 9, 2015 hearing, the Claimant was assessed a sixty (60) day suspension for violation of FRA CFR 214.319, NORAC Rule 4, NORAC Rule 133 Part F, Pan Am Railways On-Track Protection Manual relating to EROC and Pan Am Safety Rules PGR-A, PGR-D and PGR-J. The Claimant was also charged with negligence in the performance of his duties. A timely claim followed.

The Carrier asserts that the Claimant accepted authority that he should not have accepted and motioned or yelled at the Signal crew, but did not conduct a personal job briefing with any of them. The Organization's violation of Article 26.8 does not justify modifying the assessed discipline. When discipline was not agreed to off the record, discipline was assessed based on information developed during the hearing. The EROP's actions do not mitigate the Claimant's serious error. The seriousness of the incident and the Claimant's training and experience justify the discipline, which could have been even more severe.

The Organization contends that the Claimant did not receive a fair hearing because the discipline notice relied on three rules not referred to or presented during the investigation as well as on the negligence charge. The lack of due process alone should preclude consideration of the merits. Moreover, the Carrier has not proven the Claimant guilty. He was falsely accused of holding Form D line 4 track protection when he did not and therefore cannot be found guilty of related charges. The Claimant was not delegated responsibility and did not accept responsibility from EROP Gilliland. The rules prevent such delegation of responsibility. Foreman Gilliland and the Claimant provided contradictory testimony, which is a wash.

Two preliminary matters merit attention before the substance of this dispute is considered. First, the Claimant did not receive the fair hearing required by Article 26.1 insofar as charges related to Safety Rules PGR-A, PGR-D and PGR-J are concerned. Fairness and due process require that the Claimant and the Organization be appraised during the hearing of the charges being considered so that there is a reasonable opportunity to respond. The Claimant and the Organization should not have to guess or speculate about what the ultimate charges might be. The failure to make all alleged violations known during the hearing constitutes a form of trial by ambush. Moreover, the inability of the parties to resolve the claim during the on-property progression of this matter leaves resolution to this Board. Without the actual rules being appended to the transcript, the Board has no standard against which to judge the Claimant's actions. The Board finds the negligence charge irrelevant and superfluous. Assuming, arguendo, that the Carrier can prove violations of the above-noted rules attached to the transcript, the proven violations in and of themselves indicate negligence.

The second preliminary matter involves the Organization's reliance on the off-the-record discussions about the measure of discipline to be assessed. Such reliance violates Article 26.8(b). The Board has not factored these discussions into its consideration of the Claimant's appeal. The Board agrees wholeheartedly with the statement in the Carrier's November 15, 2015 denial letter that "it is an elementary concept that violations of that provision would tend to have a 'chilling effect' on future use of said provisions."

The relevant evidence bearing on whether EROP Gilliland delegated EROP authority to the Claimant can be summarized as follows. EROP Gilliland testified that he did delegate authority to the Claimant, while the Claimant testified that EROP Gilliland did not delegate authority and never asked him to tell the Signal crew to clear the tracks in the afternoon, but that he did so as a courtesy. Witnesses Beecher, Landry and Coulombe were not present at the work site, did not hear EROP Gilliland brief the Claimant, Mr. McCaw or Mr. Normandin and cannot confirm or reject the Claimant's version of the events in question. Neither Mr. McGlone nor Mr. Stevens was present at the afternoon briefing before the Form D was surrendered. Thus, the evidentiary record as it pertains only to this appeal establishes the testimony as a wash and there is no way that the Board can determine credibility.

Third Division Award 40443 quotes Third Division Award 32890 as follows:

“ . . . The record contains a direct conflict of testimony between Claimant and Carrier’s primary witness against him, with no supporting testimony for either’s position. In such a situation, where the contradictory evidence can truly be said to result in a ‘net wash,’ the party with the burden of persuasion – in this instance the Carrier – must lose . . . .”

This is the approach this Board must take in Claimant Lawrence’s appeal. His record must be cleared and he must be compensated in accordance with Articles 26.5 and 26.7 for all losses suffered as a result of the suspension. Compensation shall include payment for overtime that likely would have been worked but for the suspension.

**AWARD**

Claim sustained.

**ORDER**

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD**  
**By Order of Third Division**

Dated at Chicago, Illinois, this 12th day of December 2017.