

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42845
Docket No. MW-42708
18-3-NRAB-00003-140401**

The Third Division consisted of the regular members and in addition Referee Meeta A. Bass when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division –
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Soo Line Railroad Company (Former Chicago,
(Milwaukee, St. Paul and Pacific Railroad Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [ten (10) working day suspension and two (2) year restriction from bidding a track inspector position] imposed upon Mr. R. Gawel effective on November 19, 2012 by letter dated November 13, 2012 for alleged violation of CP’s Red Book of Track Requirements Section 14.2.0, Part (c) in connection with charges on Notice of Investigation dated August 21, 2012 was on the basis of unproven charges, arbitrary, capricious, excessive and in violation of the Agreement (System File D-32-12-445-02/8-00538 CMP)**
- (2) As a consequence of the violation referred to in Part (1) above, all reference to the aforesaid discipline shall be removed from Mr. R. Gawel’s record and he shall receive “...all lost wages, straight time, overtime, paid and non-paid allowances and safety incentives, expenses, per diems, vacation, sick time, health & welfare insurance, dental insurance, supplemental insurance, and any and all other benefits to which entitled***.”**

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 Carrier issued a Notice of Investigation letter dated August 21, 2012, which gave notice of an Investigation into the following incident:

“Alleged late/input/completion of DTN turnout and track inspection records on the Watertown Subdivision between Milepost 112 and 123 per CP’s Red Book of Track Requirements Section 14.2.0 part C.”

After some postponements, the hearing was held on October 30, 2012. Following the Investigation, the Claimant received a Discipline Notice dated November 13, 2012 finding the Claimant in violation of the Carrier’s Red Book of Track Requirements Section 14.2.0, Part C resulting in a ten day working suspension with a two year ban on bidding a track inspector’s position with the Carrier in accordance with CP’s Positive Behavior and Performance Policy. The Organization appealed the Carrier’s decision by letter dated January 17, 2013. The Carrier denied the Organization’s appeal on March 14, 2013. A formal conference was held on June 26, 2013. The claim was appealed and now is before this Board for a final resolution of the claim.

The Board has reviewed the record developed by the parties during their handling of the claim on the property, and considered evidence related to the following to make its determination of this claim:

- “1) Did the Claimant receive a full and fair investigation with due notice of charges, opportunity to defend and representation?**
- 2) If so, did the Carrier establish by substantial evidence that Claimant was culpable of the charged misconduct or dereliction of duty?**

- 3) If so, was the penalty imposed arbitrary, capricious, discriminatory or unreasonably harsh as applied to the facts and circumstances giving rise to this claim?"

The Carrier contends that the Claimant was afforded a fair and impartial investigation in accordance with the governing Collective Bargaining Agreement (CBA). There exists no requirement in the applicable CBA mandating that the Hearing Officer is required to issue any related discipline; discipline is assessed by the Carrier. The Carrier further contends that it has established by substantial evidence of the Claimant's conduct to prove the violation of Carrier's Red Book of Track Requirements Section 14.2.0, Part C resulting in a ten day working suspension with a two year ban on bidding a track inspector's position. The Claimant affirmed to the Manager that the frequency inspections were covered and in reliance on his representations, the manager approved the Claimant's leave request, and did not fill the short-term vacancy. The inspections were not done. The Carrier asserts that Claimant violated the rule, and the discipline is commensurate with the offense. The Organization did not provide any mitigating factors to the level of discipline.

The Organization contends that the Carrier failed to afford the Claimant a fair and impartial Investigation. The Organization further contends that the Hearing Officer is the person required to issue any discipline to the Claimant. The Organization asserts that the incident involved two witnesses, the Claimant and his charging manager, and their accounts of the material facts giving rise to the charge are different. The Division Engineer who reviewed the transcript and determined the facts presented at the hearing in the light most favorable to Carrier to support the charge against the Claimant. The Organization asserts that the Claimant is responsible for completing his work while on duty, and should not be charged for the managerial oversight of his supervisor for work not completed while off duty. The Organization contends that the Carrier failed to meet its burden of proof, and no discipline can be imposed.

The controlling Agreement does not specify that the Hearing Officer must issue the recommendation for discipline. As stated by the Hearing Officer, he is responsible to hear testimony and develop facts in connection with the Notice of Investigation. It is the Carrier who issues the Charge. The Board finds there were no material procedural violations which deprived the Claimant of a fair and impartial Investigation of the charges.

The record established that the Claimant is a permanent track inspector at Watertown, Wisconsin. The Claimant's supervisor is the Manager of Train Maintenance who is responsible for managing employees who do track inspection. The Manager is responsible to ensure that the FRA requirements are met by those individuals under his supervision as far as inspection frequencies and recording of inspections. Class 4 Main Tracks and Sidings require an inspection frequency of twice weekly with at least one calendar day between inspections. These inspections are kept in the Digital Track Notebook (DTN). On the day that the inspection is due, the DTN displays a yellow warning light as a reminder that the inspection is due. If the inspection is not completed within the cycle, the DTN red flags any subsequent inspection as a late filing. If the inspection cycle is not met, the Carrier could be fined by the federal government or if something was not detected the consequences could be dramatic for failure to inspect the track.

The Claimant is responsible for the track inspection of Siding Cooney and Siding Nashotah. The Claimant's normal work schedule is Tuesday through Saturday. According to Claimant when he reports to work, he checks to see what tracks need to be completed during his work day. For the week of July 31, 2012 through August 4, 2012, the Claimant worked a three-day schedule. His Manager had previously approved the Claimant's request for vacation days on August 3rd and 4th. According to his Manager, prior to approving his vacation days he asked the Claimant if the frequency inspections were covered, and the Claimant responded yes. Whereas, the Claimant believed that the Manager was asking if his inspections were up to date during the course of a telephone conversation. The Claimant denies any conversation about how these inspections would be covered during his vacation days; he was scheduled off. The Manager acknowledged that the rule does not require an inspector to have his inspections covered while he is on vacation.

There was no evidence of late/input/completion of DTN turnout and track inspection records on August 1, 2012. The Claimant completed the first inspection on August 2, 2012. The Hearing Officer noted from his review of the record that the Claimant was "quite busy from those three days," July 31st through August 2nd. The DTN indicated that the Siding Cooney and the Siding Nashotah were inspected on Thursday, August 2, 2012, and the earliest day to complete the second inspection was Saturday, August 4, 2012. The Claimant was on vacation on August 4, 2012, which was the earliest day to conduct the second inspection. The Manager did not check the DTN on August 4th. The Claimant inspected the tracks on August 8, 2012, and a late

report was generated because the DTN uses this inspection to satisfy the second inspection that was not done on August 4th.

The frequency test was not timely completed. The Claimant states that his work was complete as of the date he had the conversation with his Manager to request the days off and the Manager states that the Claimant stated that the frequency tests were covered for the week so there was no need to fill the vacancy. Two different explanations of why the tests were not completed. Based upon the record presented, a reviewing officer cannot fairly assess responsibility in a case where there are disputed material facts between two witnesses and there is no finding of credibility in the record.

Some measures of credibility can be determined from the record, i.e. witness strength of memory, witness interest in the case, inconsistent statements, and possible motives for falsifying testimony. In the instant case, these factors are relatively equal between both witnesses. The Hearing Officer was in a better position to determine the credibility of a witness through other measures like witness demeanor, the tone of voice, gestures, response time in answering questions and expressions which are not reflected in a transcript comprised of words and photographs. The Board agrees with the Organization that the Carrier reviewed the transcript and determined the facts presented at the hearing in the light most favorable to the Carrier to support the charge against the Claimant. The Carrier's reliance solely upon a conflicting record to uphold one version over another must be viewed with caution. *See*, Third Division Award 42770. The Carrier bears the burden to establish a violation of the rule.

The Board finds that the Carrier did not meet its burden of persuasion that the Claimant was guilty of the charge.

AWARD

Claim sustained.

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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 10th day of January 2018.