

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42846
Docket No. MW-42733
18-3-NRAB-00003-140429**

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) day suspension imposed upon Mr. M. Simon by letter dated May 17, 2013 for alleged violation “...GCOR 1.1.1.; GCOR 1.1.3 and GCOR 1.6 in “connection with the charge on Notice of Investigation dated April 8, 2013 was on a basis of unproven charges, arbitrary, capricious, excessive and in violation of the Agreement (System File D-18-13-445-06/8-00542 CMP)**
- (2) As a consequence of the violation referred to in Part (1) above, all references to the aforesaid discipline shall be removed from Mr. M. Simon’s record and he shall be compensated ‘...for 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, but lost as a result of Carrier’s arbitrary, capricious, and excessive discipline in assessing claimant a ten (10) working day suspension, as set forth in Carrier’s hearing decision dated May 17, 2013. In other words, this appeal seeks to make claimant whole and expunge his record the same as if he was never affected by the 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 Carrier issued a Notice of Investigation letter dated April 8, 2013, which gave notice of an Investigation into the following incident:

“An alleged incident that took place on April 2, 2013 on the River Sub when you discovered track defects of missing bolts from the tail frog, and saw the ball of the rail was broken out (approximately 5 inches long x ½ inch deep x the width of the rail) on the main line tail of the frog.”

After a postponement, the Hearing was held on April 19, 2013. Following the Investigation, the Claimant received a Discipline Notice dated May 17, 2013, finding the Claimant in violation of GCOR, Rule 1.1.1: In Case of Doubt or Uncertainty Take the Safe Course, Rule 1.1.3: Accidents, Injuries and Defects, and Rule 1.6. Conduct, (1) Carelessness of the Safety of Themselves and Others, and (2) Negligent resulting in a ten day of suspension under the CP Policy. The Organization appealed the Carrier's decision by letter dated July 26, 2013. The Carrier denied the Organization's appeal on August 19, 2013. A formal conference was held on March 6, 2014. The claim was appealed and now is before the 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. The Carrier produced substantial probative evidence of the Claimant’s conduct to prove the violation of GCOR Rules 1.1.1., 1.1.3 and 1.6. The penalty, a ten working day suspension, was commensurate to the offense in consideration of the nature of the violation, the Claimant’s record and standing within the Carrier’s Discipline Policy, was not arbitrary, capricious, excessive, and was not in violation of the Agreement.

The Organization contends that the Carrier failed to meet its burden of proof and did not submit sufficient evidence to establish the violations of GCOR Rules 1.1.1., 1.1.3, and 1.6. The Organization asserts that the record reflects that the evidence and testimony offered by the Carrier constituted hearsay and speculation, and failed to establish the Claimant violated any of the aforementioned rules. The Organization further contends that the decision to suspend the Claimant was arbitrary, unwarranted and excessive, and in violation of the Agreement.

The Organization raised no procedural issues in this matter. The Board, therefore, finds the Claimant received a full and fair investigation with due notice of charges, opportunity to defend and representation.

On April 2, 2013, the Claimant was assigned to the position of material truck operator working under the supervision of the manager of truck renewal rail. The Claimant was responsible for loading scrap at one location and then transporting and unloading the scrap at another location. While unloading scrap, the Claimant stated that he heard a train whistle. As the train passed, the Claimant stated that he heard a sound “other than a normal regular joint clickety click.” After the train passed, the

Claimant went to inspect the area. The Claimant observed a bolt out, and “a little bit of the ball broken from the rail.” The Claimant attempted to contact the foreman or maintenance supervisor, and no one answered. The Claimant did not call Dispatch but continued completing other tasks so as not to run into overtime. When his shift ended, the Claimant returned to Bass Camp, retrieved his personal vehicle and then drove to the motel with intentions of reporting the matter to someone; the Claimant fell asleep in the lobby.

On April 3, 2013, prior to the job briefing, the Claimant informed his Manager of the incident. From the Claimant’s description of the incident, the Manager stated he was not of the opinion that repairs were urgent but an inspection was needed. One train passed over the track after the disclosure but prior to the inspection. After inspection of the switch, the Manager found four consecutive broken frog bolts at the tail, a pull part of a 1-1/2, and a break in the ball that matched the description given by the Claimant. According to the Manager, the situation presented a safety concern. The Manager received track and time from the dispatcher to protect the switch. The Manager then called the Maintenance crew and the repairs were made. Amtrak ran shortly thereafter over the switch.

GCOR 1.1.3 requires employees to report by the first means of communication any accidents, personal injuries, defects in track, bridges or signal, or any unusual condition that may affect the safe and efficient operation of the railroad. The Claimant admitted that the sound he heard was not a sound similar to “a normal regular joint clickety click.” The Claimant also expressed a sense of urgency in reporting the unusual condition. The Claimant stated that he “knew I had to do something.” He attempted to contact his foreman or supervisor with no answer. The Claimant attempted to wait in the motel lobby in hopes that he would see someone to report the incident but he fell asleep. The Claimant, however, made no effort to contact Dispatch at the time of the incident. The Claimant testified that the next morning “it came back to my mind, hey, I got to tell somebody about this, and I told them.” The Claimant reported the incident approximately 14 hours after the occurrence. The Manager determined that repairs were a safety concern.

The Board finds that a usual condition that may affect the safe and efficient operation of the railroad existed and the Claimant failed to timely report. The Board

is persuaded that after the review of the record, the Carrier established by sufficient probative evidence that the Claimant violated GCOR 1.1.3.

Although the Claimant made an effort to contact his supervisor without success, the Claimant should have contacted Dispatch. The Manager testified that the Claimant stated that he was scared to contact Dispatch. The Claimant did not deny making this statement but explained that he did not want to contact Dispatch due to the issues that he perceived with the Carrier's view on overtime.

Safety is a priority in the rail industry. GCOR 1.1.3 provides that an employee must immediately report unusual conditions and defects in tracks to promote safe operations. The safe operation occurs with compliance with the rule. Thus, the rule establishes a correlative duty of an employee to maintain the safety of the workplace, and to promote public safety by immediate reporting of an occurrence in order for the condition to be remedied. The Claimant's mental state is indicative of his understanding of the risks and consequences of his failure to report. Yet, the Claimant made the decision not to notify Dispatch of the unusual conditions of the track in order to avoid overtime. The safe course of action would have been to contact Dispatch. One train had already passed over the track after his disclosure but prior to the inspection by his Manager.

The Board is again persuaded that the Claimant violated GCOR 1.1.1; in case of doubt take the safe course, and GCOR Rule 1.6, Conduct: employees must not be negligent or careless of the safety of themselves or others.

The Board further finds that the discipline imposed was commensurate with the offense.

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 10th day of January 2018.