

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42884
Docket No. MW-43672
18-3-NRAB-00003-160457**

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 [five (5) day suspension serving two (2) days and three (3) held overhead for twelve (12) months imposed upon Mr. D. Kapsimalis by letter dated July 2, 2015 for allegedly failing to fulfill his duties as an Inspection and Repair (I&R) Foreman for the Rigby I&R Crew #3743 was unwarranted and without just cause and in violation of the Agreement (Carrier’s File MW-15-30 STR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant D. Kapsimalis shall have the discipline overturned and have his record cleared of the charges and compensated for all losses.”**

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 22 discipline-free years in the Maintenance of Way Department was an Inspection & Repair (I&E) Foreman on April 13, 2015 when he noted several defects at various locations of the track that he had inspected. The next day a geometry car operated by Supervisor Cote noted a different possible defect that was not indicated in his summary report. Later that day an Amtrak train derailed at the section of track in question. On April 15, 2014, the FRA determined that the track at the site of the derailment and at one other location were impermissibly wide gage. The Claimant was charged with unspecified wrongdoing, a Hearing followed and the Claimant was given the above-noted suspension for failure to properly fulfill his responsibilities. A timely claim followed.

The Carrier contends that the evidence indicates that the Claimant should have identified the defect that caused the Amtrak derailment. There were indications that should have led the Claimant to inspect more closely. The Claimant's testimony that he saw no gage issues was inconsistent with evidence adduced at the Hearing. He, not the geometry car, was the primary source to identify and report defects. The discipline was not arbitrary or capricious.

The Organization asserts that the Carrier violated Article 26.1 by issuing an inadequate Hearing notice that contained only a vague charge. The Carrier did not prove that the Claimant was guilty of anything and charged him with wrongdoing at the wrong location, which was a location other than charged. The Claimant has found and corrected for other wide gage defects and presumably would have done so on April 13, 2014 if defects had existed. The geometry car findings indicated either that no defect existed or that it did and was "whitewashed" to protect others. Post-derailment evidence is irrelevant because the derailment itself could have damaged the track. The Claimant consistently stated that he found no gage issues where the derailment occurred or just before that. Track inspection is not an exact science. The Carrier has impermissibly relied on speculation.

Initially the Board concerns itself with the Organization's due process issues. Technically the hearing notice does not comply with the requirements of Article 26.1. The notice refers to track that the Claimant "allegedly inspected previously" but omits the date and time of the "alleged inspection," information required by Article 26.1. However, the Board does not find the missing information and thus the

technical violation of the Agreement justification to sustain the claim because the omissions did not compromise the Claimant's ability to defend against the charge. This is obvious from a reading of the transcript. Nor is the Board concerned with the discrepancy between the mention of MP 197 close to where the Amtrak derailment occurred and the FRA Inspection Report, which shows the wide gage at MP 107 instead of near MP 197. The Claimant clearly knew the location of the derailment.

Also, the Board does not find the absence of specific rules destructive of the Claimant's due process rights in this particular case. The Board acknowledges that it has sustained claims in other cases heard during this sitting because the Carrier has failed to place the relevant rules in evidence so that the Claimant knew what to defend against and the Board knew the standard against which the Claimant's conduct was to be measured. The general requirement, often set forth as the first of the seven tests of just cause, is that before an employer may enforce a rule, that rule must be communicated to employees with the idea of the discipline to be enforced for a proven violation. However, there are exceptions for cases where the rule is so obvious as to need no explication. This case illustrates an exception. The Claimant testified that he had bid and won his current position four weeks earlier. He would not have won the bid were he not qualified as a Foreman and qualified as an FRA 213 Inspector. As an I&R Foreman, the Claimant knew that his job was to inspect and ensure the safety and integrity of the track he owned by virtue of his winning bid. Thus, his duties and responsibilities were clear without publication of a specific rule. The question thus becomes: Can the Carrier show with substantial evidence that the Claimant failed to fulfill his duties on April 13, 2015?

The evidence establishes the existence of a wide gage condition near MP 197 on April 14, 2015 that in all likelihood caused the Amtrak derailment. The Board credits Charging Officer Cote's testimony that there were signs that the Claimant should have picked up on that should have caused him to inspect more closely and presumably to have discovered the wide gage condition and to have taken action to have the condition corrected.

However, there is competing evidence as well. Mr. Cote testified that "when you go out inspecting track . . . not one person is going to get the same defects as the next person." Moreover, the Geometry Car that traveled the area at 8:19:16 on April 14, 2015—approximately three hours before the derailment—did not indicate a defect. And, according to Production Superintendent Pelletier, it is possible that

some of the damage to spikes and tie plates resulted from the derailment itself. Finally, the Board believes it is reasonable to assume that the Claimant's tour of duty on April 13, 2015 ended before the evening Amtrak (he noted a morning Amtrak at about 8:00 and another at about noon) passed MP 197 so that at least one train passed through the area without incident, as did the Geometry Car. Weighing all of the above, the Board Cannot find substantial evidence supporting the allegation that the Claimant failed to fulfill his duties. The suspension is to be removed from the Claimant's record and he is to be reimbursed for lost wages, with payment to include overtime, if any, that the Claimant likely lost during the two days of actual 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 10th day of January 2018.