

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43356
Docket No. MW-44053
19-3-NRAB-00003-170162**

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference**

PARTIES TO DISPUTE: (

(Dakota, Minnesota & Eastern Railroad Corporation

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [twenty (20) working day suspension] imposed on Mr. A. Rutkowski by letter dated November 16, 2015 for alleged violation of Rule OTS 23.2.8 Unattended On-Track Equipment in connection with an incident that occurred on October 8, 2015 was without just cause, excessive, on the basis of unproven charges and in violation of the Agreement (System File RI-1534D-802 DME).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant A. Rutkowski’s record shall be cleared of the charges leveled against him and he shall ‘... be made whole by compensating him for all wage and benefit loss suffered by him for any time of loss in connection with 20 working day suspension, any and all expenses incurred or lost as a result and any other loss by compounding such discipline with any other.’ ”**

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 disciplined for improperly providing protection for equipment he unloaded onto the Class track at Ottumwa, Iowa. He allegedly incorrectly applied required protective measures by misaligning a switch, misplacing a derail, and mislocating a red flag.

The record of Investigation reveals substantial evidence in support of the carrier's misconduct determination. However, the effective Agreement does not permit the imposition of discipline unless the carrier has first provided a fair and impartial Investigation process. This procedural requirement is a threshold matter that must be satisfied before the merits of a given case can be addressed.

The Organization contends the carrier prejudged the Claimant's guilt and did not provide a fair and impartial Investigation. For a more detailed discussion of this subject, see Third Division Award 42774 between these same parties.

In the instant matter, like in the previous Award cited, the same carrier official performed the initial review of the circumstances, then issued the notice of charges, then conducted the Investigation, and, finally, then issued the discipline. Such a process that is one-sided to this degree is simply inconsistent with the fair and impartial Investigation requirement. Consequently, we must sustain the claim for lack of procedural due process and do not reach the merits of the charges.

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 14th day of December 2018.