

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 43515  
Docket No. MW-44691  
19-3-NRAB-00003-180180**

**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: (**

**(Dakota, Minnesota & Eastern Railroad Corporation**

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The discipline [thirty (30) working day suspension with five (5) days actually served] imposed on Mr. D. Jeffries, by letter dated September 15, 2016, for alleged violation of GCOR 14.8 - Track Warrant Requests, GCOR 1.13 - Reporting and Complying with Instructions and OTS 21.1.2 - Requesting on Track Safety for Controlled Tracks in connection with allegations that Claimant was responsible for the one (1) hour and six (6) minute delay of Train 475-02 on August 2, 2016 was -without just cause, excessive, on the basis of unproven charges and in violation of the Agreement (System File J-1634D-408/TM-027-11-25-16 DME).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant D. Jeffries’ record shall be cleared of the charges leveled against him and he shall be reimbursed for any days missed pay as a result of this suspension and any overtime missed at work as a result of the suspension.”**

**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.**

**Carrier hired Claimant on January 20, 2016. On August 2, 2016, Claimant was assigned and working as a foreman. His crew was assigned to remove rails. Claimant received a track warrant which protected the crew from train movements while replacing rails. Claimant received the track warrant at 1625 hours. Claimant did not inform the dispatcher how much time was needed, nor did the dispatcher give Claimant a time limit. While Claimant was in the process of drilling block bolts, the drill malfunctioned and caused a delay in the rail replacement. Claimant did not notify the dispatcher and as a result, the train was delayed.**

**The Carrier issued a Notice of Investigation letter dated August 3, 2016, which stated as follows: “The purpose of this investigation and hearing is to determine the facts and circumstances and to place responsibility, if any, in connection with your alleged rule violation that resulted in the one hour and six-minute delay of train 475-02 in Muscatine on August 2nd 2016. This indicates a possible violation of, but is not limited to, the following rules: GCOR 14.8 Track Warrant Requests, GCOR 1.13 Reporting and Complying with Instructions, and OTS 21.1.2 Requesting on Track Safety for Controlled Tracks.”**

**After a postponement, the investigation hearing was held on August 31, 2016. Following the investigation hearing, Claimant received a Discipline Notice dated September 15, 2016, finding a violation of GCOR 14.8 Track Warrant Requests, GCOR 1.13 Reporting and Complying with Instructions, and OTS 21.1.2 Requesting on Track Safety for Controlled Tracks. The Carrier assessed a thirty (30) day suspension with five (5) days actually served. The Organization appealed the Carrier’s decision by letter dated September 27, 2016, and the Carrier denied the same on October 25, 2016. The Organization advanced the claim to the Highest Designated Officer by letter dated**

**December 12, 2016, and the same was denied on February 10, 2017. A formal conference was held on September 27, 2017 with no change in the position of the Carrier. This matter 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 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 in the facts and circumstances of the case?”**

**The Carrier contends that Claimant received a fair and impartial hearing in accordance with the controlling agreement. The Carrier played a recorded telephone conversation between Claimant and the dispatcher as evidence of Claimant’s conversation with dispatcher to support the charge. Claimant did not deny the conversation and did not request that additional parts of the call be added to the record. There is substantial, probative evidence in the record to support a finding of guilt of the charges. The Carrier further contends that the penalty of thirty (30) day suspension with five (5) days served is commensurate with the offense. Lastly, it is the position of the Carrier that the claim should be denied.**

**The Organization contends that Claimant was denied his procedural and other rights to a fair hearing. The Organization argues that the Carrier failed to present a material witness, the dispatcher, for cross-examination, and that the hearing officer improperly admitted an audio tape of a conversation between the dispatcher and Claimant regarding the incident. Further, the Organization contends the Carrier failed to meet its burden of proof that the Claimant was guilty of the alleged rule violations. The discipline imposed was excessive and unwarranted in consideration of the**

mitigating circumstances. Lastly, it is the position of the Organization that the claim be sustained.

This Board has reviewed the record before us. The Board finds that the hearing officer did not abuse his discretion when he admitted the audiotape of the conversation between the Claimant and dispatcher regarding the track warrant. The argument of the Organization that Claimant was denied a fair and impartial hearing because an audiotape was used in place of the dispatcher is not persuasive. The Carrier provided sufficient information to Claimant and Organization to prepare a defense in this action, including but not limited to calling the dispatcher. The Carrier did not list the dispatcher as a witness but this did not prevent the Organization from calling the dispatcher as a witness to support his defense.

The Board is reluctant to find a due process violation, even when Carrier did not necessarily meet all the typical requirements for authentication in this instance. The Claimant did not deny the conversation and admitted to his supervisor that he did not contact the dispatcher and did not tell the dispatcher the time.

Claimant has been charged with violation of GCOR 14.8 Track Warrant Requests, GCOR 1.13 Reporting and Complying with Instructions, and OTS 21.1.2 Requesting on Track Safety for Controlled Tracks. The applicable rules are as follows:

**GCOR 14.8 Track Warrant Requests reads:**

**“An employee who requests a track warrant must inform the train dispatcher what movements will be made and, when necessary which tracks will be used and how much time is required.”**

**OTS 21.1.2 Requesting on Track Safety for Controlled Tracks reads:**

**“An employee requesting On Track Safety for Controlled Track, must inform the Train Dispatcher or Control Operator the limits and time needed where the main track will be entered or fouled. In addition, employees must ascertain if any track bulletin Form B or track bulletin removing a track from service are in effect within the territory they will**

be fouling. Employees and equipment must not enter the main track at any other point unless otherwise authorized.”

**GCOR 1.13 Reporting and Complying with Instructions reads:**

“Employees will report to and comply with instructions from supervisors who have the proper jurisdiction. Employees will comply with instructions issued by managers of various departments when the instructions apply to their duties.”

After a careful review of the facts established in the record, the Board finds that Claimant failed to notify the dispatcher of time and equipment failure in violation of GCOR 14.8 Track Warrant Requests, GCOR 1.13 Reporting and Complying with Instructions, and OTS 21.1.2 Requesting on Track Safety for Controlled Tracks. The Board further finds that the thirty (30) day suspension with five days served is commensurate with the employment record of Claimant and the facts and circumstances of this case.

**AWARD**

Claim denied.

**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 27th day of March 2019.**