

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43518
Docket No. MW-44803
19-3-NRAB-00003-170607**

The Third Division consisted of the regular members and in addition Referee Meeta A. Bass when the 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 (dismissal) imposed on Mr. P. Ludovissy, by letter dated May 17, 2016, for alleged involvement of an FRA violation issued to the Carrier for wide gauge near Mile Post 38 that he was assigned to inspect on April 12, 2016 was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File J-1634D-404/8-0105 DME).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant P. Ludovissy shall be reinstated to service with seniority and all other rights and benefits unimpaired, his record cleared of the charges leveled against him and shall be compensated for all straight time, lump sum payments, overtime and out of pocket medical expenses.”**

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.

On April 12, 2016 the Carrier received a FRA inspection report at showing “a gauge dimension on curved track exceeds allowable. Gauge measured 58 inched under-load in the curve.” The Claimant was the track inspector assigned to the territory.

The Carrier issued a Notice of Investigation letter dated April 14, 2016, which states “The purpose of the investigation and hearing is to develop all facts and circumstances and place responsibility, if any, of your alleged involvement of a FRA violation issued to CP for wide gauge near MP 38 on the Marquette sub on track that you are assigned to inspect on April 12, 2016.”

The investigation hearing was held on April 18, 2016. The Claimant received a Discipline Notice dated May 17, 2016, finding a violation of Red Book of Track Requirements 1.1.0 Requirements, 5.2.0 Identified Defects, 5.3.0 Application of Slow Orders for Defective Track, 10.2.0 Tie Defects, 14.5.0 Track Inspections-Items, Methods, Actions and FRA Track Safety Standards Part 213 Book - 213.5, 213.78, 213.53 and 213.109. As a result, the Carrier dismissed the Claimant from employment. The Organization appealed the Carrier’s decision by letter dated May 24, 2016, and the Carrier denied the same on July 21, 2016. The Organization advanced the claim to the Highest Designate Officer by letter dated August 15, 2016, and the same was denied on October 7, 2016. A formal conference was held on December 16, 2016 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 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 the 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?"

After review of the record, the Board finds that the Carrier failed to establish by substantial evidence that the Claimant was guilty of the charged offenses. The Claimant is thus reinstated to his position, and shall be made whole for the period of time that he is fit for duty.

AWARD

Claim sustained in accordance with the Findings.

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 27th day of March 2019.