

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43523
Docket No. MW-44952
19-3-NRAB-00003-180446**

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 [ten (10) day suspension with two (2) days served as well as restriction from bidding and holding a track inspector job for one (1) year] imposed on Mr. T. Billmeyer, by letter dated February 27, 2017, for alleged violation of Redbook Section 1 - Requirements (1.1.0 Important), Redbook Section 10 - Ties (10.2.0 Tie Defects), Redbook Section 4 - Gauge of Track (4.1.0 General), FRA 213.241 Inspection Records and FRA 213.13 Measuring Track Not Under Load in connection with his alleged involvement with wide gauge derailments on the #9 and GPC tracks in the Dubuque Yard on February 1, 2017 was excessive, unsupported and in violation of the Agreement (System File J-1734D-402/USA-BMWED_DM&E-2017-00010 DME).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant T. Billmeyer’s record shall be cleared of the charges leveled against him and he shall be reimbursed for any days of missed pay and any overtime missed as a result of this 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, 2014. On February 1, 2017, Claimant was assigned and working as a track inspector. On the same date, a wide gauge derailment occurred on tracks inspected by him on January 17, 2017. Investigation of the derailment uncovered several issues that were not in compliance with the Carrier's track standards on the date of the derailment. There were no defects noted by Claimant during his inspection of the track. The Roadmaster completed a detailed inspection two weeks prior to January 17, 2017, and found no defects. This is a high traffic-area and it is a lead track on the yard.

The Carrier issued a Notice of Investigation letter dated February 13, 2017, which stated as follows: "The purpose of this investigation/hearing is to determine the facts and circumstances and to place responsibility, if any, in connection with your alleged involvement with wide gauge derailments on the #9 and GPC tracks in the Dubuque yard on February 1st, 2017. This indicates a possible violation of, but is not limited to, the following rules: Redbook Section 1 – Requirements (1.1.0 Important), Redbook Section 10 – Ties (10.2.0 Tie Defects), Redbook Section 4 – Gauge of Track (4.1.0 General), FRA 213.241 Inspection Records, and FRA 213.13 Measuring Track Not Under Load."

The investigation hearing was held on February 17, 2017. Following the investigation hearing, Claimant received a Discipline Notice dated February 27, 2017, finding a violation of Redbook Section 1 – Requirements (1.1.0 Important), Redbook Section 10 – Ties (10.2.0 Tie Defects), Redbook Section 4 – Gauge of Track (4.1.0 General), FRA 213.241 Inspection Records, and FRA 213.13 Measuring Track Not Under Load and assessed discipline of ten (10) days with two (2) days to serve. In addition, Claimant was restricted from bidding and holding a track inspector job for

one year. The Organization appealed the Carrier's decision by letter dated March 14, 2017, and the Carrier denied the same on March 17, 2017. The Organization advanced the claim to the Highest Designated Officer by letter dated May 10, 2017, and the same was denied on July 5, 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 and the Organization's procedural objections are without basis. The Agreement requires no specific charge. The Notice of Investigation contained sufficient information to apprise Claimant of the actions to be investigated as required by the Agreement and the charge was sufficiently detailed to enable the Claimant and his representative to prepare a defense. The Notice of Investigation was transferred to Claimant by certified mail and to Claimant's representative via email. The address on file was incorrect and showed the City of Strawberry instead of Strawberry Point. It is the responsibility of the Claimant to maintain accurate contact information. The Carrier asserts that the company was holding multiple investigations on the date in question, and it was not practical to change the location of the hearing. The Carrier further contends there is substantial, credible evidence to support a finding that Claimant is guilty of said charges. Claimant inspected the track on January 17th and failed to find and report the wide gauge that caused the

derailment. Moreover, the Carrier further contends that the penalty of ten (10) days and two (2) days served and the restriction from holding or bidding on a track inspection job for one (1) year is justified based on the nature of the offense and Claimant's discipline record. 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. First the organization asserts that Claimant did not receive the notice of hearing as required by Rule 34, Paragraph 2. It was the Organization notified Claimant of the Notice of Investigation. Next, the hearing was not located near the employee's residence or assigned headquarter point as required by Rule 34, Paragraph 3. Claimant traveled one hundred-forty (140) miles to attend his investigation. Further, the Notice of Investigation did not contain any specific charge in accordance with Rule 34 to allow Claimant an opportunity to prepare a defense. The Organization contends the Carrier failed to meet its burden of proof that the Claimant was guilty of the alleged rule violations. There was no evidence as to the condition of the track prior to derailment, specifically what the condition of the track was on January 17, 2017 when the Claimant performed his inspection. The Organization asserts that the evidence amounts to nothing more than speculation, innuendo, and assumption in support of its charges against the Claimant. If it is determined that a violation occurred, the discipline is excessive. Lastly, it is the position of the Organization that the claim be sustained.

The Board has reviewed the record before us and finds that Carrier failed to meet its burden of proof. Claimant is charged with violation of Redbook Section 1 – Requirements (1.1.0 Important), Redbook Section 10 – Ties (10.2.0 Tie Defects), Redbook Section 4 – Gauge of Track (4.1.0 General), FRA 213.241 Inspection Records, and FRA 213.13 Measuring Track Not Under Load. A wide gauge derailment occurred on February 1, 2017. The Carrier asserts that the derailment occurred due to the failure of Claimant to detect and report the tie defect when he inspected the tracks two weeks prior on January 17, 2017. There was no evidence established on the record that a tie defect existed on January 17, 2017 and that Claimant found a defect and failed to report it. In fact, the more detailed inspection of the track that occurred approximately two (2) weeks prior to the incident did not detect a defect at all. This is a Class One (1) Track, a high traffic-area, and lead on the yard. Train traffic and weight distribution can also cause these conditions. From a consideration of all the facts, while the track had a defect on February 1st, two (2) weeks after inspection, there is no certainty that the defect

existed on January 17th. The contention that Claimant failed in his responsibilities leading to a derailment two (2) weeks later is speculative.

The Board finds that the Carrier has failed to meet its burden of proof to support the charges.

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 27th day of March 2019.