

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43755
Docket No. MW-45024
19-3-NRAB-00003-180524**

**The Third Division consisted of the regular members and in addition Referee
I. B. Helburn when award was rendered.**

**(Brotherhood of Maintenance of Way Employes 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) days on your record with ten (10) days to be served without pay and ten (10) days deferred] imposed on Mr. R. Hesse by letter dated March 7, 2017 for alleged violation of GCOR 1.1.4 – Condition of Equipment and Tools was without just cause, on the basis of unproven charges and in violation of the Agreement (System File B-1734D-203/USA-BMWED_DM&E-2017-00017 DME).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. Hesse shall ‘...be made whole by compensating him for all wage and benefit loss suffered by him for whatever the Carrier contends ten (10) days without pay, any and all expenses incurred or lost as a result of Round trip Travel not paid for the scheduled Hearings on February 10th, 2017, and the alleged charge(s) be expunged from his personal record. Claimant must also be made whole for any and all other loss. All seniority rights restored. We request that this event be expunged from the Charged employees (sic) employment record with any and all loss recovered.’”**

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.

By letter dated February 2, 2017 the Claimant was given “notice of a formal investigation and hearing” (NOI) to occur at 1000 hours at the CP Offices, 800 5th Ave. SW, Waseca, MN 56093. The NOI indicated a possible violation of GCOR 1.1.4 – Condition of Equipment and Tools. Roadmaster James Drenth was listed as the charging officer and sole Carrier witness. The investigation was thereafter postponed until February 10th, 2017, time and location unchanged. Following the investigation, by letter dated March 7, 2017 the Claimant was informed that the Carrier had concluded that GCOR 1.1.4 had been violated and had imposed the discipline set forth in Part (1) of the claim indicated above. By letter dated March 17, 2017 the Organization filed a claim on Mr. Hesse’s behalf. The claim was properly progressed on the property without resolution and was further progressed to this Board for final adjudication.

The Carrier contends that the Claimant received a fair and impartial investigation conducted in accordance with industry standards and respectful of the Claimant’s due process rights. Rule 34 – Discipline and Investigations does not require discovery; thus, the Carrier was not required to provide pre-hearing documents. The Conducting Officer’s rulings were consistent with Rule 34. The Carrier called the witness listed on the NOI and was not required to call a second witness. No bias or prejudgment against the Claimant was shown. It was not practicable to have the investigation at a location closer to the Claimant and he was not prejudiced by the Waseca location.

The Carrier provided the required substantial evidence of a violation of GCOR 1.1.4. The Claimant admitted that he did not attempt to put a pin in the step mechanism

at the rear of the hy-rail even though the step had been disabled by substitution of a bolt for the pin. The Claimant also admitted that he had not documented the broken rail sweep. The discipline was justified. It was progressive, as it was the Claimant's third suspension within fifteen (15) months. The Board should not substitute its judgment for that of the Carrier.

The Organization asserts that the investigation was not fair and impartial. No reason was given for the location of the hearing. All objections were denied. Requested documents were not provided prior to the investigation, but multiple exhibits and new rules were introduced during the investigation. The Conducting Officer had prior knowledge of the events in question, so that he could not be fair and impartial. Indeed, he showed extreme bias. The Carrier did not provide a second witness who also had knowledge of the events in question.

Also, the Carrier failed to meet the required burden of proof. The Organization showed that pins have fallen out of the rear-end step arrangement and did not show that the use of bolts instead was improper. The rail sweep was never missing as the Carrier alleged; thus, the Claimant had nothing to report. There was no indication that the truck was disorderly or was a safety hazard.

After looking carefully at the investigation transcript, the Board finds that the Claimant was afforded a fair and impartial investigation. Rule 34 – Discipline and Investigations says nothing about pre-hearing discovery; therefore, the Carrier was not obligated to respond to the Organization's request for pre-hearing documents. The NOI was sufficiently detailed so that it indicated to the Claimant and his Organization the Carrier's concerns. The Carrier had the right to introduce rules during the investigation that were not listed in the NOI, but the Board notes that the rule listed in the NOI was the only rule listed in the notice of discipline. There may well be cases when the Carrier's failure to call a material witness deprives the Claimant of a fair and impartial investigation, but this is not such a case because the facts are clear. Moreover, since Director Judge signed both the NOI, also known as a charge letter, and the notice of discipline and denied the Organization's claim, had he also served as a witness it is highly likely that the Organization would have contended that the combination of roles constituted a violation of Rule 34, Part 1.

GCOR 1.1.4 – Condition of Equipment and Tools states that "Employees must check the condition of equipment and tools they use to perform their duties. Employees must not use defective equipment or tools until they are safe to use. Employees must

report any defects to the proper authority.” While there was testimony during the investigation about scrap that allegedly should not have been in the bed of the truck, both the NOI and the notice of discipline mentioned only “non-reporting and/or identifying of hazards and modifications on safety equipment on company truck on January 24th, 2017.” Therefore, the Board has not considered the matter of scrap in the bed of the truck, but focuses on the replacement of the pin on the stairstep at the rear of the truck and the unreported broken rail sweep at the front of the truck.

Whether or not the Claimant replaced the pin with a bolt he knew that the bolt was in place and did not put the pin back in, inform the appropriate officer of the discrepancy or discuss his concerns related to the use of the pin with the appropriate Carrier officer. Instead, the Claimant took it upon himself to allow the modification to remain. Allowing employees to unilaterally make adjustments to equipment and in so doing ignore existing rules is not behavior that this Board will sanction. There may well be circumstances when employees doing the actual work may have excellent ideas that lead to safer and more efficient operations, but if so, discussion rather than unilateral action would be the preferred course. The Claimant’s decision to leave the bolt in place opened him to the justifiable charge of using defective equipment. Additionally, the Claimant’s admission that he did not document the broken rail sweep at the front of the truck provides the required substantial evidence of the additional violation of GCOR 1.1.4.

Prior to the imposition of the suspension contested herein, the Claimant had received five (5) and ten (10) day suspensions respectively on December 3, 2015 and May 16, 2016 with two (2) days served for each. The current suspension is appropriate as an element of progressive discipline designed to convince the Claimant to adhere carefully to all relevant rules and guidelines.

AWARD

Claim denied.

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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 16th day of July 2019.