

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43758
Docket No. MW-45105
19-3-NRAB-00003-180612**

The Third Division consisted of the regular members and in addition Referee I. B. Helburn 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 Carrier’s discipline [twenty (20) day suspension and one (1) year suspension from holding a track inspector position] of Mr. J. Franke, issued by letter dated March 15, 2017, in connection with allegations that he did not inspect track to FRA and Red Book Safety Standards on February 8, 2017 was unjust and in violation of the Agreement (System File J-1734D-403/USA-BMWED_DM&E-2017-00027 DME).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Franke shall have the discipline removed from his record and compensated for all time lost which includes any days missed as a result of the improper suspension as well as the difference in pay for his hourly wage had he not been unjustly removed from his track inspector position for one (1) year.”**

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 February 8, 2017 Roadmaster Scott Volden directed the Claimant, Track Inspector Franke, to do an oil train inspection and to give Manager Macewicz a ride across the Davenport Subdivision. The Claimant's subsequent report showed that he found no defects in the track that he had inspected. Approximately three (3) hours after the Claimant had inspected the track, Roadmaster Volden hy-railed over the same stretch of track and found two track defects: a spiral cross level defect requiring a 25 MPH slow-order and bad ties resulting in a wide-gauge defect requiring a 10 MPH slow-order. By letter dated February 13, 2017, the Claimant was informed of a "formal investigation and hearing" (NOI) to take place at 1100 hours at the Canadian Pacific Office, 3420 Miller Avenue, Davenport, IA 52802. The NOI further stated that "The purpose of the investigation and hearing is to develop all facts and circumstances and place responsibility, if any, in connection with your alleged involvement in not inspecting track to FRA and Red Book standards on February 8, 2017." Rules possibly violated were said to include Redbook Sections 1.1.0 – Requirements, 10.2.0 – Tie Defects and 5.2.1 – Urgent Defects. Also possibly violated was ES Safety Book Core Rule #1 – Rights and Responsibilities. Roadmaster Volden was listed as the sole Carrier witness. By letter dated February 17, 2017, the parties mutually agreed to postpone the investigation until March 3, 2017 at 1000 hours, location unchanged. Following the investigation, by letter dated March 15, 2017 the Claimant was informed that he was being assessed a twenty (20) day actual suspension and was "suspended from holding/bidding a Track Inspector position for 1 year." By letter dated May 8, 2017 the Organization filed a claim on Mr. Franke's behalf. The claim was properly progressed on the property without resolution and was further progressed to this Board for final adjudication.

The Carrier avers that the Claimant received a fair and impartial investigation conducted in accordance with industry standards that respected his due process rights.

The NOI met the requirements set forth in Rule 34, Part 2. The Conducting Officer's proper denial of the Organization's requests to produce prior irrelevant inspection reports and Manager Macewicz as a witness did not constitute bias. The sole listed witness testified and the Organization did not attempt to obtain other material witnesses. The required substantial evidence was obtained via Roadmaster Volden's testimony and accompanying documents that he found two urgent defects three (3) hours after the Claimant admittedly found none. The discipline, which was progressive, was appropriate and cannot be considered arbitrary or capricious. The Board should not substitute its judgement for that of the Carrier.

The Organization contends that the Claimant's due process rights were violated because the NOI lacked specific charges, because of the Conducting Officer's refusal to provide previous track inspection reports and because of the refusal to bring Manager Macewicz as a witness. The Carrier did not meet the required burden of proof. The Claimant did not fail to report defects since he noticed none, nor were defects noticed during the previous day's inspection. Moreover, the Claimant was given thirty (30) minutes to cover the relevant stretch of rail—insufficient time to do a proper inspection. The discipline was excessive and unwarranted because it was punitive rather than corrective and because the Claimant had not been previously disciplined for a similar infraction.

Without setting forth the rules that the Claimant allegedly violated, suffice it to say that the section of track he was to inspect and the oil train inspection was directed in order to identify track defects that potentially could create disastrous problems if not remedied or compensated for with slow orders. The Board accepts as valid the evidence that three (3) hours after the Claimant completed his inspection, Roadmaster Volden hy-railed the same stretch of track and found two defects. However, for reasons noted below, that does not provide substantial evidence of a violation by the Claimant, even considering that such defects do not arise overnight and certainly not in the space of three (3) hours.

For two (2) reasons the Board finds that the Claimant did not receive the fair and impartial investigation required by Rule 34, Part 1. First, the Hearing Officer refused to allow prior track inspection reports to be included as evidence. It is conceivable that the prior reports, which found no defects, might have raised questions about the Claimant's report, as there would have been evidence that two different track inspectors

found no defects within a brief period of time. The Claimant must have the right to have the record include possible exculpatory evidence. The Claimant was deprived of that right.

Second, and in the Board's view the more serious defect, was the Carrier's failure to call Manager Macewicz, the critical material witness. The Manager traversed the relevant stretch of track in the same hy-rail, at the same speed and in the same lighting conditions as did the Claimant. The Board does not know if the Manager also inspected the track and, if so, if he observed defects and said nothing to the Claimant or whether he observed the track and saw no defects. The Board does not even know with certainty whether Manager Macewicz had sufficient training and experience to recognize the defects that Roadmaster Volden documented. The Manager's absence as the primary material witness raises significant questions that have a bearing on the Carrier's conclusion that the Claimant was at fault, so that the Board must find that the Carrier has not produced the required substantial evidence of a violation. The Organization does not have the burden of proof in this matter and is not obligated to call the most obvious witness when the Carrier does not. For all the reasons noted above, the claim as set forth in Part (2) of the Statement of Claim must be sustained.

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 16th day of July 2019.