

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43759
Docket No. MW-45138
19-3-NRAB-00003-180652**

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 discipline [five (5) day record suspension] imposed upon Mr. M. Alba, by letter dated March 30, 2017, for alleged violation of CGOR 1.13-Reporting and Complying With Instructions and the Dressed and Ready Policy while waiting for track time on February 24, 2017 was unjust and in violation of the Agreement (System File J-1734D-404/USA BMWED_DM&E-2017-00037 DME).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant M. Alba shall have the discipline removed from his record and he shall be compensated for all time lost which includes any days missed including overtime that resulted from the improper 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.

On February 24, 2017 a routine check of the video feed to the computer of the Claimant's supervisor, Roadmaster Jacob Ward, showed the Claimant sitting in his truck. Additional review of the video feed indicated to Roadmaster Ward that the Claimant had been in the truck for about one and three-quarters (1¾) hours. When approached in his truck by Roadmaster Ward, the Claimant explained that he had been waiting for track time. Consequently, by letter dated February 28, 2017, the Claimant was given "notice of a formal investigation and hearing" (NOI) to occur at 1300 hours at the Canadian Pacific Office, 3420 Miller Avenue, Davenport, IA 52802. The letter noted that "The purpose of the investigation and hearing is to develop all facts and circumstances and place responsibility, if any, in connection with the alleged violation of the Dressed and Ready Policy when you were not engaged in non-productive work while waiting for track time on February 24th, 2017." The NOI listed a possible violation of GCOR 1.13-Reporting and Complying with Instructions in addition to the above-noted Policy. Following the investigation, by letter dated March 30, 2017, the Claimant was assessed the discipline noted in the above-noted claim. By letter dated May 22, 2017 the Organization filed a claim on Mr. Alba's behalf. The claim was progressed on the property without resolution and further progressed to this Board for final adjudication.

The Carrier contends that the Claimant was given a fair and impartial investigation conducted in accordance with the industry's procedural standards; thus, the Claimant's due process rights were respected. The NOI was in accordance with the requirements of Rule 34, Part 2 and included the Rule and Policy allegedly violated. The required substantial evidence lies in Roadmaster Ward's testimony that the video feed showed the Claimant in his vehicle for one and three-quarters (1¾) hours when there was plenty of non-productive work to be done. The Claimant acknowledged that he had never left his vehicle during that period. The discipline was appropriate in light of the May 19, 2016 letter for failing to adhere to the Dressed and Ready Policy. The Board should not substitute its judgment for that of the Carrier.

The Organization asserts that the investigation was not fair and impartial or respective of the Claimant's due process because the NOI did not provide notice of the specific section of the Dressed and Ready policy that allegedly was violated. The Carrier failed to carry its burden of proof, basing its case on speculation although the Claimant testified that while in the vehicle he checked the brakes and went over relevant rules. Factual disputes about what occurred must be resolved in the Claimant's favor. Because the discipline was punitive rather than corrective, it was excessive and unwarranted.

The Board finds that the Claimant received a fair and impartial investigation. The Carrier met the obligation contained in Rule 34, Part 2 that the NOI "will contain information sufficient to apprise the employee of the occurrence to be investigated . . ." Although the GCOR allegedly violated was included in the NOI, the Carrier was not obligated to do so.

There is no dispute that on February 24, 2017 the Claimant spent approximately one and three-fourths (1 $\frac{3}{4}$) hours in his vehicle while waiting for track time. He claimed that he used the time to check the vehicle's brakes and to review rules. The Claimant, having provided a partial explanation for his use of time, viewed by the Board as a defense, must provide a convincing defense. The Board finds the assertion that the brakes were checked to be highly questionable at best, unaccompanied by any explanation from the Claimant as to how the brake checks were accomplished, particularly since there is no evidence that the Claimant ever left the vehicle or the vehicle was lifted in the air. Nor has the Claimant provided any details about which rules he allegedly reviewed. He cannot simply "throw a defense against the wall and hope that it will stick" so that the Organization can claim that the Carrier's case is based on speculation.

Furthermore, Roadmaster Ward's testimony that there were many switches in the area that needed maintenance (see the Transcript, p. 40 [TR-40]) so that there was lots to do while waiting for track time shows that the Claimant could have engaged in non-productive work in accordance with GCOR 1.13 and the Dressed and Ready Policy.

AWARD

Claim denied.

Form 1
Page 4

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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.