

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43761
Docket No. MW-45154
19-3-NRAB-00003-180667**

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 (dismissal) imposed upon Mr. C. Noriega, by letter dated June 21, 2017, in connection with his alleged failure to properly inspect track on May 16, 2017 was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File B-1734D-206/USA-BMWED_DM&E-2017-00054 DME).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant C. Noriega shall be ‘... made whole by compensating him for all wages and benefit loss suffered by him, any and all expenses incurred or lost as a result of Round trip Travel not paid for the scheduled Hearing on June 21, 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 by (sic) expunged from the Charged employees (sic) 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.

Claimant Noriega, a Track Inspector, had been off on disability for three (3) months, returning on March 28, 2017. He was assigned to the Tracy Subdivision before and after his disability leave. At issue in this case is a section of track between MP226.9 and MP227.46. The Claimant testified that he was to inspect the track essentially once a week via hy-rail and was to do a walking inspection every six (6) months. Roadmaster James Drenth testified that he had instructed the Claimant to do a weekly walking inspection. According to the Claimant he had done one walking inspection since his return but had not documented the inspection or the defects found because only two walking inspections within twelve (12) months could be documented. He also stated that the walking inspection done by FRA Track Inspector Hugh Evans on May 16, 2017 was the first walking inspection done in 2017. Roadmaster Drenth testified that Inspector Evans walked a half-mile of the above-noted stretch of track and documented 52 FRA defects. The Claimant had previously documented four (4) defects. By letter dated May 19, 2017, signed by Patrick Judge, Director Track & Structures, the Claimant was given "notice of a formal investigation and hearing" (NOI) to be convened on May 25, 2017 at 1000 hours at CP Offices, 800 5th Ave SW, Waseca, MN 56093. The NOI listed Roadmaster Drenth as the only Carrier witness and also listed the following rules that may have been violated:

“FRA Part 213.1 – Scope of Part
FRA 213.7 – Designation of Qualified Persons to Supervise Certain
Renewals and Inspect Track
Red Book of Track Requirements 1.1.0 – Important Requirements
GCOR 1.1.1 – Maintaining a Safe course
GCOR 1.1.3 – Accidents, Injuries and Defects
GCOR 1.4 – Carrying Out Rules and Reporting Violations
GCOR 1.13 – Reporting and Complying with Instructions”

The Claimant continued to inspect track until May 21, 2017, when the Carrier withheld him from service. The Conducting Officer for the investigation was Jeff

Sundet, General Roadmaster. By letter dated June 21, 2017, signed by Director Track & Structures Judge, the Claimant was informed of his dismissal, as the Carrier had concluded that he had violated all of the above-listed rules. By letter dated July 6, 2017 the Organization appealed the dismissal on the Claimant's behalf. The appeal was properly progressed on the property without resolution and further progressed to this Board for final adjudication.

The Carrier contends that the fair and impartial investigation was conducted in accordance with procedural standards in the industry and that the Claimant's due process rights were honored. The NOI contained specifics that identified the Carrier's concern. Rule 34 does not prohibit the introduction of additional rules during the investigation, nor does Rule 34 require pre-investigation discovery. It was not necessary to call the charging officer as a witness because Roadmaster Drenth eyewitnessed the events in question. Nor was it necessary to call the FRA Inspector. The Organization cannot raise objections if they were not raised during the investigation. The Claimant was not withheld from service until the magnitude of the alleged violations became clear. The investigation was held at the nearest practicable location.

The Carrier produced the required substantial evidence that the Claimant violated rules as alleged. The FRA inspector documented 52 defects. The Claimant had not documented a walking inspection in 2017 and had documented only four (4) defects. The dismissal was justified in view of the Claimant's prior discipline, which included a last chance suspension and a warning of possible future dismissal. He seems unwilling or unable to comply with rules. The dismissal was not arbitrary or capricious and the Organization claim was excessive, as any Award in the Claimant's favor should include a set aside for outside earnings and unemployment compensation.

The Organization asserts that the investigation was not fair and impartial as the Claimant was charged, found guilty and had the initial appeal denied by the same individual. Because the FRA Track Inspector was not called as a witness by the Carrier, the Organization was unable to examine the key witness. The Carrier introduced a rule that was not listed in the NOI. The transcript contained inaccuracies. The location of the hearing was not in compliance with Rule 34 Part 3.

The Carrier did not meet its burden of proof because it did not show that any rule was violated. The Claimant had been assigned a different job on May 16, 2017. The Carrier cannot show that there were defects when the Claimant last inspected the track prior to May 16, 2017. Other Track Inspectors were also responsible for the relevant section of track. The Carrier cannot build a case based solely on speculation

and conjecture. The dismissal was excessive in light of the Claimant's nineteen (19) years of service and a minimal prior disciplinary record. He was singled out, as there is no evidence that others who inspected the same stretch of track were disciplined. This stretch of track had been "a mess" for a long period of time. The dismissal was punitive rather than corrective.

The analysis begins with the procedural aspects of the case. In its submission to this Board, the Organization contends that the Claimant was denied a fair and impartial hearing because "the record unmistakably showed that Claimant was charged, found guilty and had his discipline appeal all denied by the same Carrier official, Director . . . Judge . . ." (p. 6). The submission goes on to note that Director Judge, therefore, affirmed his decision to charge the Claimant but that "'no man can be a fair judge in his own case'" (p. 7). This contention was echoed by the Organization's advocate when the Board heard the case, with the Carrier asserting that the "judge/jury" argument was a new one not made on the property.

The July 6, 2017 Organization's appeal from the dismissal states: "Patrick Judge was the charging officer according to the documentation in the record . . . Somehow Mr. Judge was able to determine based on the record that Mr. Noriega allegedly violated the rules of charge on the date he charges." Director Judge's denial of the appeal was followed by the Organization's October 3, 2017 appeal to the Assistant Vice President, Labor Relations. That appeal noted that Director Judge was the charging officer, but was not at the hearing. The appeal further states that "The Carrier now asserts that the Carrier 'key witness,' who was not a key witness at all, was the Charging Officer. This Carrier Manager is playing multiple roles and if a Charging Officer and a key witness as the Carrier alleged, he would obviously have bias (sic) testimony." The Board notes that the "multiple roles" contention is aimed at the so-called Charging Officer/key witness—a reference to Roadmaster Drenth.

After another Carrier denial of the appeal, a final letter from the Organization to the Assistant Vice President, Labor Relations essentially summarized previous contentions made in the on-property correspondence. This correspondence has been set forth in relevant detail to provide insight into the Board's finding that, while the correspondence correctly states the various roles Director Judge played in this matter, the Organization has not in the on-property correspondence moved from the facts to the contention that Director Judge's multiple roles created an unfair and partial hearing. The appeal/arbitration procedure in the railroad industry is ultimately an appellate procedure that requires the Board to resolve the dispute based on the on-property record before it. Because the Board finds that the "judge/jury" contention

was not perfected on the property, it is viewed as new argument that is inappropriate for the Board's consideration.

The Organization further contends that the investigation was not fair and impartial because FRA Inspector Hugh Evans, who initially documented the fifty-two (52) defects on May 16, 2017, was not called as a witness, although it was Inspector Evans' activity that triggered the investigation. The Board observes that in the August 27, 2017 denial on the property, the Carrier stated that "FRA inspectors do not attend railroad investigations." While the Organization contends that Inspector Evans should have been called as a witness, it has not disputed the above-noted statement and there was no protest at the hearing about the absence of Inspector Evans, who had not been listed as a witness on the NOI. The Board finds that the absence of Inspector Evans did not result in an unfair and partial hearing and, furthermore, that the inspection report coupled with Roadmaster Drenth's testimony about what he observed when he inspected the track—testimony that confirmed Inspector Evans' findings—provides substantial evidence that the defects existed on May 16, 2017.

Other procedural contentions advanced by the Organization are unavailing. The location of the hearing was not shown to have prejudiced the Claimant. The Carrier had the right to introduce documents and additional rules during the investigation because the NOI contained sufficient detail to identify Carrier concerns and the Agreement does not require pre-hearing discovery. Moreover, the only rules that the Claimant was found to have violated were those listed in the NOI.

Turning to the merits of the charges against the Claimant, without setting forth the numerous FRA standards and GCORs listed in the NOI as allegedly violated, suffice it to say that as a Track Inspector, the Claimant was required to comply with FRA and Carrier inspection procedures and to document defects so that the defects could be repaired and/or compensated for with slow orders to minimize if not eliminate the possibility of a derailment. The Claimant had been off work for three (3) months due to a disability and had returned on March 28, 2017. Inspector Evans performed his walking inspection on May 16, 2017, over two and one-half (2½) months later. Roadmaster Drenth testified credibly that he had directed the Claimant to walk the track between MP226.9 and MP227.46 once a week. Yet, the Claimant testified both that the walking inspection done by Inspector Evans was the first in 2017 and that the Claimant had actually performed such an inspection but could not document it because such inspections can only be documented twice annually. The Claimant also testified that he was to inspect the Tracy Sub, which included the above-noted track, every five

(5) days, which amounted to once a week. The Claimant's testimony raises more questions about the performance of his duties than it answers.

It is further noted that Roadmaster Drenth testified credibly that ties do not deteriorate overnight and other defects, some resulting from bad ties, do not generally occur overnight. The Board does not need that testimony to know that is the case. Assuming that the Claimant hy-railed the track instead of walking, and further assuming that more defects are likely to be found with a walking inspection than by using a hy-rail, the discrepancy between the four (4) defects found by the Claimant in 2017 and the fifty-two (52) defects found by Inspector Evans remains unexplained. The substantial evidence of the defects and the inconsistencies and explanatory gaps in the Claimant's explanations leaves the Board with only the finding that the Claimant was derelict in his responsibility to adhere to Roadmaster Drenth's directive to do a weekly walking inspection and to conduct a careful, comprehensive inspection of track assigned as his responsibility.

This finding is not speculative and supports the Carrier's charges that FRA standards and GCORs were violated. The Organization's contention that the stretch of track that is relevant to this case has been "a mess" for a long period of time is not persuasive as an explanation for the Claimant's conduct of his responsibilities. If anything, the so-called "mess" should have increased the vigilance with which the track was inspected.

The Claimant's tenure of over eighteen (18) years at the time of dismissal, has been a consideration. The record includes an August 31, 2016 ten (10) day record suspension and an April 10, 2017 twenty (20) day suspension indicated as a last-chance waiver, which followed the Claimant's acceptance of responsibility for a series of rule-breaking actions and his waiver of a hearing. Yet, in the face of that last-chance waiver the Claimant failed to properly discharge his very important track inspection responsibilities. It was a last-chance waiver, not a second-to-last-chance waiver. While the dismissal of a long-service employee is almost always distressing, the Board cannot find that the dismissal in this case was arbitrary and capricious.

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.