

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43991
Docket No. MW-45314
20-3-NRAB-00003-190132**

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman 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 [twenty (20) day suspension – five days served/fifteen (15) days deferred] of Mr. W. Turner, by letter dated October 30, 2017, in connection with allegedly failing to give a roll by inspection of a passing train in violation of GCOR 6.29.1 – Inspecting Trains at Mile Post 20 on the Marquette Subdivision on August 16, 2017 was without just and sufficient cause (System File B-1734D-209/USA-BMWED_DM&E-2017-00120 DME).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant W. Turner shall have this event expunged from his record and he must be compensated for all wage and benefit loss suffered as well as for any expenses resulting from his roundtrip travel to and from the September 7, 2017 investigation.”**

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.

The incident giving rise to this claim occurred on August 16, 2017. On that date a Carrier officer allegedly witnessed the Claimant fail to perform a proper roll-by inspection of a passing train at Milepost 20 on the Marquette Subdivision in Bellevue, Iowa. On August 17, 2017, the Claimant was notified to appear for a formal investigation for the following purpose:

“ . . . to develop all facts and circumstances and place responsibility, if any, in connection with your alleged failure to give a roll by inspection on a passing train at Bellevue, IA, at Mp. 20 on the Marquette subdivision on August 16, 2017.”

The formal investigation was held on September 7, 2017. Following the hearing, Carrier notified the Claimant in a letter dated October 6, 2017, that he had been found guilty as charged and was assessed a 20-day actual suspension. That discipline was later changed to a five-day actual suspension with 15 days deferred suspension. The Organization filed a claim on behalf of Mr. Turner on November 2, 2017. That claim was denied by the Carrier on November 14, 2017. The Organization appealed the denial on December 13, 2017. That appeal was denied, and the matter was progressed in accordance with the Parties' Agreement. It is thus properly before the Board.

The Carrier maintains that the Claimant was afforded a fair and impartial investigation, and the Claimant's representative was able to, and in fact did, mount a fully informed defense of the Claimant. The Carrier points out that in order to perform a proper roll-by inspection, the Claimant and his co-workers were expected to be on both sides of the train as it passed them. As the Carrier witness testified, the Carrier argues, the Claimant and his co-workers remained in their trucks until the train at issue was close, and then ultimately watched the train standing only on one side of the track, rather than both sides, as they were supposed to. Accordingly, the Carrier insists, the discipline was both warranted and fair under the circumstances, particularly when it was reduced on a leniency basis prior to the claim being filed.

The Organization protests that the Carrier has not met its burden of persuasion in this case. It maintains that the Claimant did inspect the train from his side of the

tracks as it passed. The Organization also points out that Holland welders, who were working the other side of the track inspected the train as it passed them, as well. Accordingly, a full inspection was performed, contrary to the testimony of Carrier's witness. (Tp. pp. 74, 75, 83, 89, and 92). Moreover, the Organization points out that it was unsafe to cross the tracks to the opposite side of where their truck was parked, and the crew made a determination regarding safety that was reasonable and enabled them to perform their work in the safest way possible. Thus, it argues, the discipline assessed was inappropriate and unwarranted and the claim should be sustained.

A review of the record in this case indicates that, while the Claimant and his co-workers performed a roll-by inspection on one side of the track at issue, it is apparent that none of them crossed to the opposite side in order to do a thorough roll-by inspection. Moreover, as the Carrier witness noted, the Claimant and his co-workers did not don their PPE in sufficient time to perform a cross-over in a safe manner. In fact, the Carrier witness himself had donned his PPE and made the cross-over to complete the roll-by inspection as the Claimant and his crew were still in their trucks. Nor is there much question that the Claimant and his crew were aware of the imminent arrival of the train in question. Finally, the Carrier official testified without contradiction that when he confronted the crew, none of them alleged an unsafe situation on the opposite side of the track that might, in fact, have prevented them from crossing to do a "both sides" roll-by inspection.

The Claimant and his crew testified without contradiction that there were employees in safety gear on the opposite side of the track at the time in question and they made an assumption that those employees would do the required roll-by on their side of the train. However, none of them at the time confirmed that the employees they saw were Carrier employees. In fact, the record establishes clearly that they were actually employees of a separate contractor. While the Claimant and his crew can be faulted for making an erroneous assumption regarding the workers on the opposite side of the track at issue, there is no indication that they flagrantly violated the GCOR rule of which they are accused. In light of the fact, we find that the assumption made by Claimant and his crew does not constitute a sufficient violation to warrant losing five days pay, but the entire 20-day suspension shall remain on his record as a "record suspension" and as a caution regarding making such errors in judgement in the future.

Claim sustained only to the extent set forth in the above Findings.

AWARD

Claim sustained in accordance with the Findings.

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 5th day of March 2020.