

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 44678
Docket No. MW-46029
22-3-NRAB-00003-200716

The Third Division consisted of the regular members and in addition Referee Jeanne Charles when award was rendered.

(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference

PARTIES TO DISPUTE: (

(Connex Railroad, LLC. / Transdev Rail, Inc.

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed upon Mr. L. Perera, by letter dated May 31, 2019, in connection with alleged violation of Rule 1.4 Carrying Out Rules and Reporting Violations, Rule 1.13 Reporting and Complying with Instructions, 49 CFR Part 213.5 Responsibility for Compliance and 49 CFR Part 213.241 Responsibility for Compliance for not accurately recording numerous TSS defects while employed as a track inspector was arbitrary, excessive and in violation of the Agreement (System File N70198919 CNX).
- (2) As a consequence of the violation referred to in Part (1) above, we request that the dismissal letter and all matters relative thereto be removed from Claimant L. Perera’s personnel file.

‘The claimant shall be made whole for all financial losses as a result of the violation, including compensation for:

- 1) straight time for each regular work day lost and holiday pay for each holiday lost, to be paid a (sic) the rate of the position assigned to the claimant at the time of removal from service (this amount is not reduced by earnings from alternate employment obtained by the claimant while wrongfully removed from service);

- 2) any general lump sum payment or retroactive general wage increase provided in any applicable agreement that became effective while the claimant was out of service;
- 3) overtime pay for lost overtime opportunities based on overtime for any position claimant could have held during the time claimant was removed from service, or on overtime paid to any junior employee for work the claimant could have bid on and performed had the claimant not been removed from service;
- 4) health, dental and vision care insurance premiums, deductibles and co-pays than (sic) he would not have paid had he not been unjustly removed from service.”

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 L. Perera, established and held seniority within the Carrier's Maintenance of Way Department. He was employed as a Track Inspector by Transdev for approximately four (4) years and sixteen years of service with the Carrier's predecessor company for a combined total of twenty (20) years in the railroad industry. Claimant was the sole track inspector responsible for approximately one hundred tracks located in the Carrier's railyard in downtown Hialeah, Florida, including the East Rail with adjoining industry tracks.

At issue is whether Claimant was properly dismissed for violation of various work rules in connect with track inspections. During an inspection on February 19, 2019, FRA Inspector Corwyn Foster (hereinafter referred to as "Foster") reviewed the inspection records submitted by Claimant and found that they "did not accurately reflect the track conditions." Carrier Exhibit 6.4. Claimant received a "Notice to Individual Regarding Violation(s) of Federal Railroad Safety or Hazardous Materials Transportation Statutes, Regulations or Orders" dated March 25, 2019 from Foster. Thereafter, Claimant was provided with additional training and a coaching and counseling session as documented in Carrier correspondence dated April 8, 2019.

On April 17, 2019, Foster and fellow FRA Inspector George Biro (hereinafter referred to as "Biro") inspected the tracks again. Biro found a thirty-nine foot segment of track with only two effective ties in place. Federal regulations mandate that if any thirty-nine foot segment has fewer than five effective ties in place, the track should be shut down for repairs. During his inspection, Foster reviewed the conditions of tracks #4 and #5. Perera had inspected track #4 only twenty-one days earlier and track #5 only nineteen days earlier. During his inspection, Foster found "numerous defects and violations" in the railyard. Foster "determined that many of the conditions cited on the inspection report have existed for months." Carrier Exhibit 6. Foster also opined that he believed the conditions present on tracks #4 and #5 were representative of conditions in other locations in the railyard. Claimant had inspected the area just five (5) days earlier on April 12, 2019. Although he reported that ties were not evenly distributed and issued a hold pursuant to 213.9(b), he did not halt operations.

As a result of the FRA reports, Claimant was disqualified from his position and a Notice of Investigation was issued requesting his attendance at a hearing to determine his responsibility in connection with the following charges:

CHARGE ONE: Alleged violation of Rule "1.4 Carrying Out Rules and Reporting Violations" from the "General Code of Operating Rules" that reads:

Employees must cooperate and assist in carrying out the rules and instructions. They must promptly report any violations to the proper

supervisor. They must also report any condition or practice that may threaten the safety of trains, passengers, or employees, and any misconduct or negligence that may affect the interest of the railroad.

CHARGE TWO: Alleged violation of Rule "1.13 Reporting and Complying with Instructions" from the "General Code of Operating Rules" that reads:

Employees will report to and comply with instructions from supervisors who have the proper jurisdiction. Employees will comply with instructions issued by managers of various departments when the instructions apply to their duties.

CHARGE THREE: Alleged violation of "49 CFR Part 213.S Responsibility for compliance" from the of the "Title 49 of the Code of Federal Regulations" that reads:

(a) Except as provided in paragraph (b) of this section, any owner of track to which this part applies who knows or has notice that the track does not comply with the requirements of this part, shall –

(1) Bring the track into compliance;

(2) Halt operations over that track; or

(3) Operate under authority of a person designated under§ 213.7(a), who has at least one year of supervisory experience in railroad track maintenance, subject to conditions set forth in this part.

CHARGE FOUR: Alleged violation of 49 CFR Part 213.24 "Responsibility for compliance" from the "Title 49 of the Code of Federal Regulations" that reads in pertinent part:

Each record of an inspection under §§213.4, 213.119, 213.233, and 213.235 shall be prepared on the day the inspection is made and signed by the person making the inspection. Records shall specify the track inspected, date of inspection, location and nature of any deviation from

the requirements of this part, and the remedial action taken by the person making the inspection.

Under section 213.241, any defects existing in the track under Part 213 Track Safety Standards (TSS) must be recorded.

SPECIFICATIONS: We received two (2) recommended violations and numerous defects from the FRA stating the Tracks that you are responsible for inspecting are in non-compliance with 49 CFR Part 213. In addition, on April 11, 2019 we received a copy of violation letter that was sent to you from the FRA personally stating while you are a qualified 213.7(b) inspector and have demonstrated to the railroad that you have the ability to detect deviations from the TSS, their inspection determined you were not accurately recording numerous TSS defects. And your continued non-compliance in this area could result in further enforcement action by the FRFA, including potential civil penalties dependent on evidence of reckless disregard for compliance with the TSS or disqualification from safety sensitive service.

The investigational hearing was initially scheduled to be held on May 2, 2019. However, after the Claimant did not receive the initial letter, the Organization requested that the hearing be postponed until May 21, 2019, and the request was granted. On May 31, 2019, the Carrier determined that the Claimant was responsible as charged and terminated his employment.

On June 19, 2019, the Organization filed a timely claim on behalf of the Claimant. The claim was properly handled by the Parties at all stages of the appeal up to and including the Carrier's highest appellate officer. The matter was not resolved and is now before this Board for resolution.

In reaching its decision, the Board has considered all the testimony, documentary evidence and arguments of the parties, whether specifically addressed herein or not. The Carrier has the burden of proving that the Claimant's termination was for just cause. While the Board finds evidence sufficient to prove charges one and three above, after careful review of the record, the Board finds that termination was not for just cause. Although the Claimant had multiple rule

violations within a short period of time, the record reflects that other conditions contributed to the Claimant's failures to include inadequate staffing. In addition, given the Claimant's 20-year employment history and otherwise unblemished record, the tenets of progressive and corrective discipline dictate that a penalty less than termination be imposed. Based upon the mitigating circumstances present in this case, termination was excessive. Accordingly, the Claimant shall be reinstated to a non-safety sensitive position with a 30-day suspension imposed and training as deemed appropriate by the Carrier. Back pay shall be awarded less the 30-day suspension.

Despite the Organization's request in its claim that any back pay not be "reduced by earnings from alternate employment," the Board is bound by the language negotiated by the parties in Rule 19, Paragraph 1, G. which states, "It is recognized that where an employee is dismissed or suspended from service for cause and subsequently it is found that such discipline was unwarranted and the employee is restored to service with pay for time lost, it is proper that any earnings in other employment will be used to offset the loss of earnings." Accordingly, the back pay awarded to the Claimant shall be reduced by any outside earnings received during the period of termination.

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 28th day of January 2022.

CARRIER MEMBERS' DISSENT

to

THIRD DIVISION AWARD 44678 – Docket 46029

(Referee Jeanne Charles)

The Carrier dissents to the award amending L. Perera's termination to a 30-day suspension and ordering reinstatement to a non-safety sensitive position. Reinstatement is inappropriate in this case for 3 reasons:

- 1. The charges against L. Perera were proven as acknowledged in the award;**
- 2. Progressive discipline was administered prior to L. Perera's termination, yet he continued to violate safety rules and federal laws; and**
- 3. The Federal Railroad Administration (FRA) disqualified L. Perera from his position.**

Any one of the above reasons are sufficient to render reinstatement inappropriate independently.

The award specifically notes that there is sufficient evidence to prove charges one and three against L. Perera. Charge one alleges that L. Perera violated a safety rule contained in the General Code of Operating Rules by failing to report unsafe rail conditions. Charge three alleges that he violated Title 49 of the Code of Federal Regulations Part 213 by failing to bring the tracks into compliance, halting operations over the tracks, or operating under the authority of a person designated under § 213.7(a). Accordingly, it was proven on property that L. Perera violated not only the General Code of Operating Rules, but also federal regulations.

The award in one moment recognizes that L. Perera violated federal law through his employment with the Carrier, yet in the next moment states that there was not just cause to terminate his employment. Given that his violation of federal law negatively affected the Carrier as the party ultimately responsible for such violations, relieving L. Perera of any responsibility for the offense will do nothing to deter future violations by L. Perera or other employees. In fact, it may have the opposite effect as employees become aware that even if they ignore safety hazards and fail to lawfully perform their duties, they may not face termination, providing encouragement for those tempted to ignore their responsibilities.

The award also fails to consider that L. Perera committed safety infractions that resulted in the continued operation on the line after conditions had deteriorated to a point rendering them unsafe. Basically stated, L. Perera's offense resulted in unacceptably unsafe

track conditions that could have resulted in derailment. This fact should not be swept to the side.

Further, the administration of progressive discipline to L. Perera prior to his termination did not prevent him from committing the offenses for which he was terminated. As noted in the award, L. Perera was disciplined following inspections that occurred on February 19, 2019, and March 25, 2019. L. Perera was even provided additional training and a coaching and counseling session, yet he still violated safety rules and federal laws. It is evident that the Carrier did everything within their power to correct L. Perera's performance, but he failed to conform. Termination was clearly the only option available.

In reviewing L. Perera's ability to safely perform the essential functions of his position, even the FRA found that he was not qualified. After the FRA disqualified L. Perera from performing his duties, the Carrier was prohibited from utilizing him to perform safety sensitive functions on the line. Plainly stated, a federal agency, not the Carrier, made the determination that L. Perera should be removed from his position. Accordingly, the award not only usurps the Carrier's authority to administer discipline, but also undermines the authority of the federal agency tasked with railway safety.

As plainly demonstrated by the record, the termination of L. Perera was warranted and should not be overturned. The award specifically acknowledges that the charges against L. Perera that he violated the General Code of Operating Rules and the Code of Federal Regulations were proven. Both the Carrier and the federal government found those violations sufficient to remove Perera from his position. The award has not identified any deficiencies appropriate to render termination inappropriate. Accordingly, the Carrier respectfully dissents.

Timothy W. Bubenik

Timothy W. Bubenik
Carrier Member

Kristin C. Beckner

Kristin C. Beckner
Carrier Member