

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44857
Docket No. MW-47317
23-3-NRAB-00003-220378**

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

**(Brotherhood of Maintenance of Way Employees Division –
(IBT Rail Conference**

PARTIES TO DISPUTE: (

(Soo Line Railroad Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed upon Mr. A. Knutson, by letter dated January 29, 2021, in connection with allegedly failing to perform and falsely record track inspections on October 23 and October 27, 2020 was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File D-80-20-445-43/2021-00021378 SOO).**
- (2) As a consequence of the violation referred to in Part (1) above:
‘... the dismissal shall be set aside, and Claimant restored to service with their seniority rights unimpaired, shall be made whole for all time, financial, and/or benefits lost as a result of this dismissal. Any benefits lost, including but not limited to vacation and health insurance benefits (including coverage under the railroad industry National Plan), shall be restored. Restitution for financial losses as a result of the violation shall include compensation for:**
 - 1) straight time pay for each regular workday lost and holiday pay for each holiday lost, to be paid at the rate of the position assigned to the Claimant at the time of suspension from service (this amount is not reduced by any outside earnings obtained by the Claimant while wrongfully suspended);**

- 2) overtime pay for lost overtime opportunities based on overtime for any position Claimant could have held during the time he was suspended from service, or for overtime paid to any junior employee for work the Claimant could have bid on and performed had the Claimant not been suspended from service; and

Further, as remedy, all notations of this discipline shall be expunged from all Carrier records, including the Claimant's personal record, and the Claimant shall be made whole for any of those losses he may experience as a result of this assessment of discipline as set for above within this appeal. ***"

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 Claimant's date of hire is October 20, 2014. On that date he established seniority in the Maintenance of Way Department. The Claimant performed Track Inspector duties for approximately six (6) years when events giving rise to this claim occurred.

In July 2020 the Carrier installed a new system for reporting track inspections - - Track Asset Management System or "TAMS" - - and implemented it, initially, in the Claimant's territory - - Glenwood Yard. Technical issues surfaced relating to thirty (30) day inspections, specifically, TAMS "re-flagged" inspections already

completed. The Carrier states the re-flagging issues were resolved in August 2020 and September 2020; the Organization states the issues continued into October 2020.

On November 19, 2020 a track incident occurred in Glenwood Yard with the W-12 Switch. TAMS reported the switch inspected on October 27, 2020. Assistant Chief Engineer Duffy examined track inspection reports, global positioning system (GPS) data and video at Glenwood Yard and assessed the Claimant improperly reported track assets as inspected on October 23 and 27, 2020. On those dates the Claimant states that he followed the Carrier's practice and reported switches as inspected when they were erroneously flagged in TAMS.

On November 25, 2020 General Roadmaster Swenson notified the Claimant to attend a formal investigation and hearing "to develop facts and circumstances and to place your responsibility, if any, in connection with your alleged failure to properly perform and falsely record track inspections on October 23, 2020 and October 27, 2020" indicating possible violations of the following rules:

- US Rulebook for Engineering Employees 1.6 Conduct
- US Rulebook for Engineering Employees 1.13 Reporting and Complying with Instructions
- Red Book of Track & Structures Section 14 Track Inspections

In a separate notice issued on the 25th the General Roadmaster (GR) informed the Claimant that he was withheld from service based on the charges set forth in the hearing notice. The GR amended the hearing notice on December 8, 2020, adding incident dates October 30, 2020 and November 11 and 18, 2020. The formal investigation and hearing convened on January 15, 2021.

After considering the record established during the formal investigation, GR Swenson notified the Claimant on January 29, 2021 that he was dismissed from service for violations of the specified rules on October 23 and 27, 2020. The GR stated discipline assessed was based on the severity of the Claimant's infractions and his disciplinary history.

On March 30, 2021 the Organization appealed the dismissal stating the Carrier did not provide a fair and impartial hearing, failed to prove the charges and imposed harsh and excessive discipline. The Carrier denied the appeal on May 14, 2021 whereupon the parties proceeded to conference on September 3, 2021. With no resolution attained at conference the Organization filed its claim dated January 21, 2022. The claim is before the Board for final adjudication as it was timely and properly presented and handled at all stages of appeal up to and including the Carrier's highest appellate officer. The Board is fully informed of the on-property record and each party's position and argument in its submission including awards submitted in support thereof.

The Organization asserts that withholding the Claimant from service violates his right to due process and shows the Carrier prejudging the Claimant's culpability. The Board finds no due process violation as the parties agreed in Rule 20 - Discipline and Grievances that providing the Claimant a fair and impartial hearing "will not preclude an employee from being removed from the position, pending final outcome of the hearing." The Carrier assessed the incident dates as implicating "serious rules infractions" with the Claimant possibly falsifying Federal Railroad Administration (FRA) inspection reports. The Carrier did not pre-judge the Claimant.

Other concerns raised about denial of a fair and impartial hearing are without merit. For example, amending the hearing notice and adding three (3) incident dates occurred approximately six (6) weeks prior to convening the formal investigation; the underlying circumstances and implicated rules are the same for all incident dates. In other words the scope of the investigation remained unchanged. The issuance of the decision by an official other than the hearing officer is unexceptional in this forum and not prejudicial to the Claimant. As for the video, it shows the Claimant's whereabouts on the incident date. It is an exhibit in the record of this proceeding and readily available for viewing upon request. The evidentiary record is complete.

The Board reviews the record for substantial evidence supporting the Carrier's decision on the charged misconduct, rules violations and discipline assessed. Substantial evidence resides at the lower, if not lowest, level on the evidentiary spectrum. It is not an onerous level to achieve. The Board finds that technical issues or glitches with TAMS were addressed and resolved in August 2020 and September 2020. On October 27, 2020 the Claimant reported in TAMS that he inspected track and W-12 switch in Glenwood Yard. GPS data and schematic of the yard show all

locations (track and switches) the Claimant reported as inspected on the 27th. The Claimant reports in TAMS inspecting W-12 switch at 1310 hours but GPS data shows Claimant passing through Glenwood Yard and five (5) tracks away when he entered data that he had completed the inspection. On October 23, 2020 Claimant recorded an inspection at the west rip lead switch at 1113 hours but the Carrier's truck with Claimant are nowhere in the vicinity of west end of Glenwood Yard on that date and time.

Claimant's testimony cannot be reconciled with the GPS hard data and video capturing his presence at locations other than inspection sites he reported on the incident dates. The Claimant's conduct violates Rule 1.6 - Conduct (dishonest), Rule 1.13 - Reporting and Complying with Instructions (comply with supervisor instructions for employee's duties) and Red Book of Track and Structures at Track Inspection Section 14 ("each track inspection must be recorded and signed on the day the inspection is made"). The Claimant is rules qualified including the Red Book of Track and Structures.

There is substantial evidence for the Carrier's charging the Claimant with violations on October 23 and 27, 2020. Other dates cited in the notice of hearing - - October 30, 2020 and November 11 and 18, 2020 - - were abandoned by the Carrier. The decision letter states that the discipline assessed (dismissal) is based on the severity of the incidents and the Claimant's disciplinary history. The incidents are major infractions under the Hybrid Discipline and Accountability Guidelines where discipline up to dismissal may be assessed.

The decision letter does not identify the Claimant's disciplinary history because there is no history; the Claimant is a first-time offender since date of hire in 2014 and recognized by his supervisor as a capable Track Inspector. This mitigating factor is construed favorably for the Claimant. The Carrier does not provide a measure or indication in the record that the Claimant is not capable of rehabilitation and correcting his conduct. In the circumstances of this claim, the Board finds the discipline assessed - - dismissal - - harsh and punitive. The Board rescinds the Claimant's dismissal and, in lieu thereof, reinstates the Claimant without pay

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 10th day of March 2023.