

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 45009  
Docket No. MW-47419  
23-3-NRAB-00003-220515**

**The Third Division consisted of the regular members and in addition Referee Sarah Miller Espinosa when award was rendered.**

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

**PARTIES TO DISPUTE: (**

**(Evansville Western Railway, Inc.**

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

**(1) The Carrier's discipline [sixty (60) calendar day suspension, thirty (30) calendar days which were to be served immediately and the other thirty (30) calendar days which were to be held in abeyance for one (1) year, or until April 28, 2022] of Mr. J. Orrick by letter dated April 28, 2021 for alleged violation of Carrier's Rules A(!) and 1(1) was arbitrary and capricious (System file EWR403421 EWR).**

**(2) As a consequence of the violation referred to in Part (1) above, Claimant J. Orrick's:**

**' ... 30-day suspension and 30-day overhead suspension shall be set aside, and the Claimant shall be (sic) made whole for all financial and benefits lost, including vacation and health insurance benefits shall be restored. Restitution for financial losses as a result of the violation shall include compensation for:**

**1) Straight time for each regular workday lost and holiday pay for each holiday lost, to be paid in the rate of the position assigned to Mr. Orrick at the time of removal from service (this amount is not reduced by earnings from alternate employment obtained by Mr. Orrick while wrongfully suspended);**

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

All notations of this discipline and investigation should be removed from all carrier records."

**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.

In March 2021, while reviewing GPS data on the company provided vehicles of Claimant and another track inspector, Track Inspector B, the Roadmaster found that both vehicles were idle for approximately 55 minutes at Enfield, Illinois on March 24, 2021. On or about March 31, 2021, the Roadmaster asked Claimant about the work he performed at Enfield, Illinois on March 24, 2021 and whether Claimant had seen Track Inspector B; Claimant was also asked to provide a written statement. Claimant asserted he got off the track at Enfield and drove to another location and that he did not recall seeing Track Inspector B. Claimant then went outside, made a cell phone call, and returned to the office to amend his statement to say he had seen Track Inspector B. No

GPS data supported the Claimant's assertion that he had driven to another location at the date and time indicated.

A formal investigation was ordered:

**"in connection with the allegations that on March 24, 2021, you failed and/or refused to make proper use of your on-duty time; [Track Inspector B] allegedly provided incorrect information to the dispatcher regarding his location when questioned by the dispatcher. Track Inspector B allegedly inspected track at an unacceptable slow track speed: Track Inspector B allegedly departed the Carrier's property and traveled some twenty (20) miles before releasing Track Warrant No. 1024; and, Claimant allegedly provided false information in an apparent attempt to mislead the Carrier as to what occurred at Enfield on March 24, 2021, with Track Inspector B, while you were performing service as Track Inspectors."**

At the formal investigation, the following Rules were read into the record and the Claimant was asked and confirmed his understanding of the Rules:

**A(1), Safety: Safety is the most important element in performing duties. Obeying the rules is essential to job safety and continued employment.**

**1(1). Dishonesty, disloyalty, desertion from duty, insubordination, willful neglect, gross carelessness, making false reports or statements, immoral conduct or serious violations of the law, are prohibited.**

(Tr. 117-119:21-17). Claimant testified that he spoke with Track Inspector B while at Enfield, Illinois and did not challenge the GPS data indicating he was present for approximately one hour. Claimant also testified that, after being directed to travel to McLeansboro for a meeting on March 31, 2021, he did not make any phone calls. However, the call log of the Carrier provided cell phone indicated Claimant spoke with Track Inspector B twice after he was instructed to report to McLeansboro and before Claimant gave his initial statement that he did not recall seeing Track Inspector B at Enfield, Illinois on March 24, 2021.

The Carrier informed the claimant he was in violation of Carrier's Rules A(1) and I(I) as:

The facts presented during the formal investigation revealed that that March 24, 2021, you failed and/or refused to make proper use of your time as you spent approximately one hour conversing with Track Inspector [B] for no apparent work related reason; on March 31, 2021, you provide misleading and/or false information ... in your written statement; and, you provided false testimony during the formal investigation on April 21, 2021, regarding your contacts with [Track Inspector B] on March 30 and 31, 2021, regarding the March 24, 2021, date.

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For your violation of these Rules, you are assessed discipline in the form of a sixty (60) calendar day suspension. You will be required to serve thirty (30) calendar days of suspension and thirty (30) calendar days will be held in abeyance.

The Organization appealed Claimant's suspension, asserting in part that the Carrier had deprived the Claimant of a fair and impartial hearing because the rule violations were not provided in the hearing.

As this is a disciplinary matter, the Carrier bears the burden of proof to demonstrate "just cause." In Award 26295, the First Division held that the Rules relied upon by the Carrier must be provided. In that matter, the Carrier "neither quoted in the Investigation nor attached to the transcript" the Rules and, therefore, the discipline was rescinded. Our review of the record in this matter demonstrates that, unlike the circumstances at issue in Award 26295, the Rules were, in fact, quoted at the hearing and the Claimant confirmed he understood the rules.

A review of the instant record also makes clear that the Claimant not only failed to make proper use of his time for approximately one hour on March 24, 2021, the Claimant also provided false statements on March 31, 2021 and at the Investigation on April 21, 2021. After being notified to report to McLeansboro, the Claimant spoke on the phone with Track Inspector B and then provided a statement (albeit later amended) wherein Claimant asserted he did not recall seeing Track Inspector B at Enfield on March 24, 2021. In fact, both Claimant and Track Inspector B were at Enfield together for approximately one hour. Further, at the Investigation, the Claimant again denied speaking with Track Inspector B prior to the March 31, 2021 meeting, a statement at odds with the documentary evidence.

As to the penalty imposed, given the serious nature of the misconduct established, a 60-day suspension with 30-days served and 30-days held in abeyance, is reasonable.

Were it not for the Claimant's nearly 15-years of service and favorable work record, a more severe disciplinary consequence would likely have resulted. It is clear, therefore, that the work record of the Claimant was considered in mitigation of the penalty imposed.

**AWARD**

Claim denied.

**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 28<sup>th</sup> day of June 2023.