

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 45093
Docket No. MW-47454
24-3-NRAB-00003-220647**

The Third Division consisted of the regular members and in addition Referee Patricia T. Bittel when award was rendered.

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

PARTIES TO DISPUTE: (
(Keolis Commuter Services

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

(1) The discipline (dismissal in all capacities effective immediately) imposed upon Mr. L. Bovill, by undated letter (following a ‘Decision Letter’ dated August 27, 2021), for alleged violation of Keolis Code of Conduct: Rule 1 - Knowledge of the Rules, Rule 2 - Courtesy and Professional Conduct, Rule 4 - Absence from Duty, Rule 8 - Behavioral Expectations and Prohibited Behaviors, Rule 9 - Safety, Rule 17 - Attending to Duties and for alleged violation of the Safety Policy and Roadway Worker Protection Rules, in connection with his alleged failure while working as a watchman on the Fitchburg Main Line on August 3, 2021, to devote his full attention to detecting approaching trains and sitting on a spike keg using an electronic device, was unwarranted, arbitrary, capricious and extremely excessive (Carrier’s File BMWE 72/2021 KLS).

(2) As a consequence of the violation referred to in Part (1) above, Claimant L. Bovill shall ‘* be placed back into service effective immediately, with all lost straight time, overtime, double-time wages, his safety pay allotments, seniority unimpaired, credits for vacation, credits for retirement, and any other benefits that are applicable to him under our Collective Bargaining Agreement with all charges withdrawn. ***’”**

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.

Factual Background:

Claimant was hired August 17, 2020. On August 3, 2021 he worked as a watchman on the Fitchburg Main Line. A FRA inspector allegedly observed him sitting on a spike keg using an electric device instead of devoting his full attention to detecting approaching trains. The Carrier determined that Claimant was in violation of its applicable rules and dismissed him from service. The resulting claim was processed through the grievance procedure to consideration by this Board.

Position of Organization:

The Carrier violated Rule 15(2) which provides: "The Company must supply the Organization, five (5) days prior to the hearing, all documents to be used in any investigation." The Carrier blatantly added evidentiary documents in an electronic exchange outside the required timeline under Rule 15. The Carrier sent an initial notice dated August 5, 2021 scheduling Claimant's Investigation for August 11, 2021. The Carrier also verbally confirmed with the Organization on August 6, 2021 that the Carrier was moving forward with the previously scheduled date of August 11, 2021. The Carrier's Notice of Investigation failed to include the names of the witnesses to be called by the Carrier during the investigation, leaving the Organization at an unacceptable disadvantage in preparing for the Investigation. Finally, the Carrier entered a written report as evidence against Claimant but did not make the report's alleged author available for questioning/cross-examination or testimony. As such, the

Carrier appreciably hampered the Organization's ability to probe the evidence offered against Claimant, in line with the old adage that "you cannot cross-examine a document."

The Carrier's whole case against Claimant rests on pure hearsay, offending all notions of "just cause" and "fairness and impartiality." An ultimate discipline of dismissal, to say nothing of lesser disciplines, simply cannot entirely rest upon such an unfair and unreliable basis.

The Carrier argument against Claimant is predominantly based upon an FRA Inspection Report. When the FRA inspector approached Claimant to confront him about the alleged violation, Claimant did not speak to the FRA inspector because that is a violation of watchmen rules. Claimant complied with the inspector's request to hold up both hands revealing a paddle in his left hand and an empty right hand; no electronic device was found. Claimant even went out of his way to alert the FRA inspector, whose sole responsibility is to ensure workplace safety, that the track he was walking towards was live. Claimant sat down on spike barrel simply to take a drink of water to stay hydrated due to the high heat; he continued to remain attentive of his watchmen duties.

Position of Carrier:

Claimant was provided with all documents at least five days before the Investigation. The Carrier sought and was granted a postponement of the Investigation hearing from the originally scheduled date of August 11, 2022 to August 19, 2022. The Investigation hearing was conducted on August 19, 2022.

As the Carrier see it, the Hearing Officer properly found the FRA Inspection Report to constitute a business record, created by the FRA as part of the FRA's business activity of reporting incidents and pursuant to their lawful authority to carry out regulatory and enforcement responsibilities. It was a record kept in the ordinary course of business, admissible as an exception to the hearsay rule.

In the Carrier's view, whether Claimant was on an electronic device or otherwise is irrelevant; the plain facts demonstrate he was inattentive with his gaze directed down between his legs, unable to detect approaching trains. Claimant's proven misconduct was a serious safety violation that put the employees on site in grave danger. The

Carrier cannot employ track employees who do not take seriously the safety of their co-workers and the riding public.

Analysis:

We do not find a procedural violation in this case. The Investigation was postponed and held August 19, and the documents were timely transferred to the Organization prior to that Investigation.

The report from the FRA stated as follows: “At approximately 1350 hrs. FRA observed a watchmen/lookout sitting on a spike keg, with their head looking between their legs. The employee was holding a black colored object and swiping it with their right thumb. The watchman/lookout was not devoting their attention to detecting approaching trains.”

This report is a record kept in the ordinary course of business and therefore falls within an exception to the hearsay rule. The FRA reported a violation to the Carrier. The Carrier was within its rights to credit the report and act on it. No carrier would be well advised to ignore FRA reports. The Carrier therefore had adequate basis to find Claimant had neglected his very important safety duties.

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 31st day of October 2023.