

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 45250  
Docket No. MW-47475  
24-3-NRAB-00003-220664**

**The Third Division consisted of the regular members and in addition Referee George Edward Larney 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 (dismissal) imposed on Mr. S. Gertner, by letter dated March 25, 2021 for alleged violation of GCOR 1.6 Conduct and GCOR 1.15 Duty – Reporting or Absence and Red Book of Track & Structures Requirements – 14.3.0 Methods of Inspection was imposed without according Claimant his contractual rights and with no burden of proof being fulfilled by the Carrier before it assessed what can only be deemed as excessive and unduly harsh discipline the constitutes an abuse of discretion (System File B-2134D-204/USA-DM&E-2021-00021618 DME).**

**As a consequence of the violation referred to in Part (1) above, Claimant S. Gertner shall “ . . . now be made whole by compensating for all wage and benefit loss suffered, any and all expenses incurred or lost as a result of Round trip Travel not paid for the scheduled Hearing on March 11, 2021, and the alleged charge(s) be expunged from Claimant’s personal employment record. Claimant must also be made whole for any and all other loss incurred and compounding from this event until this event is expunged from the Charged employees (sic) employment record”**

**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 S. Gertner established and maintains seniority in the Carrier's Maintenance of Way and Structures Department. On the date giving rise to this dispute, January 7, 2021, the Claimant was assigned to a Maintenance of Way Track Sub Group position as a Track Inspector.

The record testimony by the Claimant rendered at the Formal Hearing held March 11, 2021 reflected that on the morning of Christmas Day, December 25, 2020, at about 3:00 AM, while performing his duties as a track inspector, the truck he was driving caught on fire and completely destroyed the truck. As the truck was burning, the Claimant stated he was trying to get to a crossing to get help and that this occurrence "messed him up pretty badly", asserting in a written statement this event was "one hell of a traumatic experience". The Claimant recalled however that between Christmas Day and New Year's, he worked two (2) or three (3) days running track through cold weather and the record evidence reflects he returned to his scheduled tour of duty on Sunday, January 3, 2021. The Claimant noted his return to work on January 3, 2021 was a return to his regularly scheduled full five-day work week since the incident of the truck fire, acknowledging that between the date of the fire and January 7, there had been a span of thirteen (13) work days. Even so, the Claimant maintained that on January 7, he was not feeling real safe and normal in the truck.

Sam Pimental, Director of track and structures in Dubuque, Iowa testified that on January 7, 2021 he was in transit from Waseca, Minnesota to New Ulm Minnesota when he received a call from Jamie Stark, Senior Manager of Structures asking him to stop at his office to make an observation. That observation was of the truck assigned to the Claimant that day and was being tracked by means of the truck's GPS (Global Positioning System). According to Claimant's vehicle GPS record and photographic evidence of Claimant's truck movements throughout his tour of duty on January 7 the Claimant made several unauthorized stops throughout the day, but not once did he high rail the truck or stop along side of the tracks presumably to perform his duty of track inspection. Pimental summarized the Claimant's movement during his work day of January 7, which commenced at 7:00 AM as follows:

- Claimant left Tracy Depot at 8:06 am, drove 90 miles to Mills Fleet Farm located in Mankato, Minnesota and remained at that location for 50 minutes and 59 seconds.
- Claimant departed Mills Fleet Farm at 10:44 am, drove 23 miles to Waseca where he picked up Personal Protective Equipment (PPE) and was at that location for 25 minutes and 10 seconds.
- From Waseca, he drove 39 miles to Nicollet, Minnesota where he spent 15 minutes and 14 seconds at Smith's Meat Market.
- From Nicollet, he drove 56 miles to Lamberton, Minnesota where he spent 17 minutes and 41 seconds at which location he maintained he inspected three (3) assets. Pimental noted however, that the three (3) assets referenced at this location spanned a distance of over two (2) miles but no driving of the truck occurred over this distance during those 17 minutes and 41 seconds. It was subsequently determined by a visit made by Management to the location in Lamberton where Claimant stopped that the time spent there was at a business establishment where Claimant visited his brother-in-law.
- From Lamberton he drove 28 miles to the Tracy Depot in 28 minutes and 19 seconds where he parked his truck at 2:38 pm. Prior to parking the truck, the record evidence reflects that Claimant purchased fuel for the truck at 2:30 pm.

Pimental testified that at 2:50 PM, he called the Claimant and asked him what exactly he had done in terms of performing his duties for the railroad that day and according to Pimental, the Claimant's response was deceptive (meaning untruthful) and covered by falsified records. Pimental testified that the Claimant stated he had performed several track inspections and made several repairs whereas the GPS tracking of his activity showed he had not performed any inspections nor made any repairs that day. Pimental noted that the Claimant had no knowledge at the time when he inquired regarding his productivity that day that his movements had been monitored by GPS throughout the day and documented.

The Claimant testified that when Pimental asked him what he had accomplished in terms of performing his work, he thought the question pertained to the whole week as opposed to just that day (January 7<sup>th</sup>), by telling Pimental he had inspected switches

and D-Rails. When shown a FRA track inspection report for January 7<sup>th</sup>, where he reported he had inspected a total of seven (7) switches and D-rails that day thus contradicting the answer he gave to Pimental that he thought this identical answer pertained to the whole week as opposed to just that day. The Claimant then testified in response he had not performed those inspections on January 7<sup>th</sup>, asserting he did not recall exactly what day he performed those inspections. The Claimant admitted to signing and submitting the FRA track inspection report that incorrectly referenced the work he had performed on January 7, 2021. The Claimant explained that the entire full week he returned to work following the Christmas and New Year's holiday period was a blur, more precisely, he did not remember exactly what took place that week due to his being in a truck fire on Christmas Day. The Claimant next was shown Section 14.6.0(a) Record of Track Inspections from Section 14-Track Inspection of the Red Book of Track & Structures Requirements which reads, "Each track inspection must be recorded and signed on the day the inspection is made" and was asked had he complied with this regulation, the Claimant conceded he had not. Again, the Claimant attributed his failure to comply with the regulation on the affect the truck fire had on him, asserting he was zombie-like just going through the steps of doing his job of making his inspections. Verbatim, the Claimant testified as follows:

I was having troubles with everything. I was using a different truck. Didn't have my computer with me. Some of the things were taking me longer than they should have and I was not getting back to the depot in time to put inspections in, so I would try and remember to put [them] in the next morning to back date [them] . . . one day. Ended up forgetting about it and making mistakes being confused on what I was doing and not getting [them] in correctly.

In other testimony, the Claimant admitted to stopping at a shop in Lamberton on January 7<sup>th</sup> where his brother-in-law is employed explaining the shop does detailing of vehicles. The Claimant asserted he went to see if this shop would work with ARI which allows for a truck to be detailed once every six (6) months. When asked if he sought approval from the Company to have a family member accept money from ARI through the Company, the Claimant admitted he had not sought such approval. The Claimant was asked the purpose of his stopping at the meat market to which he replied to have lunch, explaining it was take-out as the market was busy, he paid and left. The Claimant admitted making this stop had not been approved by his manager.

**WHEN ASKED IF HE HAD INSPECTED ANY TRACKS THE DAY OF JANUARY 7<sup>TH</sup>, CLAIMANT ANSWERED "NO".**

The Claimant averred that his duties on January 7 was to perform track inspections but instead, he decided on his own volition to drive to Waseca, (round-trip travel taking five hours from where he commenced his work day), the Tracy Depot to replenish the PPE equipment that was lost in the truck fire. The record evidence reflects this trip was unauthorized as was all the stops he made along the way. The Claimant also explained the purpose of the stop at Mills Fleet Farm which was on the way to Waseca was to replace the cooler that was also lost in the truck fire. The amount of time spent at the Fleet Farm was due to the fact it was very busy and it took time to find the coolers that were way back in a corner of the store. However, the Claimant explained that the Fleet Farm only carried Yeti brand coolers which were priced at \$350 to \$400, too much money for the Company to spend and in his estimation was not a wise choice. As a result, the Claimant related that on the way out, he grabbed a bag of nuts.

The Claimant recalled he was part of a “drilldown” held the following Monday, January 11, delving into his non-performance of duties, Thursday, January 7, 2021. According to the Claimant, his Manager, James Drenth was among those present, realized how much trouble he was having and gave him the phone number of the EAP (the Company’s Employee Assistance Program). The Claimant recalled that on Tuesday, January 12, 2021, Pimental showed up to finish the drilldown and on that day, Pimental took him out of service without giving him any reason for doing so. The Claimant testified and supporting written record evidence reflects that the Claimant participated in EAP and was seen by a medical practitioner who diagnosed his condition as “Acute Stress Reaction” related to the fire truck incident that occurred on Christmas Day, December 25, 2020. In a report dated February 8, 2021, the medical practitioner wrote that the Claimant had “greatly improved but still was dealing with stress” indicating his estimated date for return to work full-time was February 16, 2021. In a following report dated February 15, 2021, the medical practitioner wrote that the Claimant was able to return to regular duties as of February 16, 2021. However, the Claimant was still being held out of service pending holding the Formal Hearing that was convened on March 11, 2021.

By letter dated March 25, 2021, Carrier notified the Claimant that upon a review of the transcript of the investigation held March 11, 2021, it has been determined that substantial evidence and proof has shown he violated the following rules:

- GCOR 1.6 Conduct
- GCOR 1.15 Duty – Reporting or Absence
- Red Book of Track & Structures Requirements – 14.3.0 Methods of Inspection

Carrier further informed the Claimant that based on the facts and evidence adduced at the Hearing and his past disciplinary record, he was dismissed from Carrier's service effective immediately.

Upon a thorough review of witness testimony, substantial written record evidence, and the declaration by the Claimant against self-interest that counter to his job duties as Track Inspector, he did not perform any of the duties of his position on the incident date of January 7, 2021, but instead spent the entire work day incurring unauthorized travel and stops in his assigned Company truck, the Board finds the discipline imposed by Carrier would, under most circumstances, justifiably support his dismissal except for the fact, Carrier failed to take into account the mitigating factor of the Claimant's temporary disability of acute stress reaction due to the truck fire he experienced on Christmas Day, December 25, 2020, that prevented him from performing his regularly assigned duties without problems. Therefore, the Board orders Carrier to reinstate the Claimant to his position of Track Inspector without back pay or other make whole benefits as soon as it is determined he is fit for duty in accordance with Carrier's criteria for such determination. Additionally, the Claimant is to be returned to duty under a last chance agreement, the terms of which are to be mutually agreed to by the Parties including the duration of the agreement which shall become effective from the date of his return to employment.

**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 28<sup>th</sup> day of March 2024.