

BEFORE PUBLIC LAW BOARD NO. 7566  
CASE NO. 161/Award No. 161

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BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES  
DIVISION – IBT RAIL CONFERENCE

and

WISCONSIN CENTRAL LTD.

Carrier's File WC-BMWED-2018-00008  
Claimant: Joshua Nuthak

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**Statement of Claim**

“Claim of the System committee of the Brotherhood that:

1. The discipline [thirty (30) day actual suspension from service and disqualified as a foreman for one (1) year] imposed upon Mr. J. Nuthak for alleged violation of Carrier rules in connection with an incident that occurred on January 18, 2018 when Claimant allegedly put track back into service without completing a pull apart repair, was arbitrary, capricious and unwarranted (Carrier's File WC-BMWED-2018-00008 WCR).
2. As a consequence of the violation referred to in Part 1 above, Claimant J. Nuthak's personal record shall be cleared of the charges immediately and he shall be provided the remedy prescribed in Rule 31 Paragraph I of the Agreement.”

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier or employee within the meaning of the Railway Labor Act as approved June 21, 1934.

Public Law Board 7566 has jurisdiction over the parties and the dispute involved herein.

**Facts**

Claimant Joshua Nuthak has established and holds seniority in the Carrier's Maintenance of Way Department.<sup>1</sup> On January 18, 2018, while assigned as a Track Foreman in connection with a track repair assignment at or near a North Shore Siding, the Claimant removed but did not replace Pandrol clips. Believing at the time that a restriction would suffice, Foreman Nuthak instructed the RTC to release his track authority and place the rails back in service with a 10 MPH restriction so that a train could pass through the area under repair. The train proceeded through the area and

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<sup>1</sup> The Claimant's personal work record was not submitted during the investigation; thus, the date of hire and prior discipline record are unknown.

the Claimant instructed his crew to return to the depot as they were approaching an hours of work deadline. A preliminary investigation led the Carrier to issue a January 26, 2018 letter directing the Claimant to attend an investigation that took place on February 6, 2018. He was removed from service pending the investigation. By letter dated February 14, 2018 the Carrier informed the Claimant that had been found guilty of a Level 3 violation in that he had allegedly violated USOR General Rule A – Safety, Peer to Peer Critical Task – 03 and FRA Track Safety Standards Part 213.127 – Rail Fastenings. On February 27, 2018 the Organization filed a timely claim on Foreman Nuthak’s behalf. The claim was properly progressed on the property without resolution and advanced to this Board for final and binding adjudication.

### **Carrier Position**

There is substantial evidence of the Claimant’s guilt as he admitted his failure to complete the repair and never denied responsibility for putting the track back in service with a 10 MPH restriction. He was the senior foreman and EIC. The hearing was fair and impartial without pre-judgment, with the Claimant afforded representation, with a Hearing Officer who acted professionally and who did not commit procedural violations. Mr. Matekarich, a charged employee, had signed a waiver and was not called as a witness in accordance with standard operating procedure. His statement does not contradict the Claimant and was not referred to after it was introduced. The discipline was just and with sufficient cause as the Claimant had violated multiple rules. This was a Level 3 violation. The Claimant was pulled from service as the results of not completing the repairs could have been catastrophic. The violation was not willful, but the foreman disqualification was within management’s rights.

### **Organization Position**

The investigation was not fair and impartial because all of the pertinent witnesses were not made available. The Carrier has not met the required burden of proof. Track Supervisor James Bard testified that the Claimant left nineteen (19) Pandrol clips unsecured, but exhibits show only ten (10) clips. Assistant Track Supervisor Andra Erickson knew that the work had not been completed and that the 10 MPH restriction was in place with limits on hours of work approaching, yet she approved the situation. There is no evidence of improper track gauge and there was no derailment over the sixty-two hours that the partial repair existed. The discipline was arbitrary and unwarranted and represented disparate treatment because Mr. Matekarich and Mr. Ankarlo were allowed to waive an investigation, but the Claimant was not. All three were not held equally accountable.

### **Findings**

USOR General Rule A. Safety states that “Safety and a commitment to obey the rules are the most important elements in performing duties. If in doubt, the safe course must be taken.”

Engineering Peer to Peer Communication, which also applies to other than Engineering employees, at 3.1 states that “When operating or working around track units, a clear understanding of the work to be performed and the method of track protection must be established between the operator(s) and the employee(s). This must be clearly communicated between the parties involved.” FRA Track Safety Standards Part 213.127 Rail Fastenings lists failures including Insufficient fasteners in a track segment, Insufficient fasteners at rail joint and Failure of Applied rail anchors to provide effective longitudinal restraint. A Level 3 violation is “A Violation of a critical rule that is related to or implicates a critical rule, which does not otherwise meet the criteria for a Level 4 Rule Violation.” With no prior recorded discipline, the discipline is a 30-day suspension.

The neutral chair has read the more than nine (9) prior awards attached to the Organization’s submission where claims have been completely or partially sustained because of the Carrier’s failure to call one or more witnesses. The prior awards do not dictate the outcome in this case despite the fact that neither Trackman Ankarlo nor Track Foreman Matekarich, whose statement is in evidence, were made available as witnesses. The case before us presents no significant factual dispute. Foreman Matekarich’s written statement does not contradict the Claimant’s written statement or his testimony, both of which contain an admission that he had made a mistake (see TR-42, ll. 11-19 and Exhibit 4). There is substantial evidence of the Claimant’s violations of the above-noted rules and standards.

The contention that the Carrier has not met its burden of proof because the record includes photos of only ten (10) of the nineteen (19) unsecured Pandrol clips is unpersuasive in the face of the Claimant’s admission and the photographic evidence of at least some missing clips. That Assistant Track Supervisor Andra Erickson approved the situation as she knew it is only part of the story. She testified that she had spoken with Senior Foreman and EIC Nuthak at about 7:30 pm and was told that the crew had “Left the job site. Everything was complete, except they could only get one bolt in one side.” The Claimant further stated that he “put a 10 mph in for the night and would complete the work tomorrow” (TR-27, ll 15-20). Neither Supervisor Erickson nor the Claimant when he testified indicated that her approval was with the knowledge that the Pandrol clips had been reattached.

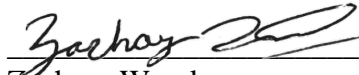
The Organization’s further contention that the Claimant was disparately treated fails because the crew of three (3) were not equally responsible. As Senior Foreman and EIC, the Claimant was ultimately responsible for seeing that the assigned work was performed correctly and safely.

## **Award**

Claim denied.



John K. Ingoldsby  
Carrier Member



Zachary Wood  
Organization Member



I.B. Helburn  
Neutral Member

Dated: December 9, 2021