

**PUBLIC LAW BOARD NO. 7599**

**AWARD NO. 55  
CASE NO. 55**

**PARTIES TO  
THE DISPUTE:** Brotherhood of Maintenance of Way Employees Division  
IBT Rail Conference

vs.

Grand Trunk Western Railroad Company

**ARBITRATOR:** Gerald E. Wallin

**DECISION:** Claim is partially sustained in accordance with the Findings.

**STATEMENT OF CLAIM:**

"Claim of the System Committee of the Brotherhood that:

1. The Carrier's discipline [disqualified from the position of foreman and assistant foreman effective May 8, 2015 and ten (10) days actual suspension from service and twenty (20) days deferred suspension] of Mr. C. Sorah, issued by letter dated May 8, 2015 in connection with his alleged installation of two (2) rails that were not ultrasonic tested prior to installation, his not using the required dye penetrate on all rail ends, his failure to have the rails he installed spiked to CN track standards and his failure to call Senior Manager Dave Chaney as instructed whenever work performed disturbed the track, was capricious, excessive, harsh and unwarranted (Carrier's File GTW-BMWED-2015-00014 GTW).
2. As a consequence of the violation referred to in Part 1 above, Claimant C. Sorah shall be returned to service, compensated for all lost time [not less than thirty (30) days, at the foreman straight and overtime rates of pay], restored with all rights and benefits (including foreman and assistant foreman rights) and have all references to this incident removed from his record."

**FINDINGS OF THE BOARD:**

The Board, upon the whole record and on the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties; that the Board has jurisdiction over the dispute, and that the parties were given due notice of the hearing.

Claimant was disciplined in three respects as noted in the above Statement of Claim. At the time of the incident in question, he had approximately eight (8) years of service with the

Carrier. His work record was not provided in the Carrier's submission.

Our review of the transcript of the investigation, as well as the appeal process on the property, revealed several procedural objections advanced by the Organization. Although the record before us shows them to lack merit, the amount of time devoted to them during the investigation was extensive. Indeed, the 213-page transcript of the investigation may well be approximately twice as long as it otherwise could have been to cover the pertinent factual information involved. Accordingly, some discussion of the objections might provide guidance for future investigations.

Rule 25 of the effective Agreement governs "Discipline, Investigations and Appeals." Section 1(d) of the rule provides that a charged employee "... shall be given at least five (5) days advance notice, in writing, of the *precise charge* of which he is accused ..." (Italics supplied) The provision does not contain any language that explicitly requires the Carrier to also include a listing of all rules, by rule number or letter, in a notice of investigation. Literally for decades, the prevailing view of public law boards as well as the National Railroad Adjustment Board is that a notice of investigation is sufficient if it provides enough details about the incident to direct the attention of the accused and his/her representative to the incident. Typically, where the notice accurately describes the date, time, place and description of the conduct involved, it satisfies the "precise charge" requirement. See, for example, Award No. 4 of Public Law Board No. 206, which dates from 1970. The notice in this case did accurately describe the date, the two milepost locations on the Dearborn Subdivision, and the four aspects of Claimant's performance to be investigated. Moreover, the transcript does not show that the Claimant or his representative were either confused or somehow misled about the scope or nature of the investigation.

When Carriers do include rule citations under similar Agreement language that does not explicitly require them to do so, it is not uncommon for the affected Organization to turn to the other side of the coin and object on the grounds that the claimant has been prejudged. It is for this reason that "precise charge" language does not require a listing of potential rules violated unless the effective Agreement contains additional terms that explicitly require such a listing or there is a substantial body of past arbitral precedent on the given property between the given parties that has evolved to create the requirement. No such prior awards have been cited to this Board.

Accordingly, the Organization's objection that the notice violated the "precise charge" language is found to lack merit. This finding is without prejudice to the Organization's ability to make this same objection in future similar matters if it can show prior award support between these same parties.

For its second objection, the Organization contended that Claimant was denied a fair and impartial investigation because the Carrier official who signed the notice of investigation was not

present at the investigation to justify why the notice was issued. Nowhere in the text of Rule 25 provided to this Board do we find language that requires the notice signer to attend an investigation. We, therefore, find the Organization's objection to lack merit. This finding, again, is without prejudice to the Organization's ability to advance this objection in the future if it has sufficient award support.

The Organization's third objection was related to its second objection. The Organization objected to the Carrier's first witness contending that the witness somehow also became the charging party and, thus, played the dual role of charging party and witness. Not only is the record devoid of Agreement and prior award support for this contention, the record provides no logical rationale for this objection. It must be, and is, rejected.

For its fourth objection, the Organization contended it was entitled to interrogate the conducting officer of the investigation with 26 separate questions to determine whether the conducting officer was qualified to conduct a fair and impartial investigation. Again, nowhere in the text of Rule 25 available to this Board do we find any language that entitles the Organization's representative to determine the conducting officer's qualifications. Indeed, the Organization's effort on this point effectively attempts to usurp the authority of this Board. Among the several responsibilities of this Public Law Board, it is our role to review the transcript and exhibits to determine whether the investigation was conducted in a fair and impartial manner. This duty is performed by us on a case-by-case basis upon examination of the transcript whether the Carrier official is conducting his or her first investigation or the hundredth. It matters not what had gone before as long as the transcript under review shows that the investigation was fair and impartial. Upon careful review of the transcript, we find that the instant investigation was fair and impartial. Accordingly, this fourth objection must be rejected.

For its fifth objection, the Organization challenged the introduction of all exhibits because they were not provided at least five days in advance of the investigation. Again, nowhere in the text of Rule 25 available to this Board do we find any requirement for the Carrier to provide such pre-hearing discovery. Once again, the Organization did not provide any prior award support between these parties interpreting Rule 25 language as the Organization does. Although Rule 24(i) was referenced for support, it is clear from the title of Rule 24 as well as the text of Rule 24(a) that the rule, and its sub-sections, applies only to claims initiated by the employee or the Organization. That is an entirely different process that has no direct bearing on investigations, discipline, and appeals. Our finding, therefore, once again without prejudice, is that the Organization's objection lacks merit.

Although the foregoing were not the only objections advanced by the Organization, our review of the investigation does not reveal any that create a procedural barrier to our ability to consider the merits.

Although the Claimant either denied any misconduct or provided his rationale justifying his conduct, our review of the record finds it to contain substantial evidence in support of three (3) of the Carrier's charges. He failed to apply dye penetrant to the cut ends of the rail he cut out and he either knew or should have known he was required to do so without exception. The presence of rain did not relieve him of his responsibility to use the dye. He did use replacement rail that had not been ultrasonically tested. Finally, he did not spike the rail in accordance with the Carrier's spiking standards.


The fourth charge is that he failed to call the designated supervisor after completing the repair work to discuss the procedures he used. While Claimant did not make the call, the record does not clearly establish that he should have known to do so even as late as the midnight hour. According to the record, Claimant had to do two (2) rail defect repairs at Mileposts 3.44 and 3.56. His crew did not finish the two (2) jobs until close to midnight.

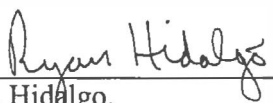
Given the state of the record herein, we find that Claimant's discipline should be appropriately modified. Because the record shows he intentionally or carelessly failed to perform as required on the dye usage, the usage of untested rail, and the improper spiking, we find the ten (10) day actual suspension and the one-year disqualification as a foreman are warranted. However, because we find the failure to call the supervisor has not been adequately proven, we find the twenty (20) day deferred suspension should be removed from Claimant's record.

If the deferred suspension was triggered later, then Claimant must be compensated for any pay loss. If it was not triggered, it is sufficient to remove any entry from his work record.

AWARD:

The Claim is partially sustained in accordance with the Findings. The Carrier is directed to comply with the Findings within thirty (30) days of the date shown below.

  
Gerald E. Wallin, Chairman  
and Neutral Member

  
R. Hidalgo,  
Organization Member

  
C. K. Cortez,  
Carrier Member

Date: 2-8-2018