

SPECIAL BOARD OF ADJUSTMENT NO. 986

PARTIES TO THE DISPUTE:

Brotherhood of Maintenance of Way Employees Division – IBT Rail Conference

and

National Railroad Passenger Corporation (AMTRAK) – Northeast Corridor

STATEMENT OF CLAIM:

- 1. The Carrier's discipline (dismissal) of Mr. R. Torres, issued by letter dated February 9, 2021, when on September 1, 2020, the Carrier alleged to have discovered the Claimant being dishonest and derelict in his duties as a track inspector was unjust, arbitrary, capricious, based on unproven charges, and a violation of the agreement (System File BMW-158871-D AMT).**
- 2. As a consequence of the violation referred to in Part 1 above, Claimant R. Torres shall be reinstated to service immediately and made whole for all losses associated with his dismissal, which includes lost time, including but not limited to lost overtime, all benefit rights restored, and all seniority rights restored. Additionally, this matter shall be stricken from the Claimant's record.**

OPINION OF BOARD:

At the time of the incident giving rise to this grievance, Foreman Robert Torres was assigned as a Track Inspector. In a letter dated September 11, 2020, the Carrier notified Claimant to appear for an investigation to be held to determine his responsibility, if any, regarding the following charge:

As a result of an investigation conducted by Amtrak Track Dept, New York Division, it was discovered on September 1, 2020, that Track Inspector Foreman Robert Torres was dishonest and derelict in his duties. On Monday 8/24/20 a

Maintenance Foreman found several track conditions in one location (Track 13 Torres territory) that were not indicated in Mr. Torres's Maximo inspection report for the month of August. In addition, for Mr. Torres to perform his track inspections he must take foul time for protection. On 8/25/20 Transportation ran a foul time block log for the 5 days prior in PSNY. It was discovered that Mr. Torres had not requested foul time during that time. As a result, it was suspected that Mr. Torres was not walking his territory or performing his duties properly. On 8/27, 8/30, and 8/31/20 management positioned themselves to observe Re. Torres in the area he is assigned to walk to perform track inspections on the body tracks 1-21 PSNY. On 8/27/20 and 8/30/20, Mr. Torres was not observed at all during his shift to walk his assigned territory. On 8/31/20, Mr. Torres was observed walking part of, but not his entire territory as required. Mr. Torres falsified company documents when he signed off on the Maximo Track Inspection reports (FRA required) indicating that he visually inspected the tracks on these dates when he was either not there at all or did not perform his duties properly. Mr. Torres's actions jeopardize the safety of our employees and customers and are in violation of Amtrak Standards of Excellence.

Following postponement, the investigative hearing was held on January 6, 2021, and January 27, 2021. Following the investigation, the Carrier notified Claimant in a letter from the hearing officer dated February 8, 2021, that he had been found substantially guilty of the charges in the Notice of Investigation. On February 9, 2021, the Carrier issued a letter confirming Claimant's dismissal from service, effective as of that date.

On February 20, 2021, the Organization filed an appeal on Mr. Torres's behalf. That appeal was denied and subsequently progressed in accordance with the parties Agreement, after which it remained in dispute. It is properly before the Board for resolution.

At the outset, the Organization has raised a procedural claim regarding alleged lateness of the Carrier's response following the hearing on appeal on September 30, 2021. It points out that Rule 74 specifies that "a decision [after the appeal hearing] will be rendered by the highest designated officer within 30 calendar days of the hearing." (Rule 74 (b)(3)) The Carrier's hearing response was received on November 11, 2021, and the Organization asserts that, although it

was dated October 28, 2021, it was not even mailed until November 7, 2021. In this case, however, there appears to have been a “revised appeal” submitted by the Organization dated October 6, 2021, with no indication on this record regarding when it was received by the Carrier, although it was presumably a day or two thereafter. Accordingly, while we do not condone the Carrier’s dating the letter so much earlier than it was actually sent, in light of the “appended appeal” letter from the Organization dated October 6, 2021, we cannot say with assurance that the Carrier violated Rule 74, as alleged. Therefore, it is proper to proceed to the merits of this case.

The Carrier contends that it has shown by substantial evidence presented at the investigation, including both testimony and photographs, the charges leveled against the Claimant were correct. It points to the testimony of Assistant Division Engineer Stephanie Park that the number of defects not found by Claimant strongly suggest that he was filling out his report forms without actually doing the inspections required. She testified that she then chose to observe the Claimant’s territory on August 31, 2020, from A Tower between 10:00 p.m. through 3:00 a.m. and saw him walking only tracks 14 and 17 when he “should have been walking 12 through 21”.

Ms. Park also testified that she assigned Carrier managers to observe Claimant’s territory from A Tower on August 27 and August 30, and they reported they did not observe him walking his territory in the FRA-required frequency, despite reporting that he had. Both managers confirmed they did not see Claimant properly perform his track inspection duties. In light of the photographs of track defects subsequently found on Claimant’s territory, and the Carrier’s conclusion that, in addition, he falsified his reports, the Carrier asserts that there is

sufficient evidence on this record to confirm Claimant's negligence. Moreover, his proven failure to request foul time as he inspected each of the tracks in his territory further supports the discipline of discharge, particularly in light of the threat to the safety of both employees and passengers implied by such neglect. It asks that the instant claim be denied in its entirety.

For its part, the Organization strongly disputes that the Carrier has shown that Claimant was negligent or violated any of the Carrier's safety standards. Nor, it argues, have they shown that Claimant falsified his Maximo Track Inspection reports. The Organization points out that the Carrier's position rests solely on the testimony of the three Carrier managers – S. Park, R. Flores, and M. Avenoso – who testified that Claimant was not observed inspecting all of the track in his assigned territory. It notes that even the Hearing Officer acknowledged that those managers did not observe Claimant for the entire shift, and there is doubt on this record regarding whether they could have observed him effectively at all from their apparently obscured viewpoints.

Furthermore, the Organization argues that Claimant's testimony is supported by Carrier Supervisor R. Belle, who confirmed that inspectors are not required to walk their territory in any particular order, that they do not always have to have foul time, and that the observed discrepancies in the trackage could have occurred after Claimant completed his shift. The Organization also urges that there is no showing on the record that Claimant falsified his reports and points out that Claimant's reports were submitted as they stood to the FRA by the Carrier for compliance. Finally, the Organization protests that even if, for the sake of argument, some of the accusations against Claimant had a modicum of truth to them, the discipline assessed was arbitrary, excessive, and unwarranted. In sum, the Organization asks that the instant claim

be sustained in full.

The Board has carefully reviewed the record in this case, including the voluminous transcript and the photographic evidence submitted therewith. In particular, we note the thoroughness of the Hearing Officer's (HO) detailed post-hearing report. In that report, the HO raises questions, supported by our reading of the transcript, regarding the ability of the managers testifying against the Claimant to actually observe Claimant's entire shift, due in part to the amount of time they spent doing those observations, and in light of the apparent inability to see most of his territory from their chosen vantage points. Testimony on the record supports the Claimant's statement that it is not always necessary for an inspector to request foul authorization when inspecting a particular track – even though it is recommended. This is true for tracks with an available site for an inspector to retreat to in order to assure his personal safety, should a train traverse the tracks during his inspection. No manager was able to testify with assurance that on those tracks for which Claimant did not request foul permission there were not available "safety sites."

In addition, testimony on the record leads the Board to conclude that Claimant's supervisor and the Carrier took no issue with Claimant's FRA reports before forwarding to the FRA for compliance. Further, as the HO pointed out in her report, the evidence presented by Carrier "was not dispositive on the issue of whether...[Claimant] inspected the tracks as he reported." In addition, the Board notes that none of the managers observing Claimant actually continued observing him through his entire shift – thus casting considerable doubt on whether he omitted inspecting certain tracks.

The Board does have a concern, however, that the number of defects discovered on

Claimant's territory despite his reporting no defects for an entire month, casts considerable doubt on the care taken by Claimant during his tours of inspection. While there is some testimony on the record that those all could have appeared "overnight", we find more credible the testimony that Claimant may have been less than vigilant on his inspection rounds.

To summarize, the Board finds that the bulk of the charges leveled against Claimant are not supported, except for the allegation that he was less than vigilant in his inspection rounds. That is not a trivial failure. However, in light of the Claimant's clean 7-year record, we find that the penalty of dismissal was unwarranted. In the unique circumstances of this case, and without precedent to other similar cases that may arise, we find that Claimant's penalty should be reduced to a three-month suspension, that he be made whole for the remainder of his time out of service, and that his other rights and benefits remain intact. The amount of the restitution shall be determined by a joint examination of employee records by the Carrier and the Organization.

AWARD

Claim is sustained only to the extent set forth in the above Opinion. The Carrier is ordered to make the Award effective on or before 30 days following the date the Award is transmitted to the parties.



Elizabeth C. Wesman, Chairman

Carrier Member
Organization Member**Dated** 12-16-2022