

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 33567
Docket No. MW-34405
99-3-97-3-891

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

PARTIES TO DISPUTE: ((Brotherhood of Maintenance of Way Employees
(Grand Trunk Western Railroad Company

STATEMENT OF CLAIM:

“Claim on behalf of the System Committee of the Brotherhood that:

- (1) The discipline [withheld from service, subsequent six (6) day suspension] of Foreman J. Martinez, for alleged violation of Grand Trunk Operating Rules 368 and 376 on November 26, 1996, was arbitrary, capricious, unwarranted, without just and sufficient cause and in violation of the Agreement (Carrier's File 8365 -1- 568).
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant shall have his record cleared of the charges leveled against him and he shall be compensated for all wage loss suffered.”

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.

As of December 27, 1996, when Claimant's discipline was imposed, the Carrier had employed Claimant since June 14, 1977, a period of over 19 years. Prior to the discipline imposed in this case, Claimant had received the following disciplines:

DATE	DISCIPLINE	OFFENSE
8/24/81	20 demerits	Failure to properly protect Form Y Train order
10/19/81	3 day suspension	Failure to properly protect Form Y Train order
2/24/82	2 day suspension	Improperly operated motor vehicle
10/17/91	40 demerits 10 day suspension	Responsible for accident and violation of Rule 904 A
2/25/93	10 demerits	Violation of GT safety rules 3355 and 3303
10/12/94	30 day suspension	Responsible for vehicle accident

The incident in question occurred on November 26, 1996. On that date, Claimant had an RCBS clearance from Milepost 10 to Milepost 28 and was working as a Track Foreman on the Mt. Clemens subdivision. On that day, Materials Engineer R. Nagel and Planning Manager D. Wilfong decided to hy-rail from Pontiac to Detroit (Milepost 10), and onto the Mt. Clemens subdivision where they planned to hy-rail to Port Huron (Milepost 55). When Nagel and Wilfong reached the Mt. Clemens subdivision, where Claimant was working, Nagel contacted the Train Dispatcher and requested his own RCBS clearance in order to continue to hy-rail to Pt. Huron. This clearance was denied, but the Dispatcher suggested that Nagel contact Claimant for permission to operate under his clearance. At approximately 1:30 P.M., Nagel contacted Claimant and obtained permission to operate under his clearance from Milepost 10 through Milepost 28. At the end of his shift, approximately 4:00 P.M., Claimant canceled his RCBS clearance without contacting Nagel, thus leaving Nagel and Wilfong without protection. When Nagel and Wilfong reached Milepost 28, he called to request continued clearance and found that he no longer was protected by Claimant's clearance. Pursuant to this event, Nagel removed Claimant from service without pay on the following day, November 27, 1996 pending the Investigation.

By letter dated December 2, 1996, Claimant was instructed to attend an Investigation on December 6, 1996. Claimant was charged with violation of Grand

Trunk Western Operating Rules 368 and 376. The Investigation took place on December 6, 1996 and on December 27, 1996, Claimant was found guilty of violating Rules 368 and 376 when he "failed to protect a hy-rail unit operated by Materials Engineer, Rod Nagel, operating under your protection, on the Mt. Clemens subdivision, when you canceled your RCBS at 1611 hours, leaving Mr. Nagel on the main track with no protection." As a disciplinary action, Claimant was deprived of pay for six days. In addition, Claimant was not allowed to work in the position of Foreman until he successfully completed an Operating Rules class.

The Organization contends that the Carrier violated the Agreement when it failed to provide the Claimant with a fair and impartial Investigation. The Organization contends that Claimant's guilt was predetermined and that the Hearing Officer acted inappropriately. Further, the Organization contends that Claimant was innocent of the charges alleged because even though Claimant dropped his clearance, Nagel was still protected by Conductor Henson and Engineer Meyers under the RCBS clearance issued to Local 505 (Extra 5702) which had clearance from Milepost 10 through 40. Nagel knew of this secondary clearance and was thus protected even though Claimant's clearance was dropped.

According to the Carrier, the Claimant was pulled out of service because he had engaged in serious misconduct, not because of any predetermination. In addition, the Hearing Officer at the Investigation is clearly allowed to both conduct the Investigation as well as assess discipline. On the merits, the Carrier alleges that the results of the Investigation fully support a finding of guilty for the offense of failing to protect Nagel under Claimant's clearance. While Claimant appears to believe that Train No. 505 protected Nagel, this was an incorrect assumption as Nagel indicated that the Rules did not allow such protection. Nagel was under Claimant's protection. Thus, when Claimant released his clearance without contacting Nagel, he placed Nagel at risk and violated the two Rules at issue. Finally, the Carrier contends that the discipline imposed was appropriate based upon Claimant's prior disciplinary record as well as the offense involved.

The Board sits as an appellate forum. We do not weigh the evidence de novo. As such, our function is not to substitute our judgment for the Carrier's, nor to decide the matter in accord to what we might or might not have done had it been ours to determine, but to pass upon the question whether there is substantial evidence to sustain a finding of guilty. If the question is decided in the affirmative, we are not warranted in disturbing the penalty unless we can say it appears from the

record that the Carrier's actions were unjust, unreasonable or arbitrary, so as to constitute an abuse of the Carrier's discretion. (See Second Division Award 7325; Third Division Award 16166).

The Board reviewed the transcript and the positions of both parties. On the question of whether there was substantial evidence that Claimant was guilty of violating Carrier Rules when he failed to notify Nagel before clearing his RCBS clearance, the Board finds that there is substantial evidence to sustain the Carrier's position. Claimant was responsible for the RCBS clearance between Milepost 10 and Milepost 28 on November 26. Claimant allowed Nagel to be protected under his clearance and nothing modified that protection. Nagel requested that he be protected under Claimant's clearance and when Claimant suggested that Train No. 505 protect Nagel, Nagel rejected this contention. Thus, when Claimant left for the day without notifying Nagel that his clearance was also removed, he placed Nagel and another employee at great personal risk. The Organization is incorrect that Train No. 505 was protecting Nagel. The Hearing Officer at the Investigation accepted Nagel's word that the conversations that he had had with the other train crew had been very "casual" and he had not requested clearance. Further, he accepted Nagel's version of the conversation with Claimant which was backed up by the Train Dispatcher's log. These are credibility determinations and such determinations are the province of the Hearing Officer and the Board will not disturb such determinations absent compelling reasons (See Third Division Award 32332). Thus, when Claimant went off duty without notifying Nagel, he left Nagel and Wilfong unprotected. Thus, we find that there is substantial evidence to uphold the Carrier's conclusion that Claimant violated the Carrier's Rules.

We next review the question of whether Claimant was denied a fair and impartial Hearing. The Carrier was within its rights to pull Claimant out of service because of the nature of the infraction. Claimant had, at least allegedly, placed Nagel at great risk of personal harm by not contacting him prior to pulling his clearance and there was nothing to preclude the Carrier from removing him from service. Further, as to the objection that the Hearing Officer also imposed the discipline involved, the Board rejects that claim as well. As the Carrier notes, it is not unusual or improper for the Hearing Officer to also act as the finder of fact (See Third Division Award 24207). Thus, we find that the Claimant did receive a fair and impartial Investigation and the Organization's arguments are rejected.

Finally, we turn to the degree of penalty imposed in this case. As noted above, we are not warranted in disturbing the penalty unless we can say it appears from the record that the Carrier's actions were unjust, unreasonable or arbitrary, so as to constitute an abuse of the Carrier's discretion. Here, the Carrier relied on the events of November 26 as well as Claimant's prior record to impose the discipline. As noted above, since 1977, Claimant had received a number of prior disciplines, some directly involving breaches of Safety Rules and Regulations.

The instant matter involved a serious breach of Safety Rules, specifically dealing with a failure to properly protect another employee. This is a matter of serious concern, in and of itself. Further, in his disciplinary record, Claimant had previously violated Safety Rules. This Claimant obviously has had some previous difficulties with safety questions and the substance of this case deals with a safety issue. Based on a review of all these considerations, we believe that the discipline imposed, a six day suspension, was not arbitrary capricious or unreasonable, under any circumstances. The Board concludes that the discipline should be upheld and the claim denied.

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 20th day of October 1999.