

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 34976
Docket No. MW-33434
00-3-96-3-962**

The Third Division consisted of the regular members and in addition Referee Hyman Cohen when award was rendered.

**(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(Burlington Northern Santa Fe Railway Company (former
(Atchison, Topeka and Santa Fe Railway Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of Section Foreman P. L. Edwards Jr., for alleged violation of Rules 1.1; 1.1.1; 1.1.2; 1.1.3, 1.3.1; 1.6 Items 1, 2 and 3, 1.20; 50.1 and 50.15.2 of the Safety and General Rules for All Employees; Rule 20.7 of Maintenance of Way Rules and Rule 10.3.2 of General Code of Operating Rules in connection with a westbound coal train hitting hydraulic impact wrench on September 27, 1995 was arbitrary, capricious, extremely harsh and an abuse of the Carrier’s discretion (System File 40-13C2-952/12-29-AA ATS).**
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be reinstated to service with all seniority and benefits unimpaired, his record cleared of the charges leveled against him and he shall be compensated for all wage loss suffered beginning November 16, 1995 and continuing until he is reinstated to service.”**

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.

On September 27, 1995, the Claimant was working as a Section Foreman at Emporia, Kansas, where he led a gang which was renewing a crossing on the north track at Merrick, Kansas, just east of an industrial facility. A surfacing gang led by Foreman Svoboda had surfaced the track earlier in the day.

At approximately noon, a westbound coal train contacted the Claimant by radio and indicated that they struck an unidentified object at the crossing. The Claimant replied that all of the members of his crew were safe.

At approximately 1:30 P.M. the Claimant went to the office of Roadmaster W. Coester and informed him that a train had struck and severely damaged an impact wrench his gang had been using while working at the crossing at Merrick. The impact wrench had been left lying close to the track when the Claimant and his gang took their lunch break. The Claimant admitted that he had left the impact wrench laying close to the track while the gang ate lunch, and that he had planned to get track and time to finish working on the crossing after they finished eating.

The Carrier notified the Claimant that a formal Investigation was scheduled to be held on October 12, 1995 in connection with a westbound coal train hitting [a] hydraulic impact wrench on September 27, 1995, in order to determine the responsibility, if any of possible violations of various Rules. The Hearing was eventually held on November 2, 1995. Following the Hearing, the Claimant was dismissed.

Turning to the events of September 27, 1995, it must be underscored that the Claimant testified he did not obtain track and time to protect his gang before the train hit the impact wrench. The Claimant said that he "knew Svoboda had track and time, but [he] did not tell Svoboda that [he] was working under his track and time."

The Claimant admitted that it was not the Company's policy to share track and time with someone else without first informing them. He was aware that the purpose of notifying the other party of sharing track and time is to "[L]et him know you are working under his track and time so he knows when to give it back, before he gives it back, to get in touch with you."

The Claimant failed to afford protection for his gang by working within the limits of the track and time obtained by Svoboda and his surfacing gang, without first informing Svoboda that he was sharing track and time with him. Indeed, the Claimant acknowledged that in his previous years as a Foreman, as he "always got track and time" in order to place a crossing on tracks.

Svoboda said that he was in the segment of track in question between 7:00 A.M. and 11:51 A.M. on September 27, 1995. During that period of time Svoboda said that the Claimant never talked to him about "wanting to work within [my] track and time."

It is significant to point out that the Claimant did not inform either the train which hit the impact wrench or a nearby Welder who contacted him by radio that the train had struck an object. Rather, he told the Welder by radio, that everything was alright. After 20 or 30 minutes went by, the Claimant contacted Coester and explained the incident to him. The Claimant acknowledged that he did not report the incident by the first means of communication available.

There was no lack of specificity in the Notice of Investigation that was sent to the Claimant. Moreover, the Carrier did not raise issues at the Hearing which went beyond the scope of the notice. The notice that was sent to the Claimant set forth that the purpose of the Hearing was to determine facts and place responsibility, if any, involving possible violations of Carrier Rules. The Rules were clearly identified in the notice and read into the record of the Hearing. The Board concludes that every issue or possible Rule violation which was brought out at the Hearing was identified in the notice and thus the Claimant was given a full, fair and impartial Hearing. Indeed, the Claimant said "no" to the following question: "Concerning the incident under investigation here, getting the impact wrench hit, was there anything involving this case that had changed that you were not aware of?" Thus, any alleged lack of familiarity by the Claimant with changes in work practices had no bearing on the case.

The Claimant violated various Safety and General Rules by not properly protecting his gang and allowing a tool to be left on unprotected track. He was negligent when he and his gang took a lunch break while the tool was left on the track. His act compromised the safety of his men. There is no question that the Claimant also knowingly disregarded the Carrier's policies and practices by failing to inform Svoboda that he was working under his track and time.

In arriving at the penalty of dismissal of the Claimant for violating various Rules on September 27, 1995, the Carrier considered his disciplinary record for previous offenses, and his involvement in its Progressive Intervention Program. This program was introduced by the Carrier in order to address the serious safety concerns which exist at all locations on the railroad. On October 1, 1993, the Claimant was placed into the education phase of the program for failing to wear the proper safety headgear. On November 17, 1994, the Claimant was placed into the retraining and corrective action phase for his violation of work Rules when he crossed through the cars of a moving train at Lebo, Kansas.

The Board finds that the Claimant had adequate warning before the November 2, 1995 Hearing that there was a likelihood he would be terminated. The Claimant was reinstated on September 14, 1995 by Award 528 of Public Law Board No. 1582 after being previously terminated for violating the Carrier's Rules. The Award provided that his reinstatement came under "the doctrine of last chance" and it was his final opportunity to be returned to the service of the Carrier.

The Board finds that the Investigation was fair and objectively administered. The Claimant was afforded the full extent of his rights under the Agreement. He was represented at the Investigation by a duly authorized representative of the Organization and was given the opportunity to provide a defense with witnesses and by the cross-examination of Carrier witnesses.

The record contains compelling evidence that the Claimant violated various Rules and practices. The penalty of dismissal is commensurate with the severity of the offenses committed by the Claimant on September 27, 1995.

AWARD

Claim denied.

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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 September, 2000.