

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35984
Docket No. MW-35909
02-3-99-3-936**

The Third Division consisted of the regular members and in addition Referee Nancy F. Eischen when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Union Pacific Railroad Company (former Missouri
(Pacific Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Level 2 Upgrade Discipline Assessment assessed Machine Operator C. Brown for his alleged responsibility of fouling the track with his assigned weed mower on September 29, 1998 was without just and sufficient cause, based on an unproven charge and in violation of the Agreement (System File MW-99-28/1166006 MPR).**
- (2) As a consequence of the violation referred to in Part (1) above, Machine Operator C. Brown shall have the discipline ‘... removed from his personal record, for four (4) hours at his respective straight time rate of pay for attending the hearing on September 29, 1998 and all expenses the claimant aquired (sic) to include meals and mileage reporting to Spring, Texas, account the carrier failed to produce sufficient evidence to support their charges for the alleged violations of Rule 136.4 and the claimant’s rights were violated with regard to ‘Due Process’ and in accordance with Rule 12, of the current agreement between the Union Pacific Railroad and the BMWE, SP, Atlantic Federation respectively.”**

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 August 11, 1998, Machine Operator C. Brown (Claimant) was instructed to mow the grass and high weeds between Storage Tracks 2 and 3 at Strang Yard. While performing the task, the Claimant's machine became "bogged down" in the mud between the tracks. When the Claimant was unable to free the machine, he began to walk toward the Yard for help. According to the Claimant, he had been walking for approximately five minutes when a fellow employee offered him a ride to the yard. However, as the pair started toward the yard, two FRA Inspectors who were on the property, and had been observing the Claimant, stopped the Claimant to question him about leaving the machine unprotected. Thereafter, the Carrier received a citation from the FRA who had observed the Claimant "fouling the main line without permission or authority."

By Notice dated September 16, 1998, the Claimant was directed to attend a September 29 Hearing in connection with the events of August 11. On October 15, the Claimant was informed that he had been found guilty of violating Rule 136.4 of the Chief Engineers Instructions, and assessed with a Level 2 Discipline.

The Organization protested the discipline, noting at the outset that the FRA report was "illegible." The General Chairman further noted that the FRA Inspectors were "no closer than 200 yards" and "as far away as six (6) or seven (7) football fields" away from the Claimant while observing him.

The General Chairman maintained that the Carrier based its decision to discipline the Claimant "solely upon the testimony of Manager Track Maintenance White, who did not witness Claimant operating the machine." And, although White did interview the Claimant and examine the marks in the mud, he did not take any pictures or measurements, rendering his testimony "speculative," according to the General Chairman.

For his part, the Claimant stated that he did not cross or foul Storage Tracks No. 2 and 3 on August 11, and was therefore, not guilty of failing to provide on-track safety protection.

The Carrier denied the claim, asserting that:

"Claimant was rules qualified at the time of the incident and responsible for complying with Carrier's rules. The FRA's determination that the Claimant was in violation of the On Track Safety rules after watching him work is substantial evidence in and of itself to support the discipline assessed. The FRA inspection report was entered as an exhibit during the hearing and outlines the Claimant's actions of violating the rules."

Rule 136.4 On-Track Safety Procedures states, in pertinent part:

“On-Track Safety can be provided for roadway worker by the following methods:

*Track and Time, Track Warrant, Track Permit . . . train approach warning, train approach warning system, or flag protection.”

The Organization argues that the Claimant was relegated to a section of the Yard, alone and without communication. Moreover, the Organization asserts that the Claimant was more than four feet away from the track and did not need flag protection.

However, Manager Track Maintenance White, who investigated the August 11 incident, testified that:

“Q. Was Mr. Brown’s weed mower fouling the track?

A. Based on the marks and talking with Mr. Brown, yes he would be fouling the track. He was too close to the track without protection.”

The Claimant was assessed a Level 2 discipline which is one day of alternative assignment, with pay, to develop a corrective action plan. Despite the Claimant’s protestations otherwise, the record evidence supports the Carrier’s assertion that, on August 11, 1998 the Claimant violated Rule 136.4 when he allowed equipment to foul the track without authority and without protection.

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 19th day of March, 2002.