

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37326
Docket No. MW-37022
05-3-01-3-653**

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
(New Orleans Public Belt Railroad)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The discipline [five (5) working days suspension] imposed upon Mr. A. Thornton in connection with charges of alleged violation of NOPB's General and Safety Rules for All Employees Rules 1.1, 1.4 and 1.6 while working as a bridgeman helper on July 31, 2000 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File MW-00-2-NOPB/NOPB-00-2).**
- (2) As a consequence of the violation referred to in Part (1) above, the aforesaid charges shall be removed from Mr. A. Thornton's record and he shall be compensated for all time lost with all rights and benefits restored and he shall be compensated for all time in attending the investigation on August 25, 2000 at his applicable straight time and overtime rates of pay and for any and all expenses incurred in connection therewith."**

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.

Claimant A. Thornton, at the time of the incident that occurred on July 31, 2000, had established and held seniority as a Bridgeman Helper in the Bridge Sub-Department. On that date, he was working on the bridge tie gang under the supervision of Foreman S. Bourgeois on the Mississippi River Bridge. At that time, he had two years of unblemished service.

The Mississippi River Bridge is both a railroad bridge and a highway bridge spanning the Mississippi River upstream approximately seven miles from downtown New Orleans. The rail portion of the bridge consists of two main lines and is located above the vehicular portion of the bridge that consists of four lanes of traffic.

While performing his duties, the Claimant dropped a hook bolt (which fastens the track to the bridge structure) from the elevated railroad tracks onto the highway below. The Claimant assumed that the bolt fell into the safety net and, therefore, did not attempt to locate the bolt. He did not report this incident or notify the Bridge Foreman, as previously instructed. In fact, the hook bolt dropped through the safety net below, striking a white truck that was passing, causing damage to the truck.

By letter dated August 9, 2000, the Carrier directed the Claimant to report on August 23, 2000 for an Investigation relating to his alleged violation of Rules 1.1 (Safety) 1.4 (Carrying out rules and reporting violations) and 1.6 (Conduct). Following a postponement, the Investigation was ultimately held on August 23, 2000.

Pursuant to the Investigation, the Claimant was suspended for five calendar days.

The Organization claims that the discipline imposed upon the Claimant was unwarranted, harsh, and excessive. It contends that the burden of proof in a discipline matter such as this is on the Carrier and that burden has not been met. The Organization claims that not only has the Carrier been unable to prove that the Claimant engaged in the act alleged, even if he did engage in said act, the discipline imposed was unreasonably harsh. According to the Organization, the Carrier should now be required to clear the Claimant's record of any mention of the incident, to compensate him for all lost wages, including lost overtime, and to make him whole for vacation, holidays, and seniority.

Conversely, the Carrier takes the position that it met its burden of proof. The Claimant was afforded a fair and impartial Investigation in accordance with the requirements of the Agreement. The Carrier considers the Claimant guilty as charged. According to the Carrier, a review of the Investigation transcript leaves no doubt that the Claimant violated the applicable Rules. According to the Carrier, the Organization failed to appeal the matter in a timely fashion rendering the instant appeal "dead" under the time limits imposed by the Agreement.

In discipline cases, 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 with what we might or might not have done had it been ours to determine, but to rule upon the question of 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 its discretion. See Second Division Award 7325 and Third Division Award 16166.

After a review of the evidence, the Board determines that the Carrier failed to prove that the Organization's appeal was untimely. The burden of proof for a procedural matter such as this falls to the party asserting the contention. While the Carrier presented limited evidence to support its position, the Organization successfully rebutted that evidence and has shown that it properly appealed the discipline. Thus, this portion of the Carrier's defense is rejected.

As to the substance of the matter, the Board finds that the Carrier proved that the Claimant violated the cited safety Rules. He was guilty of dropping a bolt (which led to vehicular damage) failing to attempt to retrieve it, and failing to report the incident, all of which are in violation of the Rules cited by the Carrier.

In addition, the Board finds that the discipline imposed was reasonable. Based on the evidence in this matter, the Board upholds the discipline imposed.

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 January 2005.