

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32959
Docket No. MW-33583
98-3-96-3-1093**

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employes
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Level 3 discipline assessed Track Foreman C. F. Knape for allegedly releasing a track and time permit before all equipment was clear of the main track on May 4, 1995 was without just and sufficient cause, based on an unproven charges, excessive punishment and in violation of the Agreement (System File D-235/960043).**
- (2) As a consequence of the violation referred to in Part (1) above, Track Foreman C. F. Knape shall now be compensated for all wage loss suffered and have his record cleared of the charges."**

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 May 4, 1995 Claimant was assigned to pilot a contractor owned and operated Loram Rail Grinder between main line mile posts 277 and 281 near Montanic, Oregon. The grinding operation included the use of a rail-mounted water truck, for clean-up purposes, that normally followed along behind the grinder. To secure control of the track segment for the necessary grinding, Claimant obtained a track and time permit. Claimant released the track as being clear at approximately 1:05 P.M. Shortly thereafter it was determined that the water truck still occupied the track. A train that had just started movement toward the affected track was stopped by other Carrier personnel without further incident. Claimant was found culpable following Investigation and was assessed with a Level 3 suspension of five days pursuant to Carrier's UPGRADE (Union Pacific General Rules for Administering Discipline Effectively) policy, which had been implemented effective July 1, 1994.

The Organization challenged the discipline for a number of procedural and substantive reasons. Its chief procedural objection was that Carrier did not produce either the Grinder Operator or the Water Truck Driver after being requested to do so.

According to the record, the Carrier's Notice of Investigation contained the following advisory:

"This investigation will be conducted in conformity with Rule 48 of the Schedule Agreement between the Company and the Brotherhood of Maintenance of Way Employees. You are entitled to representation per the applicable Schedule Agreement rule and may produce such witnesses as you desire at your own expense." (Emphasis added)

By letter dated May 22, 1995, the 2nd Vice General Chairman requested that Carrier produce the two contractor employees. In this regard, the letter read:

"The witnesses are needed to investigate the facts related to charges that Mr. Knappe allegedly released Track and Time Permit No. 292, between CPN277 and CPN281 without ensuring that all equipment was clear. Mr. Knappe was not able to produce the above named witnesses so as an expression of fairness we request the Carrier produce the witnesses named to investigate all the facts at the hearing on May 25, 1995."

A Carrier official informed the 2nd Vice General Chairman that it declined to produce the witnesses. The 2nd Vice General Chairman did not appear at the Investigation. Rather, Claimant was represented by a different Organization official. When that official raised the objection about the two witnesses, the Hearing Officer offered, several times, to grant a postponement to enable Claimant to secure the witnesses. The offer was declined.

On the point of producing witnesses, Rule 48 reads, in pertinent part, as follows:

"(c) Prior to the hearing, the employee alleged to be at fault shall be apprised in writing of the precise nature of the charges(s) sufficiently in advance of the time set for the hearing to allow reasonable opportunity to secure a representative of his choice and the presence of necessary witnesses."

On its face, Rule 48 does not place responsibility upon the Carrier for producing witnesses to testify on behalf of the Claimant. Not surprisingly, therefore, on-property Awards have held that it is Claimant's responsibility to arrange for the presence of witnesses on his behalf. See Third Division Award 26435. Under the circumstances, Carrier's refusal to produce the two witnesses did not deny Claimant a fair and impartial Hearing. The Organization's remaining procedural objections are found to lack merit.

The Organization also challenged the sufficiency of the evidence. Our review of the transcript, however, reveals substantial evidence in support of Carrier's finding of guilt. Claimant knew the applicable Rules and knew that it was his responsibility to ensure the track segment was clear before he released it. By his own admission, he only thought the Truck Driver had radioed that he was clear. But Claimant was not positive he had heard such a report and he did not affirmatively check to verify the truck's status. When asked why he released the track when he was not sure it was clear, Claimant responded that he did not know. In addition, Claimant said he normally asks the Dispatcher if the track is clear before returning his permit. In this case, however, he did not. It was not until after the problem was discovered that Claimant contacted the truck by radio. The Driver immediately responded that he was still waiting at mile post 277. These facts establish Claimant's culpability.

The final issue is the appropriateness of the discipline. Claimant was a 29-year employee with a relatively clean record. Nonetheless, the seriousness of the Rules infraction fell within Level 3 of the UPGRADE policy. The policy had been communicated to all employees nearly a year earlier. On its face, the policy appears to represent a reasonable correlation between the gravity of various types of misconduct and a progressive disciplinary schedule. Under the circumstances, we do not find the disciplinary penalty to be unreasonable or unwarranted.

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 23rd day of November 1998.