

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35827
Docket No. MW-35855
01-3-99-3-842**

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(I & M Rail Link, LLC

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (time withheld from service pending Drug and Alcohol test results) imposed upon Bridge and Building Carpenter M. Smith for alleged violation of I&M Rail Link General Code of Operating Rules 1.1, 1.1.2, 1.6, 14.5, CP Safety Handbook General Rules A, I, 747, 23.4, 29.2 and 31.1.2 concerning vehicle accident on May 17, 1999 was arbitrary, capricious, disparate, on the basis of unproven charges and in violation of the Agreement (System File D-25d-99-390-03-I).**
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be compensated ‘ . . . for all lost wages, including but not limited to straight time, overtime, paid and non-paid allowances and safety incentives, flex time, health & welfare benefits, and any and all other benefits to which entitled, but lost as a result of Carrier’s arbitrary, capricious, and excessive discipline when it suspended Claimant from service effective July 1, 1999.”**

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.

Carpenter M. Smith (Claimant) had been employed by the Carrier for approximately 29 years, and was assigned to Mobile Crew 1, under the supervision of B&B Supervisor S. Schneider, Assistant B&B Supervisor J. Sheridan and B&B Foreman B. Ingles when this dispute arose.

On May 17, 1999, the Claimant and fellow crew members Foreman Ingles, Truck Driver E. Cooksley and Carpenter P. Ludovissy, obtained a track warrant allowing them to work on the main line between Edmore and Guttenburg. In pertinent part, the track warrant specified:

“Do not foul limits ahead of IMRL 364 West”; and

“Between Edmore and Guttenburg make all movements at restricted speed. Limits occupied by men or equipment.”

At approximately 3:00 P.M., shortly after rounding a curve in the track, the Mobile Crew 1 hi-rail vehicle collided with the rear end of Train IMRL 364 West which was stopped on the main line approximately 500 feet ahead. Approximately 315 feet from the point of impact, the Claimant jumped from the hi-rail vehicle in anticipation of the collision, sustaining a broken collarbone and cuts to his face. (Of note, Driver Cooksley also jumped from the vehicle approximately 100 feet before impact, but did not report any serious injuries.)

On May 19, 1999, the Carrier directed the Claimant and Messrs. Cooksley, Ingles and Ludovissy to attend a fact finding as a result of the collision. On July 1, 1999, the Claimant received the following Letter of Discipline:

“In response to the fact finding session accorded you on June 3, 1999, you have been assessed the following discipline:

- Actual suspension from service equal to the time you were withheld from service pending the Drug and Alcohol test results.**
- You will hold one (1) safety meeting in which you will discuss truck and equipment handling.”**

The Organization protested the discipline, asserting that the Claimant did not receive a fair and impartial Hearing. Specifically, the General Chairman noted that General Roadmaster Holloway had served multiple roles during the proceedings, thereby denying the Claimant his contractual rights to due process. The General Chairman further asserted that Hearing Officer Holloway “engaged in making factually inaccurate statements and misrepresentations of fact (without corrections) for alleged clarification” and “insisted on witnesses engaging in expressing opinion, speculation, supposition and prejudgment” during the Hearing.

Regarding the merits of this dispute, the Carrier “failed to connect or associate a single one of its charges leveled against the Claimant with the factual circumstances of the incident involved,” according to the Organization. Finally, the General Chairman contended that the Claimant was disciplined for being injured, rather than for his alleged failure to comply with the Rules.

With respect to the procedural violations asserted by the Organization, the Carrier notes that there is nothing in the Agreement that prohibits the General Roadmaster from assuming multiple roles in the disciplinary process, nor did the assumption of those multiple roles prejudice the Claimant’s Hearing, according to the Carrier.

Further, the Carrier maintains that the record evidence clearly demonstrates that the Claimant “was careless of his own safety and that of his fellow B&B crew members when he failed to take care to see that the hi-rail vehicle in which he was riding was operated in accordance with governing rules.” The Carrier noted that, as a result of the collision, the hi-rail vehicle sustained heavy damage, and the end of train device on IMRL 364 West was completely destroyed.

Finally, the Carrier deems the Organization's contention that the Claimant was disciplined for being injured "a completely self serving and preposterous argument not supported by the record evidence."

The issue remained unresolved on the property and has now been placed before the Board for adjudication.

At the outset, the Organization asserts that the Claimant was not afforded a fair and impartial Hearing because the Hearing Officer "engaged in making factually inaccurate statements and misrepresentations of fact for alleged clarification" and "insisted on witnesses engaging in expressing opinion, speculation, supposition and prejudgment" during the Hearing. However, we find no persuasive evidence of Hearing Officer bias on this record.

The Organization further asserts that the Hearing Officer was "the prosecution, judge, jury and executioner." The issue of multiple roles by one officer in discipline proceedings in this industry has been the subject of many Board Awards. While these Awards caution the Carrier against this practice because of the obvious due process risks involved, the better reasoned majority of these Awards also provide that, in the absence of Agreement language specifically prohibiting one officer from serving multiple roles, each case must be reviewed to determine if the employee's Agreement due process rights were actually compromised or prejudiced in any way. Although we reiterate that such multiple roles are contrary to good practice, we are not persuaded, on this record, that there was any fatal prejudice to the Claimant's contractual right to a fair and impartial Hearing.

The questions to be decided regarding the merits of this dispute are: 1) Did the Carrier present substantial evidence to prove the charge leveled against the Claimant? and; 2) Was the discipline arbitrary, unjust, or excessive?

The Carrier asserts that on May 17, 1999, the Claimant was careless of his own safety and that of his fellow B&B crew members when he failed to take proper care to see that the hi-rail vehicle in which he was riding was operated in accordance with the governing Rules.

For his part, the Claimant contends that he and his fellow crew members complied with each of the mandates set forth in the May 17 track warrant, particularly

that portion which directed the crew to "... make all movements at restricted speed. . . ." The Claimant also noted that when the accident took place it was "raining, dark and windy," making the heavily greased portion of track "very slick." However, neither the condition of the track nor Cooksley's prowess as a hi-rail vehicle operator are before the Board for consideration. Rather, our deliberations are confined to the issue of whether the Claimant was, as the Carrier asserts, "careless of his own safety and that of his fellow B&B crew members" on the date at issue.

In these particular circumstances the Carrier failed to present credible evidence to support the charges leveled against the Claimant. Specifically, the Carrier failed to prove that the Claimant, who was seated in the rear passenger seat of the hi-rail vehicle and was literally "along for the ride," could have foreseen the accident or done anything to prevent the collision. The Carrier's mere assertion that the Claimant "was careless of his own safety and that of his fellow B&B members," is not supported by the record evidence, and therefore, does not meet the burden of proof required of the Carrier.

Based on all of the foregoing, this claim is sustained.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 14th day of November, 2001.