

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 35969
Docket No. MW-36294
02-3-00-3-510

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Burlington Northern Santa Fe (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (withheld from service and subsequent dismissal) imposed upon Mr. C. J. Such for alleged failure to report incident when Locomotive Crane BNX 975432 struck a power line at Mile Post 222.70, Lake Park, Minnesota on September 24, 1998 in ‘ . . . violation of Rule 1.1.3 Accidents, Injuries and Defects of the Maintenance of Way Operating Rules, Rule 1.2.1 Sufficient Time of the Safety Rules and General Responsibilities for All Employees, Rule 1.6 Conduct of the Maintenance of Way operating Rules.’ was arbitrary, capricious, excessive, on the basis of unproven charges and in violation of the Agreement (System File T-D-1719-B/11-99-0227 BNR).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant C. J. Such shall now be ‘ . . . reinstated to his position, paid for all time lost (including overtime), made whole for any and all benefits, and his record cleared of any reference to any of the discipline set forth in the November 23, 1998 letter from Mr. H. C. Jeske, Division Engineer.’”

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.

After an Investigation on November 17, 1998, the Claimant was dismissed from service based on the Carrier's determination that he struck a power line while working without a groundman on September 24, 1998 and failed to report the incident to Carrier Officials. At the time of his termination, the Claimant had been employed by the Carrier since August 1978.

According to the transcript, Roadmaster T. Swalboski received a telephone call from the Superintendent of the Lake Park City Public Works Department on October 20, 1998, informing him that the City's power lines had been damaged by one of the Carrier's cranes on September 24, 1998. The Roadmaster testified that he had been on vacation when the alleged incident occurred, so he contacted the other Roadmasters on the territory covering Lake Park, Minnesota, to determine if they had been informed of the power line incident on September 24. None had received reports of a crane striking the City's power lines.

After investigating further, the Roadmaster learned that the Claimant was operating a Locomotive Crane picking up scrap at the time and location in question. Indeed, the Claimant admitted at the Hearing that he struck a cable line which then hit the power lines. He acknowledged that he was operating the crane without a groundman. He further conceded that he never reported the incident to his supervisors. A Notice of Investigation was issued on October 21, 1998.

Based on the evidence adduced at the Hearing, the Carrier contends that the Rule violations were proven and that dismissal was fully justified, particularly in light of the Claimant's prior disciplinary record. The Organization maintains that the dismissal was improper for several reasons, each of which will be addressed in turn by the Board.

As a preliminary matter, the Organization argues that the Carrier violated Rule 40A of the Agreement by failing to set the Investigation within 15 days from the date of the occurrence. It contends that the Carrier scheduled the Investigation to commence on October 30, 1998, more than 15 days following the incident on September 24, 1998.

The Board is not persuaded that the Organization's position has merit. The language of Rule 40A provides as follows:

"An employee in service sixty (60) days or more will not be disciplined or dismissed until after a fair and impartial investigation has been held. Such investigation shall be set promptly to be held not later than fifteen (15) days from the date of the occurrence, except that personal conduct cases will be subject to the fifteen (15) day limit from the date information is obtained by an officer of the Company. . . ."

The foregoing provision clearly contemplates that not all occurrences will be discovered at the time they happen. Accordingly, the Carrier is allowed 15 days to set an Investigation either from the date of the occurrence, or, where the employee's personal conduct is at issue, within 15 days from the date the Carrier receives information about the occurrence. The language of Rule 40A recognizes that the Carrier cannot be expected to schedule an Investigation until it is aware of an incident or occurrence upon which an Investigation can be based.

The Organization argued that the 15-day time limit began to toll on the date of the incident because the Dispatcher was notified that trains passing through may have to slow down after the power lines in the area had been damaged. However, a Train Dispatcher is not an officer of the Carrier. Rule 40A plainly states that it is an Officer of the Company who must be the recipient of the information.

Nor do we agree with the Organization that common sense and logic dictate that Carrier Officials knew of the incident. In the Organization's view, experience teaches that Carrier Officials know what occurs under their direction, and they most certainly would have known about a power outage that affected the City of Lake Park for many hours that day. While that argument has a certain appeal on its face, the Board must base its findings on evidence rather than unproven assertion. In the absence of any testimony or probative proof that a responsible Carrier official had knowledge of the occurrence at any time prior to October 20, 1998, we must conclude that the

Organization's timeliness objection must be rejected. A Notice of Investigation was issued on October 21, 1998, the day after the Roadmaster first learned of the incident, in compliance with Rule 40A.

Careful review of the Organization's remaining procedural arguments suggest that they, too, are without merit. Nothing in the Agreement prohibited the Division Engineer from signing the Notice of Discipline or required that only the Conducting Officer might do so. No showing of actual prejudice or deprivation of a fair and impartial Investigation has been made on this record, and therefore there is no basis for holding that the Claimant's rights were violated. Additional arguments not advanced during the handling of this claim on the property have not been considered by the Board, because we are without authority to entertain new bases for appeal at this level.

On the merits, the Board concludes that the charges have been proven by the record evidence, including the Claimant's own testimony acknowledging the misconduct alleged. See Third Division Awards 20250, 22740, 33446.

The Organization's exculpatory arguments are unfounded. Essentially, the Organization argues that other employees had knowledge of the power outage, yet only the Claimant was disciplined. Of the two employees referenced, one was a Foreman who was not at the site of the Claimant's accident. Moreover, there is no clear evidence which shows that he was informed of the accident after it happened.

The other employee, Flagman D. Morlock, testified that the Claimant notified him of the accident and said that he was going to report the matter himself. The Claimant testified that he assumed Morlock would notify Carrier officials because he had a cell phone. It is not within the province of the Board to resolve the credibility conflict in the testimony. That function was properly conducted by the Hearing Officer and he concluded that Morlock's testimony was more credible than the Claimant's. We have no basis to interfere with that determination.

In short, the Organization's defenses fail to exonerate the Claimant from culpability for his actions and not reporting the accident. That being the case, the only remaining question is whether the penalty imposed falls within the range of discretion afforded to the Carrier in discipline matters. The Claimant's negligent actions amounted to significant violations of the Carrier Rules. Moreover, his disciplinary record shows that this is his fourth offense within a three-year period. Under the

Carrier's Policy for Employee Performance Accountability, that sort of record indicates that progressive discipline has not been successful in eliminating further disciplinary occurrences. Thus, while the Claimant is a long-term employee, his overall record and the serious nature of the proven misconduct in this case outweigh longevity as a mitigating factor. The claim must therefore be denied.

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 8th day of March, 2002.