

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36261
Docket No. MW-36504
02-3-00-3-721**

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

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

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [six (6) days’ actual suspension beginning August 18 through 25, 2000] imposed upon Mr. J. Schroder for alleged violation of ‘*** General Safety Rules G-11 Slip, Trip and Fall Prevention item 33, 34, and 40. General Code of Operating Rule 1.1.2, 1.1, and 1.6 Conduct, item 1.’ in connection with his personal injury on June 28, 2000 at approximately 9:45 A.M. at Bettendorf, Iowa was arbitrary, capricious, excessive, on the basis of unproven charges and in violation of the Agreement (System File D-33-00-550-06-I).**
- (2) As a consequence of the violation referred to in Part (1) above, the aforesaid discipline shall be set aside and removed from Mr. J. Schroder’s record and he shall now be compensated for all lost wages, including but not limited to straight time, overtime, paid and no-paid allowances and safety incentives, flex time, health and welfare benefits, and any and all other benefits lost as a result of said discipline.”**

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.

In this case, the Claimant and the Organization seek reversal of the Carrier's imposition of a six day suspension without pay following an Investigation into a charge that the Claimant was negligent in connection with an on-the-job injury which resulted from his stepping into a mud hole. It is worth noting at the outset that the Claimant conceded at the Hearing that he could have avoided traversing the muddy spot, had he taken the time to do so. Thus, the claim is not premised on the merits so much as on several alleged procedural insufficiencies in the Carrier's handling of the Investigation process.

The Organization asserts that the Carrier erred in calling the Claimant as the first witness to testify at the fact-finding Investigation. We recognize that the Carrier has the burden of proof in discipline cases and that it is somewhat unusual to require the accused employee to testify before presenting other evidence. But the Agreement does not address the subject specifically and we are not persuaded that the mandate for a fair and impartial Investigation is automatically violated whenever the Carrier calls the charged employee to testify first. In the absence of any showing of actual harm or demonstrated deprivation of the right to a fair Hearing, we find no fatal error in that regard in this case.

Similarly, the Carrier acted at its peril in not sending the discipline letter to the Organization within 30 days and in having the same Carrier Officer issue the initial charges, act as Hearing Officer, and issue the discipline. The Board has previously observed that such mixing of roles is certainly not good practice and an open invitation to arbitral reversal if the record demonstrates actual harm. However, because we find no evidence of actual abuse of process or harmful error in this particular record, we conclude that the claim must be denied. See Third Division Awards 35827, 35641 and 35506.

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 28th day of October 2002.