

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37266
Docket No. MW-37763
04-3-03-3-68**

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**
(**Union Pacific Railroad Company**)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [Level 3 with five (5) day actual suspension] imposed under date of November 19, 2001 upon Mr. D. Crowe for alleged violation of Union Pacific Chief Engineer Instructions 136.7 and Rule 1.1.2 while working as a tamper operator on October 2, 2001 while operating a tamper on the Peoria Sub, Mile Post 12.4, and hit another piece of equipment was arbitrary, unsupported, excessive and in violation of the Agreement (System File 3KB-6750D/1299224-D).**
- (2) As a consequence of the violation referred to in Part (1) above, Mr. D. Crowe shall now “*** be compensated all lost time, be made whole all losses and have any reference to the investigation removed from his personnel record as outlined in Rule 48 (h) of the effective Agreement.”**

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.

At the time of the incident on October 2, 2001, the Claimant held seniority and was assigned as a Tamper Operator to Tie Gang 9062 and was working on the Peoria Subdivision. Tie Gang 9062 was regularly assigned to work from 7:00 A.M. until 5:00 P.M. The Claimant worked under the supervision of Track Supervisor G. Steward, Foreman T. Koniak and Assistant Foreman G. Drafz.

On October 2, 2001, Trackmen V. G. Drafz and O. Ortiz were each operating a rail lifter, or plater, behind which the Claimant was operating a tamper. Drafz stopped his plater near Milepost 12.4 and held a mini-job briefing with Ortiz, acknowledging that Ortiz would stop his plater behind Drafz's plater within the proscribed 50-foot limit between machines. The Claimant approached the idle platers in his tamper and informed Ortiz that he would continue tamping ties up to his plater, inside the 50-foot limit. However, the Claimant did not specify the distance he would leave between his tamper and Ortiz's plater. When the Claimant attempted to tamp the tie directly behind Ortiz's plater, the Claimant's tamper hit Ortiz's plater, bending the plater's bumper. The Claimant acknowledged to Ortiz and Drafz that he had mistakenly hit the plater.

By letter dated October 25, 2001, the Carrier directed the Claimant to report on November 6, 2001, "for investigation and hearing on charges to develop the facts and place responsibility, if any, that while working as Tamper Operator, you allegedly entered into a work zone on October 2, 2001 while operating a tamper on the Peoria Sub, MP 12.4, and hit another piece of equipment, which allegedly violates on-track safety." The Claimant was present for the November 6, 2001 Investigation.

In a letter dated November 19, 2001, D. G. Neuner, Manager Track Programs, notified the Claimant that he was to receive a Level 3 Discipline (5-day

Suspension) “for your violation of Chief Engineer Instructions 136.7.4 and Rule 1.1.2. . . .”

The Organization claims that the discipline imposed upon the Claimant was unwarranted, harsh, and excessive. The Organization contends that the burden of proof in a discipline matter such as this is on the Carrier; that burden of proof has not been met. While the Organization concedes that the Claimant was involved in said accident, it is the Organization’s position that the accident was extremely minor and certainly not worthy of a Level 3 discipline. 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 of his 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 transcript developed during the Investigation leaves “no doubt” that the Claimant violated Union Pacific Chief Engineer Instructions 136.7 and Rule 1.1.2, as follows:

**“Union Pacific Chief Engineer Instructions 136.7.4 Safe Working
Distance Between Machines**

Unless a different distance is specified in the job briefing, keep at least 50 feet between roadway machines while working.

Union Pacific Railroad Rules 1.1.2 Alert and Attentive

Employees must be careful to prevent injuring themselves or others. They must be alert and attentive when performing their duties and plan their work to avoid injury.”

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 the Carrier's discretion. (See Second Division Award 7325, Third Division Award 16166.)

After a review of the evidence, the Board finds that there was substantial evidence in the record to sustain the Carrier's position in whole. We note that the Carrier proved that on October 2, 2001, the Claimant was operating a tamper and hit another piece of equipment in violation of Union Pacific Chief Engineer Instructions 136.7.4 and Rule 1.1.2. While the Board acknowledges that said accident was minor and fortuitously no injuries resulted, the accident was nonetheless due to the Claimant's error. The minor nature of the accident does not excuse the error. See Third Division Award 33157.

Further, we find that the Level 3 discipline imposed was reasonable and we will not disturb it.

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 5th day of November 2004.