

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37401
Docket No. MW-38116
05-3-03-3-570

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 Employees
(Union Pacific Railroad Company (former Missouri
(Pacific Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [Level 2 requiring one (1) day of alternate assignment with pay to develop a corrective action plan] imposed upon Mr. D. Carter for alleged violation of Union Pacific Rules 70.1, 71.3, 80.1 and Chief Engineer Bulletin Instruction 135.0 effective October 25, 1998, in connection with alleged failure to inspect the ground before getting off the equipment to ensure safe footing and alleged failure to use LOTO when attempting to remove a spike by hand without gloves on September 4, 2002, was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File MW-03-26/1344338 MPR).
- (2) As a consequence of the violation referred to in Part (1) above, the Carrier shall remove all references of this discipline from Mr. D. Carter's personal record and he shall now be compensated for eight (8) hours' pay at his respective rate of pay for attending the investigation on October 16, 2002 and for any and all expenses incurred in connection therewith.”

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.

This claim arose after the Claimant was observed by a supervisor rapidly dismounting from his Spiking Machine Helper position without checking the surface onto which he was stepping. The supervisor saw him step on a large piece of rip rap rock and briefly stumble. Thereafter, the Claimant bent down to wiggle a jammed spike from the machine. This required him to reach under the machine while it was still running. He did so without following the Lock Out Tag Out ("LOTO") safety procedure. The Claimant was also observed to have done this without wearing gloves.

The Claimant flatly denied doing all of what the supervisor observed except for dismounting the machine. He said he did not dismount abnormally. He looked where he stepped. He did not step on any unusual rock. He did not stumble. He did not remove a jammed spike. Rather, he used a spike to straighten a skewed tie plate. He had his gloves on at the time. Finally, he denied saying "Yes, sir, yes, sir" to the supervisor when the observations were brought to his attention.

The Organization also raised a number of procedural objections about the Investigation. Although our review of the record fails to reveal sufficient support for these objections, some of them warrant comment. First, the Carrier's assertion that the Investigation was scheduled by agreement with the Claimant's representative was not effectively refuted in the record. Accordingly, the Investigation was not untimely held. Second, no Rule was cited that prohibited the tape recording of the proceeding instead of using a stenographer. Moreover, our review of the transcript does not reveal any shortcomings that unduly diminish its usefulness. Third, although the Hearing Officer did intervene several times, he did so only after allowing considerable latitude in the questioning of the Carrier's witness; his ultimate disallowance of further repetitious questioning was justified. Fourth, the record does not establish what material information the alleged missing witness could have provided. The statement introduced does not provide any clue about what the alleged witness saw or heard. Accordingly, the Board has no proper basis for concluding that the absence of the

witness deprived the Claimant of a fair and impartial Investigation. Fifth, no Rule was cited that required the Hearing Officer to allow opening statements. It must be remembered that opening statements are not evidence. Accordingly, they are not required unless the Agreement so provides. Finally, the Hearing Officer did not err when he denied the Organization's request to sequester the Carrier's witness after completing his testimony. The witness was the only Carrier witness and he did not testify again. Thus, his continued presence at the Investigation did not adversely impact the proceeding in any way.

Although the testimony of the supervisor and the Claimant was sharply conflicting, the testimony of the supervisor constitutes substantial evidence in support of the basic charges of unsafe conduct. The record does not, however, provide a sufficient basis for any finding that the Claimant was in violation of the LOTO procedures. The actual text of any LOTO requirements does not appear in the record. Accordingly, the Claimant's record must be cleared of any reference to violating Rule 135.0. On the basis of the remaining contents of the record, however, we do not find any other basis for disturbing the Carrier's action. The discipline imposed, which was time with pay to reflect on safety requirements, was not excessive under the circumstances.

AWARD

Claim sustained in accordance with the Findings.

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 24th day of February 2005.