

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37580
Docket No. MW-38436
05-3-04-3-389

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

PARTIES TO DISPUTE: ((Brotherhood of Maintenance of Way Employes
(Duluth, Missabe and Iron Range Railway Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The discipline [thirty (30) day suspension beginning August 30, 2003 and one (1) year suspension of seniority and rights as foreman] imposed upon Mr. A. Pappas for alleged violation of Section I-Policy, A.-Safety Policy, D.-Code of Conduct, Paragraphs 1, 3, 6, 9, Section II-Safe Work Rules and Procedures, B.-General Rules and Procedures, Equipment Lock-out Procedures, Paragraph 1, D.-Maintenance Rules and Procedures, Safe Maintenance of Dock and Structures, Paragraph 1 and Rules of the Docks effective May 15, 1999, in connection with the Two Harbors Belt fire on June 20, 2003, was arbitrary, capricious, unwarranted and in violation of the Agreement.
2. The discipline [ten (10) day suspension beginning September 1, 2003] imposed upon Mr. M. Lennartson for alleged violation of Section I-Policy, A.-Safety Policy, D.-Code of Conduct, Paragraphs 1, 3, 6, 9, Section II-Safe Work Rules and Procedures, B.-General Rules and Procedures, Safe Maintenance of Dock and Structures, Paragraph 1 and Rules of the Docks effective May 15, 1999, in connection with the Two Harbors Belt fire on June 20, 2003, was arbitrary, capricious, unwarranted and in violation of the Agreement.

3. As a consequence of the violation referred to in Part (1) above, this discipline shall now be removed from Mr. A. Pappas' record, restore his foreman's seniority and he shall be compensated for all wage loss suffered.
4. As a consequence of the violation referred to in Part (2) above, this discipline shall now be removed from Mr. R. Lennartson's record and he shall be compensated for all wage loss suffered."

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.

By letter dated July 16, 2003, the Claimants were notified to attend a formal Investigation on charges relating to their alleged "failure in your respective duties by not properly restoring and protecting the operation of Belt 2 at Two Harbors on June 20, 2003, resulting in fire and severe damage to the conveyor system." After a postponement, the Investigation was conducted on August 12, 2003. By letter dated August 28, 2003, Claimant Pappas was informed that as a result of the Investigation, he had been found guilty as charged, and he was being assessed a 30-day suspension, along with a one-year suspension of his seniority rights as a Foreman. By letter dated August 28, 2003, Claimant Lennartson was informed that as a result of the Investigation, he had been found guilty as charged, and he was being assessed a ten-day suspension. The Organization thereafter filed claims challenging the Carrier's decision to discipline the Claimants. The Carrier denied the claims.

The Carrier initially contends that the evidence clearly supports the determination that Claimant Pappas was guilty. The Carrier argues that there is no

doubt that Claimant Pappas was guilty of absenting himself from conveyor TR2 work site repairs for about two hours on June 20, 2003, and that he failed to properly brief employees on how to conduct the repairs in a safe and responsible manner. The Carrier points out that Claimant Pappas admitted that this motor/reducer job did not proceed as it should have and that mistakes were made in this particular incident.

The Carrier emphasizes that it obviously is important for a Foreman to be present at all times during gear and conveyor testing to make sure that everything is handled properly and is in good running order before the conveyor belt is put back into interlock. The Carrier expected Claimant Pappas, as a Foreman, to understand the paramount importance of seeing his job through, but Claimant Pappas elected not to do so. Claimant Pappas was not anywhere to be found during two critical hours.

The Carrier further asserts that although Claimant Pappas left instructions on the night in question, it is clear from the Claimant's own testimony, as well as that of other witnesses, that the Claimant did not do a complete and proper job explaining what work had been done and what still was left to be done. Moreover, if Claimant Pappas had left more detailed instructions regarding Belt 2 and the fact that it still was in a testing mode and testing was not complete, this unfortunate accident would not have occurred.

As for Claimant Lennartson, the Carrier argues that there is no doubt that he is guilty of not complying with instructions from his Foreman to stay until the repairs and testing at issue had been completed. The evidence shows that Claimant Lennartson left the property at midnight, while the belt was being tested, only 16 minutes before the side travel emergency stop occurred on the dock tripper and 20 minutes before the Fire Department was called. The Carrier points out that Foreman Larson and Claimant Pappas both instructed Claimant Lennartson to stay and monitor the system until a load ran over the belt, but Claimant Lennartson did not do so. The Carrier maintains that if Claimant Lennartson had stayed, as instructed by his Foreman, for a mere 16 minutes longer, then this catastrophic fire could have been minimized or may not have occurred. The Carrier asserts that Foreman Larson's testimony demonstrates that he fully expected Claimant Lennartson to be present for the test run of pellets across the belt, as Lennartson had been instructed to do. The testimony in the record further establishes that the Claimant left the job site before the job was complete – before testing was finished and the system restored to interlock, the normal operating mode.

The Carrier maintains that it is clear that Claimant Lennartson is guilty of not following specific instructions from Foreman Larson to stay and watch the belt with a load run on it. The Carrier insists that had the Claimant followed instructions, he could have minimized, if not prevented, the damage to the belt. The Carrier contends that because of this proven violation, the Claimant is guilty of violating the applicable Rules.

The Carrier then points to the Organization's argument that there is a serious flaw in the procedure and operations of the belt system at Two Harbors and that the Carrier is looking for someone to blame in order to take pressure off management for not having safeguards in place. The Carrier insists that this simply is not accurate. The Carrier asserts that when in repair mode, this large and complex system requires experienced and trained personnel to supervise the operation. Claimant Pappas was proven to be absent from the repair site, and he did not perform his Foreman duties by sufficiently briefing his employees before the fire occurred. Claimant Lennartson was proved to have left the site after being instructed to stay until the repairs and testing had been completed.

The Carrier then addresses the Organization's assertion that there have been other fires in the belt system at Two Harbors. The Carrier maintains that the fact that there may have been other fires at this facility is irrelevant. The Carrier insists that the only issues for the Board to decide are in reference to the fire that occurred on June 20, 2003. Similarly, there is no relevance to the Organization's suggestion that there is confusion as to whether the Control Operator knows from the control panel whether the system is in local or interlock. The Carrier emphasizes that the Board is to determine if the Claimants failed in their respective duties by not properly restoring and protecting the operation of Belt 2 at Two Harbors, resulting in a fire and severe damage to the conveyor system. The Carrier further states that the record refutes the Organization's contention that there was insufficient training on the procedure and operation of this belt system, and that the "16-hour rule" and the Claimants' pay are irrelevant to this matter.

The Carrier additionally maintains that the Hearing Officer made the necessary credibility determinations in this matter. The Carrier points out that it is not within the jurisdiction of the Board to substitute its own judgment for that of the Hearing Officer. The Carrier argues that, based on the transcript, it is apparent that the Claimants were guilty as charged.

The Carrier then turns to the Organization's argument that the Claimants did not receive a fair and impartial Hearing. The Carrier points out that the Organization bears the burden of providing evidence to support this assertion. The Carrier asserts that contrary to the Organization's argument about the lack of representation during pre-investigation employee interviews, there is no Agreement requirement for representation when management interviews or talks with employees. The Carrier insists that Rule 10 was satisfied by the formal Investigation of August 12, 2003. The Carrier further maintains that there is no evidence of improper conduct by the Hearing Officer or a failure to develop all of the facts in this case. The Hearing Officer properly developed all of the facts in this case, while minimizing irrelevant testimony. The Carrier maintains that the Investigation was fair and impartial.

The Carrier goes on to assert that the discipline assessed each of the Claimants was warranted. The Carrier points out that in view of the seriousness of the event, the discipline was light. The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Organization initially contends that the Claimants were denied a fair and impartial Hearing in this matter. To ensure that an employee is afforded a fair and impartial Hearing, in accordance with the Agreement and due process, the Hearing Officer must act in a non-prejudicial manner as an impartial fact-finder. The Organization asserts that the Hearing Officer also must make every attempt to develop all of the facts, not just those that support the Carrier's position.

The Organization points out that prior to the June 2003 fire at issue, there previously was a fire at the same facility during 2002. The Organization emphasizes that during the Hearing, the General Chairman attempted to determine if there were any similarities between the two fires, but the Hearing Officer restricted and otherwise denied the Organization the latitude to question witnesses about previous fires at the facility. Moreover, the Carrier conducted extensive pre-investigation interviews of a number of employees at Two Harbors. The Organization does not dispute the Carrier's right to conduct such interviews, however, the Organization maintains that any information obtained by the Carrier and utilized at the Hearing or in the decision-making process should be supported by direct testimony at the Hearing of the employee who provided the information, thereby allowing the Organization to cross-examine and question the validity and relevance of all such information. The Organization emphasizes that several Carrier witnesses referred to statements made by Foreman Souja, but the Carrier failed to call Souja as a witness.

The Organization then argues that the Carrier did not inform the Claimants that they were entitled to union representation during the pre-investigation interviews. The Organization contends that although there is no dispute that the Carrier has the right to interview employees in such circumstances, the Carrier should demonstrate the same degree of honesty and sincerity that it demands from its employees. The Organization insists that an unbiased review of the record will establish that the Carrier's actions denied the Claimants their right to a fair and impartial Investigation, thereby requiring an Award that sustains the instant claim.

The Organization goes on to contend that the Carrier failed to demonstrate how the Claimants' actions violated any of the numerous Rules listed in the notice of discipline. The Organization asserts that the Carrier's decision to issue discipline apparently was based on conjecture, assumption, and hearsay. The Organization emphasizes that the Board consistently has held that in discipline cases, the Carrier bears the burden of presenting substantial evidence of probative value to support the charged leveled against an accused employee. Moreover, a carrier's basis for disciplinary measures must rest on substantially more than mere speculation, supposition, and conjecture. The Organization insists that the Carrier's decision to issue discipline in this case was not based on evidence or information ascertained at the Hearing. Accordingly, the instant claim should be sustained.

The Organization additionally argues that the Carrier unquestionably was aware of the pre-existing problem with the conveyor belt system at Two Harbors. The Organization maintains that the Carrier was negligent in that it failed to timely correct the problem or alert employees of the situation. The Organization also emphasizes that the record demonstrates that there was considerable confusion regarding the operation of the Two Harbors conveyor system. Moreover, the Claimants had not received sufficient formal or informal training in the operation of the conveyor belt system at the facility. The Organization points out that the evidentiary record fails to justify the discipline assessed against the Claimants, and the Board consistently has held that discipline cannot stand when it is excessive, capricious, improper, and unwarranted.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The parties being unable to resolve their dispute, this matter came before the Board.

The Board reviewed the procedural arguments raised by the Organization and we find them to be without merit. A thorough review of the transcript convinces the Board that all of the Claimants' rights were protected throughout the investigatory interviews and the Hearing processes. The Claimants' Agreement due process rights were protected by the Hearing Officer.

The Board reviewed the evidence and testimony, and we conclude that there is sufficient evidence in the record to support the finding that both Claimants were guilty of violating various Safety Rules when they left the belt system to run under load for the first time after there had been a major replacement of a gear reducer. The Claimants failed to make sure that the system was operating properly before they left. Although there are other employees who were responsible for the subsequent problems that occurred, had the Claimants been there, they could have intervened and shut the system down before the damage occurred.

Once the Board has determined that there is sufficient evidence in the record to support the guilty finding, we next turn our attention to the type of discipline imposed. The Board will not set aside a Carrier's imposition of discipline unless we find its actions to have been unreasonable, arbitrary, or capricious.

Claimant Pappas was issued a 30-day suspension, as well as a one-year suspension of his seniority rights as Foreman. Given Claimant Pappas' higher level of supervision and responsibility, the Board cannot find that the Carrier's action in issuing this severe discipline to the Claimant was unreasonable, arbitrary, or capricious.

Claimant Lennartson was issued a ten-day suspension. Although that discipline was significantly less than Claimant Pappas' discipline, there is a sufficient basis for issuing that discipline to Claimant Lennartson for his failure to follow the instructions of his Foreman to stay while the belt began operations.

For all of the above reasons, both claims are denied.

AWARD

Claim denied.

Form 1
Page 8

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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 24th day of August 2005.