

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 39696
Docket No. MW-40241
09-3-NRAB-00003-070471
(07-3-471)**

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

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Northern Indiana Commuter Transportation District**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of Trackman/Machine Operator R. D. East for his alleged responsibility in connection with the damage to NICTD Tie Spiker #697 on May 22, 2006 was without just and sufficient cause, based on an unproved charge, arbitrary, capricious, and excessive (System File D-11a-06-390-04N).**
- (2) Trackman/Machine Operator R. D. East shall now be reinstated to service with seniority and all other rights unimpaired, be compensated for all wage loss suffered and benefits and have his record cleared of this incident.”**

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 notice dated May 31, 2006, the Claimant was directed to attend a formal Investigation to determine the facts and the Claimant's responsibility, if any, in connection with damage caused to Tie Spiker No. 697. The Investigation was conducted on August 7, 2006. By letter dated August 21, 2006, the Claimant was notified that as a result of the Investigation, he had been found guilty as charged, and that he was being dismissed from the Carrier's service. The Organization thereafter filed a claim on behalf of the Claimant, challenging the Carrier's decision to discharge him.

The Carrier initially contends that the Notice of Investigation properly apprised the Claimant of the charge against him, and he was given an opportunity to prepare a defense. The Carrier asserts that at the Investigation, the Organization had no questions about the Notice. The Carrier argues that the Investigation was fair and impartial, and the Claimant received Agreement due process.

The Carrier asserts that the charges were proven by substantial evidence. The Claimant failed to comply with the terms of the Last Chance Agreement and various Carrier Rules. The Carrier asserts that over the course of his employment, the Claimant demonstrated a pattern of carelessness and inattention to duty, as well as insubordination. The Carrier emphasizes that the Claimant was afforded an opportunity to correct his work habits, and he even was brought back on a leniency basis after being discharged in 2003. The Carrier asserts that the Claimant's failure to comply with the provisions of his Last Chance Agreement resulted in his discharge.

The Carrier argues that the Investigation revealed that the Claimant and his co-worker each were culpable for the incident at issue. The Carrier insists that the discipline imposed on each employee was appropriate in light of their employment and disciplinary histories. The Carrier emphasizes the Claimant's lengthy disciplinary history, which includes a Last Chance Agreement, while noting that this

was the other employee's first offense. The Carrier asserts that under the circumstances, the discipline imposed upon the Claimant was appropriate, and he was not the victim of disparate, arbitrary, or capricious treatment.

The Carrier argues that there is more than substantial evidence in the record to support its decision to discharge the Claimant. The Carrier insists that the charges were sufficient, the evidence supports a finding of guilt, and the discipline imposed was appropriate under the circumstances. The Carrier asserts that its actions cannot in any way be construed as an abuse of discretion. The Carrier contends that the record demonstrates that there is no justification for the relief requested in the claim, and it must be denied.

The Carrier emphasizes that there is no reason for the Board to substitute its judgment for that of the Carrier. Based on the Investigation, dismissal was a proper exercise of the Carrier's judgment and reversal is not warranted.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Organization initially contends that the Claimant was denied a fair and impartial Hearing because the same person served as both the Charging Officer and the Investigating Officer. The Organization asserts that not only did this violate the Agreement, but it is clear that the Investigation decision was based solely on the Investigating Officer's memorandum. Essentially, one person preferred charges against the Claimant, conducted the Investigation, and imposed the discipline of dismissal. Moreover, the Hearing Officer refused to allow a continuance in order to call a witness who was not in attendance at the May 22, 2006 Hearing. The Hearing Officer thereby failed to fulfill his responsibility to conduct a fair and impartial Hearing, as well as to develop all facts.

The Organization then points to the August 7, 2006 Investigation relating to the other Machine Operator involved in the incident at issue. The Organization emphasizes that the other Machine Operator was issued a 15-day suspension, with three days actually to be served and the remaining 12 days placed in his permanent service record as a record suspension. On appeal, the Carrier agreed to reduce the

discipline to a total of ten days, again with three days actually to be served and the remaining seven days documented as a record suspension.

The Organization emphasizes that the Claimant here was charged with and found guilty of the same Rule violations as the other Machine Operator. The Organization maintains that there is no evidence indicating that the Claimant was more culpable than the other Machine Operator. The Organization contends that the Carrier's decision to dismiss the Claimant while it suspended another employee for the same alleged Rule violations is arbitrary, capricious, and excessive. The Organization further argues that the record demonstrates that the incident in question was minor in that the machine still was used for spiking operations on the same day as the incident, and in light of the discipline imposed upon the other Machine Operator involved in the incident.

The Organization goes on to assert that the Carrier's dismissal of the Claimant is based on the finding that the Claimant violated nine separate and distinct Rules. Citing prior Awards, the Organization contends that if the Board determines that the Claimant was not in violation of any of those nine Rules, then the discipline should be set aside. The Organization insists that in this case, the Carrier did not present evidence to support all of the alleged Rule violations or to substantiate its decision to dismiss the Claimant from service.

The Organization argues that although there is no dispute that Tie Spiker No. 697 sustained some minor damage during the incident at issue, there is a dispute as to the Claimant's responsibility in connection with such damage. The Organization points out that the record shows that on the date in question, the Claimant was responsible for controlling the movement of the machine, while the other Machine Operator controlled the switch that operated the nipper assembly and put it into either work or travel mode. The record indicates that the machine was in travel mode, meaning that the nippers were in the up position. The Organization emphasizes that the Claimant pointed out the mechanical problem with the nipper assembly that would start to pulsate on its own, and that the only way to stop this was to change from travel to work mode. The Organization argues that the nipper assembly problem had been reported to the Foreman, but it had not been fully corrected as of the date of the incident. The Organization maintains that the nipper

assembly therefore could have malfunctioned as Tie Spiker No. 697 entered the switch area involved here.

The Organization insists that at the time of the incident, the Claimant was on the right side of the machine controlling its forward movement, while his co-worker was on the left side of the machine, which is where the switch point was located. The Organization asserts that the Claimant could not even see the switch. The Claimant's co-worker was responsible for watching for road crossings and switches, and for raising the nipper assembly to proceed over crossings or switches. The Claimant's co-worker stated that he was aware of the switch and raised the nipper assembly, but the nipper struck the closure rail.

The Organization argues that Claimant's co-worker was responsible for reporting any problems with the nipper assembly. In addition, there was an emergency stop button on the control panel directly in front of the other Machine Operator, which he was to use in the event that he had any concerns with the nipper assembly. The Organization points out that the Claimant's co-worker could have activated this emergency stop button at any time prior to the incident, and this would have stopped the tie spiker machine. The Organization maintains that the Claimant's co-worker did not relate any concern to the Claimant as they entered the switch area. The Organization asserts that although the nipper assembly did hit the switch, the Carrier failed to prove that the Claimant violated any Rules, let alone that the Claimant was directly and solely responsible for the incident involved here.

In addition to arguing that the Carrier failed to meet its burden of proof in this matter, the Organization also asserts that the Carrier's decision to assess the discipline of dismissal based on previous letters of discipline in the Claimant's record is both highly improper and insupportable. The Organization emphasizes that the record is devoid of any evidence that reasonably could link the issues and discipline of 2002 and 2003 to the issued involved here. Moreover, the record demonstrates that the Claimant was discipline-free for the 38 month period from his 2003 reinstatement through May 22, 2006. The Organization therefore maintains that even if discipline was warranted here, dismissal was arbitrary, excessive, and clearly not progressive. The Organization additionally asserts that the difference in

the level of discipline imposed upon the Claimant's co-worker and the Claimant clearly reveals disparate action by the Carrier.

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

The Board reviewed the procedural arguments raised by the Organization and finds them to be without merit.

The Board reviewed the evidence and testimony and finds that the Carrier met its burden of proof that the Claimant violated the Carrier's Safety Rules when he was operating a Spiker and the nipper assembly collided with a switch and was sheared off by the Spiker. There is no question that both the Claimant and his partner (Kasinger) were careless on the date in question and that their improper behavior led to the accident.

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.

The record in this case reveals that the Claimant had previously received a great deal of discipline since his June 7, 1999, hire date. He had received several letters of instruction, several suspensions, and was actually dismissed in January of 2003 for a Rule violation. In March of 2003, the Claimant signed a Last Chance Agreement which stated in part that any future disciplinary action may lead to his discharge. After signing that Last Chance Agreement, the Claimant received more discipline in 2005 and 2006. Consequently, the record reveals that leniency has already been afforded to the Claimant on several occasions since he signed the Last Chance Agreement.

The Organization raises the issue that the other culpable employee involved in this accident (Kasinger) only received a suspension. However, the record reveals that Kasinger had not received any previous discipline and that is quite a contrast from the Claimant's extensive disciplinary record.

Given the seriousness of the offense in this case, as well as the extensive disciplinary record of the Claimant and the fact that he signed a Last Chance Agreement recognizing that he would be facing discharge in the future and was already afforded leniency, the Board cannot find that the Carrier acted unreasonably, arbitrarily, or capriciously when it terminated the Claimant's employment. Therefore, the claim must 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 26th day of May 2009.