

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 42773  
Docket No. MW-42843  
17-3-NRAB-00003-150051**

**The Third Division consisted of the regular members and in addition Referee George Edward Larney when award was rendered.**

**(Brotherhood of Maintenance of Way Employees Division –  
(IBT Rail Conference**

**PARTIES TO DISPUTE: (**

**(Dakota, Minnesota & Eastern Railroad Corporation**

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

**(1) The discipline [five (5) days actual suspension] imposed on Mr. Q. Sewell by letter dated July 3, 2013 for alleged violation of General Code of Operating Rules 1.1.3 Accident, Injuries, and Defects and Safety Rules and Recommended Practices for Engineering Services Employees: Rights and Responsibilities 1.(f) in connection with his alleged ‘. . . failure to report the incident to a supervisor not later than the end of shift or as soon as possible of having the water pump start fire during the refueling process and extinguishing the fire with a fire extinguisher on April 18<sup>th</sup>, 2013.’ was without just cause, excessive, on the basis of unproven charges and in violation of the Agreement (System File G-1334D-01/8-0007).**

**(2) As a consequence of the violation referred to in Part (1) above, Claimant Q. Sewell’s record shall be cleared of the charges leveled against him and he ‘\*\*\* must be made whole for the lost compensation, benefits and mileage, at the applicable rate of pay.’”**

**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.**

**The Claimant established and held seniority within the Carrier's Maintenance of Way Building and Bridge (B&B) Department for approximately nine years at the time the incident at issue occurred in the early morning hours of April 18, 2013.**

**On the evening of April 17, 2013, the Claimant was employed as a B&B foreman assigned to monitor a water pumping operation during an extreme weather occurrence. Claimant and Assistant Foreman M. Gee were instructed by Manager N. Schmuecker to travel to tracks located near Marquette Street to manually place, operate, and monitor gas-powered electric water pumps in order to alleviate excess water (flooding) that had begun to build up in the vicinity of the tracks. At approximately 3:00 a.m. in the darkness of the morning hours, Claimant and Gee under prevailing circumstances were required to manually refuel one of the water pumps to keep it operating in order to remove water from the tracks so that trains could continue to traverse through Marquette Street. As Assistant Foreman Gee was pouring gasoline into the pump's fuel tank, a small amount of gasoline spilled past the fuel tank which made contact with the pump's muffler causing a flare-up (fire). The Claimant responded by immediately grabbing a fire extinguisher using it to successfully put out the flame. Both Claimant and Gee then engaged in inspecting the pump and determined the flare up did not result in any damage to the pump or any injury to themselves. Finding no damage to the pump, Claimant and Gee restarted the water pump upon which the pump resumed operation removing the water build up around the tracks for the remainder of their shift which ended at 7:00 A.M. At 7:00 A.M., Claimant and Gee were relieved by employee J. Axtell who continued monitoring the operation of the gas powered electric water pump involved in the flare-up without further incident for the remainder of his shift.**

**On April 25, 2013, seven days after the subject flare-up incident, Manager Schmuecker and Assistant Division Engineer B. Wold inspected the pump in question and determined it was damaged and that the damage was significant enough to deem**

the pump to be non-operational and in need of repair. Thereafter, Schmuecker called Claimant to inquire if he knew anything about the damage to the water pump at which time Claimant informed Schmuecker of the flare-up that occurred the morning of April 18, 2013. Upon being so informed, Assistant Division Engineer Wold by letter dated May 22, 2013 instructed Claimant to attend a formal investigation. Said letter read in pertinent part the following:

“ . . . You are hereby notified to attend a formal investigation to be held . . . on June 5, 2013 for the purpose of determining the facts and your responsibility, if any, in connection with the events that transpired on April 18, 2013 and reported on April 25, 2013, at Marquette Street, mile post 193.25 Davenport Sub.

This includes, but not limited to, the failure to report an incident, damage to Canadian Pacific Railway property, and/or incorrect refueling procedure, which posed an injury risk.”

By letter dated July 3, 2013, Wold who conducted the Investigation as Carrier’s interrogating officer, informed Claimant it had been determined upon review of the investigation transcript and the whole of the record proceeding that he was found responsible for having violated General Code of Operating Rules 1.1.3 Accident, Injuries, and Defects and Safety Rules and Recommended Practices for Engineering Services Employees: Rights and Responsibilities 1.(f) for failure to report the incident to a supervisor not later than the end of shift or as soon as possible of having the water pump start fire during the refueling process and extinguishing the fire with a fire extinguisher on April 18, 2013.

Having found the Claimant in violation of the stated Rules, Wold informed the Claimant that upon review of his past personal record he was being assessed five (5) days actual suspension.

General Code of Operating Rule (GCOR) 1.1.3 reads as follows:

“Report by the first means of communication any accidents; personal injuries; defects in tracks, bridges, or signals; or any unusual condition that may affect the safe and efficient operation of the railroad.”

The record evidence reflects the Organization appealed Carrier's imposition of this subject five (5) day suspension on Claimant by letter dated August 19, 2013 and that Carrier's Division Engineer Cindy Ingram by letter dated October 18, 2013 in an "abbreviated" response for the purpose of meeting contractual time limits denied the claim in its entirety without providing any explanation as to the reason(s) the claim was being denied. As a bar to reaching the merits of the claim by the Board, the Organization raises the procedural argument that Carrier violated the provisions of Rule 33 – Time Claims and Grievances as well as Rule 34 – Discipline and Investigations of the controlling January 1, 2013 Collective Bargaining Agreement.

Rule 33 states in pertinent part the following:

"2. Should any such claim or grievance be disallowed, the Company shall, within sixty (60) calendar days from the date same is received, notify the party who filed the claim or grievance (the employee or his employee representative) in writing, with copy to the General Chairman, of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the Company as to other similar claims or grievances.

\* \* \* \*

8. The parties may, at any time, mutually agree to modify the time limits contained herein."

The Board takes judicial notice that Carrier's written response to the subject claim was dated on the 60th day from the date the claim was filed (12 days in August, 30 days in September and 18 days in October) and concurs in the Organization's argument that a straightforward reading of the response does not comply with the obligations set forth in Rule 33 which Carrier confirmed by its own admission in its response wherein Carrier officer Cindy Ingram stated unambiguously that her response was "abbreviated for the purpose of meeting contractual time limits". This is all very well and good except for the fact as the Organization validly argues, the intended extension of the time limit past the contractual 60 days had not been mutually agreed to as required by Rule 33 (8) as noted above. The Board takes further judicial notice of Carrier's counter argument that the Parties were governed by a relatively new collective bargaining agreement at the time the subject incident

occurred (4 ½ months after the CBA became effective) and that this short interim period of time was insufficient to get fully acclimated to its various contractual obligations, one being compliance with the time limits in responding to filed claims. The Board is not persuaded by Carrier's defense. Although the controlling collective bargaining agreement was indeed a very recent development governing its relationship with the Organization whereas, prior to January 1, 2013 it had been operating without such an agreement, nevertheless Carrier is not new to the operations of a railroad and is not new to dealing with collective bargaining agreements at its other properties.

Based on the foregoing exposition, the Board finds Carrier, as charged by the Organization, with being out of compliance with its obligations set forth in the above cited sections of Rule 33 and accordingly, rules to sustain the claim on procedural grounds but also noting the non-precedent nature of this ruling with regard to other similar claims as set forth in Rule 33 (1) above.

**AWARD**

Claim sustained.

**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 October 2017.