

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42774
Docket No. MW-42874
17-3-NRAB-00003-150059**

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 days actual suspension] imposed on Mr. M. Gee 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 the 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 the fire extinguisher on April 18th, 2013’ was without cause, excessive, on the basis of unproven charges and in violation of the Agreement. (System File G-1334D-02/8-0008).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant M. Gee’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.

Claimant established and held seniority within the Carrier's Maintenance of Way Department for approximately 11 years at the time an incident occurred on April 18, 2013 subsequently resulting in the filing of the instant claim. On this date, Claimant was assigned and working as a B&B Assistant Foreman.

On the evening of April 17, 2013, Claimant and B&B Foreman Q. Sewell 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 of April 18, 2013, prevailing circumstances required Claimant and Sewell to manually refuel one of the water pumps in order to keep it operating to remove water from the tracks so that trains could continue to traverse through Marquette Street. As Claimant was pouring gasoline into the pump's fuel tank, a small amount of gasoline spilled past the fuel tank which then made contact with the pump's muffler causing a flare-up (fire). Sewell immediately grabbed a fire extinguisher and was successful in putting out the fire. Both Claimant and Sewell then engaged in the effort to inspect the pump and upon their inspection determined the flare-up had not caused any damage to the pump or any injury to themselves. Finding no damage to the pump, Claimant and Sewell restarted the water pump at which time 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 Sewell were relieved from duty 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, though the record evidence is devoid of any explanation as to what prompted their inspection, and determined the pump had been damaged significantly enough to deem

it non-operational and in need of repair. Thereafter, Schmuecker called Sewell to inquire if he knew anything about the damage to the water pump at which time Sewell informed Schmuecker of the flare-up that had occurred in refueling the pump and that the fire was extinguished by using a fire extinguisher. Upon being so informed of the incident, Assistant Division Engineer Wold by letter dated May 22, 2013 instructed Claimant to attend a formal investigation. In part, the Notice of Investigation apprised the Claimant the formal inquiry would include 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 the Claimant that upon review of the investigation transcript and the whole of the record proceeding it had been determined he was responsible for having violated General Code of Operating (GCOR) Rules 1.1.3 and, as a result, he was being assessed the discipline of a five day suspension. GCOR Rule 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."

As a first defense of Claimant the Organization raises the procedural objection that Claimant was denied his right to a fair and impartial hearing in that Carrier Officer Wold served in multiple roles in connection with the incident in question beginning, along with Manager Schmuecker, of inspecting the water pump in question and determining the pump had sustained damage, being the Charging Officer who issued the Notice of Investigation, and the Conducting Officer of the Investigation who subsequently determined Claimant violated GCOR Rule 1.1.3 and as a consequence assessed the discipline of a five day suspension. The Organization submits, notwithstanding the fact that Wold did not actually testify as a witness at the investigation, that it is ultimately reasonable to be convinced his role as charging officer, prosecutor, and judge prevented him from conducting the trial as an impartial fact-finder. The Organization asserts that Wold's role as prosecutor and not as an independent fact-finder clearly prevented any possible attempt during the hearing to seek and permit testimony which would contravene a case against Carrier and lead to any decision other than a finding that Claimant was guilty of the charges brought against him. The Organization maintains this Board has consistently sustained claims wherein a carrier permitted one of its officers to perform dual/multiple roles to the

extent this Carrier permitted in this instant case. As support for its position on this point the Organization cites awards in one case from each of the Divisions, First, Second, and Third Division and three awards from the Fourth Division.

Carrier counters this procedural argument of the multiplicity of roles carrier officers perform with respect to formal investigations asserting the Organization has offered no arbitral support proving such a practice has not been supported.

The Board concurs that while a practice of allowing carrier officers to perform multiple roles with respect to formal investigations have been a fact of railroad arbitration since the inception of the process of resolving minor disputes, and respectively organizations have challenged the multiple roles performed by carrier officers at formal investigations on grounds it denies claimants their due process right to a fair and impartial hearing, past decisions have sustained the organization position only in those instances when a carrier officer conducting the investigation also assumes the role of a witness testifying at the investigation. The previously decided cases relied upon by the Organization here to support its position that the Claimant was denied a fair and impartial Investigation all stress that the deciding factor to sustain the organization's position was based on the fact that the conducting officer also testified at the proceedings. This was clearly not the case here where the Organization admits that Carrier Officer Wold who conducted the investigation did not actually assume the role of witness and therefore did not render any testimony.

However, Wold was so intricately involved in the incident that led to the Claimant being charged with having violated GCOR Rule 1.1.3 from the very beginning having been one of the two decision-makers in determining, after inspecting the water pump in question, it had sustained damage and needed to be repaired that, notwithstanding the fact he did not actually assume the role of witness at the investigation it is simply undeniable he was the proverbial 800 pound guerilla in the room; that is, his presence alone at the investigation made it unnecessary for him to actually render testimony about his first-hand knowledge of the incident as he knew what he knew without having to formally put what he knew on the official record, the transcript. Recognizing that to be the case, an objective evaluation by Wold determining the Claimant's responsibility in connection with the incident was literally impossible and therefore, even though the Board is persuaded by the merits of the case that both Claimant and Sewell should have reported a minor fire had occurred due to a mishap in refueling of the pump, nevertheless, Carrier's conduct of the investigation,

that is, having appointed Wold to be the conducting officer of the investigation deprived Claimant of his due process right to a fair and impartial hearing.

Based on the foregoing exposition, the Board rules to sustain the claim in its entirety.

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.