

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42840
Docket No. MW-42517
18-3-NRAB-00003-140152**

The Third Division consisted of the regular members and in addition Referee Meeta A. Bass when award was rendered.

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

PARTIES TO DISPUTE: (

**(Soo Line Railroad Company (Former Chicago,
(Milwaukee, St. Paul and Pacific Railroad Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [five (5) consecutive starting Monday August 13 through Friday August 17, 2012] imposed upon Mr. J. Brown by letter dated July 28, 2012 for alleged violation of GCOR Rule 1.1 Safety and 1.1.2 Alert and Attentive pursuant to the Notice of Investigation dated June 25, 2012 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File D-21b-12-550-04/8-00535 CMP).**
- (2) As a consequence of the violation referred to in Part (1) above, all references to the aforesaid discipline shall be removed from Claimant Mr. J. Brown’s record and he shall receive ‘... all lost wages, straight time, overtime, paid and non-paid allowances and safety incentives, expenses, per diems, vacation, sick time, health & welfare insurance, dental insurance, supplemental insurance, and any and all other benefits to which entitled, but lost as a result of Carrier’s arbitrary, capricious, and excessive discipline ***’ ”**

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 Carrier issued a Notice of Investigation letter dated June 25 2012, which gave Notice of an Investigation in to the following incident:

“An alleged incident that took place on June 20, 2012 and reported on June 21, 2012 on the Portal sub where there may have been a rules violation failing to perform work in a safe manner while unloading rail.”

After some postponements, the hearing was held on July 19, 2012. Following the Investigation, the Claimant received a Discipline Notice dated July 28, 2012 finding the Claimant in violation of GCOR, Rule 1.1 Safety and 1.1.2 Alert and Attentive resulting in a five day consecutive suspension under the CP Policy. The Organization appealed the Carrier’s decision by letter dated September 25, 2012. The Carrier denied the Organization’s appeal on November 20, 2012. A formal conference was held on June 26, 2013. The claim was appealed and now is before the Board for a final resolution of the claim.

The Board has reviewed the record developed by the parties during their handling of the claim on the property, and considered evidence related to the following to make its determination of this claim:

- “1) Did the Claimant receive a full and fair investigation with due notice of charges, opportunity to defend and representation?**
- 2) If so, did the Carrier establish by substantial evidence that Claimant was culpable of the charged misconduct or dereliction of duty?**
- 3) If so, was the penalty imposed arbitrary, capricious, discriminatory or unreasonably harsh as applied to the facts and circumstances giving rise to this claim?”**

The Carrier contends that the Claimant was afforded a fair and impartial investigation in accordance with the governing Collective Bargaining Agreement and that the representative acquiesced to any procedural errors. The Carrier produced substantial probative evidence of the Claimant's conduct to prove the violation of Rules 1.1 and 1.1.2. The penalty, a five working day suspension, is appropriate based upon the seriousness of the offense in accordance with the Carrier's Discipline Policy.

The Organization contends that the Carrier failed to afford the Claimant a fair and impartial Investigation when the hearing officer sequestered the Claimant during the testimony of a witness depriving the Claimant his due process rights to confront the witnesses against him. The Organization further contends that Carrier failed to meet its burden of proof to establish a violation of Rules 1.1 and 1.1.2. The Organization asserts that the fact that an accident occurred does not establish that the Claimant violated the General Code of Operating Rules. In addition, the Organization asserts that the discipline assessed was arbitrary, capricious, and not consistent with the principles of progressive discipline.

On June 20, 2012, the Claimant was assigned as a track laborer, and assisted another laborer. His duties on that particular day were unloading rail, taking the binders and flat bars off the joints, using the needle bar to separate the binder from the rail and load them on the truck to resupply the rail train. While trying to get in position to open a binder which was upside down, the Claimant was injured. The only witnesses to the injury were the Claimant and his coworker. During the course of the investigation hearing, the hearing officer sequestered Claimant during the testimony of his coworker.

The Organization questions the elementary fairness of the proceedings when the Claimant was sequestered when the witness gave testimony in support of the charges against him. The Board recognizes that the Investigation Hearing is not a court trial, and strict adherence to non-contractual, technical rules of procedure or evidence is not necessary. However, it is essential that the Hearing Officer hold fast to the fundamental principles of fair play or due process. A claimant charged with a rule violation has the right to confront a witness against him at the investigation hearing. The right of the confrontation ensures the reliability of the evidence. This includes the right to be present at the hearing and compel a witness to stand face to face with the accused as well as the right to cross-examine to determine the credibility of the witness. The right of cross-examination is considered the most important of the due process protections because it allows the accused to challenge the testimony offered by

the witness during an examination to provide reliable information related to the facts giving rise to the charge. The Claimant's representative is limited in his role because the accused is not seated next to him informing him of any fabrications, inconsistencies or even to test the recollection of events.

The Board finds that the Claimant was precluded from exercising these fundamental rights of confrontation and cross-examination when the hearing officer sequestered him. The Board finds that the Claimant did not receive a full and fair investigation, and therefore, this Board cannot proceed to the merits of this case.

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 10th day of January 2018.