

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42844
Docket No. MW-42707
18-3-NRAB-00003-140400**

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 (dismissal) imposed upon Mr. R. Gawel by letter dated June 5, 2013 for alleged violation of ‘...General Code of Operating Rules 1.1.3; Accident, injuries and defects, 1.2.7; Furnishing Information, 1.4; Carrying out rules and reporting violations, 1.6; Conduct.’ in connection with charges on Notice of Investigation dated May 24, 2013 was on the basis of unproven charges, arbitrary, capricious, excessive and in violation of the Agreement (System File D-27-13-390-12/8-00540 CMP).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. Gawel shall be reinstated to service with seniority and all others rights unimpaired, his record cleared of the charges leveled against him 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***’.”**

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 May 24, 2013, which gave notice of an Investigation in to the following incident:

“with an alleged incident which resulted in a Motor Vehicle Accident at MP 185.2 Tomahawk Subdivision, near Wyeth Road, Portage, WI and the alleged failure to promptly notify your supervisor of the MVA incident. The dates of the alleged event(s) were on Wednesday, May 15 and Thursday, May 16.”

The Hearing was held on May 29, 2013. Following the Investigation, the Claimant received a Discipline Notice dated June 5, 2013 finding the Claimant in violation of GCOR, Rule 1.1.3; Accidents, injuries and defects, 1.2.7; Furnishing Information, 1.4; Carrying out rules and reporting violations, 1.6: Conduct resulting in an immediate dismissal from service of the Canadian Pacific. The Organization appealed the Carrier’s decision by letter dated July 12, 2013. The Carrier denied the Organization’s appeal on August 13, 2013. A formal conference was held on March 6, 2014. The claim was appealed and now is before this 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. The alleged procedural arguments raised by the Organization did not deny the Claimant his due process rights. The Carrier introduced substantial evidence of Claimant's conduct inclusive of his own admissions to establish the violation of GCOR Rules 1.1.3 Accident, injuries and defects, 1.2.7; Furnishing Information, 1.4; Carrying out rules and reporting violations, 1.6; Conduct. Carrier Policy 5612 provides for immediate dismissal from services depending on the specific circumstance which may include charges related to dishonesty about any job-related subject, for example falsification of an injury or incident or the reason for laying off or taking a leave. The Carrier contends that the dismissal of the Claimant is appropriate based upon the seriousness of the offense, the Claimant's record and standing with the Carrier's Discipline Policy, and the dismissal is not arbitrary, capricious, excessive, or in violation of the Agreement.

The Organization contends that the Carrier failed to afford the Claimant a fair and impartial Investigation. According to the Organization, in violation of Rule 18(a) of the Agreement, the Carrier removed the Claimant from service prior to holding a hearing to determine responsibility, denied the Claimant a fair Hearing due to certain rulings, and "the line, manner and demeanor of questions" of the Hearing Officer. The Organization further contends that Carrier failed to meet its burden of proof, and a charge of dishonesty requires a heightened burden of proof. In addition the Organization asserts that the Claimant was disciplined more severely than other employees who were on the property for this same offense.

The Board recognizes that procedural rules for every conceivable situation that arises during a hearing cannot be formulated. However, the process recognizes that the hearing officer is in the better position than a reviewing tribunal to fashion the appropriate or reasonable response to a specific situation that occurs during the hearing. More specifically, the hearing officer cured any procedural objection of admitting hearsay evidence of material facts by later calling the drafter of the document, who then was subject to cross-examination by the Claimant's representative. After a review of the record, the Board finds that the Claimant was provided a fair and impartial Hearing.

The Claimant is charged with four rule violations of the General Codes of Operating Rules. GCOR Rule 1.1.3 which is entitled Accidents, Injuries and Defects states:

“Report by the first means of communication any accidents; personal injuries; defects in tracks, bridges, or signals; or any usual condition that may affect the safe and efficient operation of the railroad. Where required, furnish a written report promptly after reporting the incident.”

GCOR Rule 1.2.7 which is entitled Furnishing Information states:

“Employees must not withhold information, or fail to give all of the facts to those authorized to receive information regarding unusual events, accidents, personal injuries or rule violations.”

GCOR Rule 1.4 which is entitled Carrying out Rules and Reporting Violations states:

“Employees must cooperate and assist in carrying out the rules and instructions. They must promptly report any violations to the proper supervisor. They must also report any condition or practice that may threaten the safety of trains, passengers or employees, and any misconduct or negligence that may affect the interest of the railroad.”

GCOR 1.6 which is entitled Conduct states:

“Employees must not be:

- 1. Careless of the safety of themselves or others.**
- 2. Negligent.**
- 3. Insubordinate**
- 4. Dishonest**
- 5. Immoral**
- 6. Quarrelsome or**
- 7. Discourteous**

Any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported. Indifference to duty or to the performance of duty will not be tolerated.”

The facts giving rise to the charge are not disputed. On May 15, 2013, the Claimant, a 23 year employee, was hauling towers for Signal & Communications. The Claimant observed no damage to the vehicle during his walk around inspection at the start of his assignment. During the course of the day, the Claimant had to travel with his truck and trailer over some uneven (hard) terrain at TriEnda and Weyh Road. At Weyh Road, there was a job briefing; the tower could not be unloaded by the signal hut. The Claimant had to get track and time, and pulled the trailer on the old road bed. With the assistance of the signal worker, the Claimant started to back up but stopped the vehicle because the frontend of the truck went low. Claimant exited the vehicle and noticed the dent. The Claimant was unsure if the dent occurred at that time or at TriEnda. At TriEnda, the truck was higher than the trailer. The Claimant did not report the damage to the vehicle.

The next day, another material truck operator, was going to use the dually for transportation. As he performed the walk around inspection, he noticed that the passenger rear fender was dented and bent inward. He described the dent as approximately a foot long, and it was “pretty noticeable compared to what it should look like.” The Claimant explained to him that the dent must have occurred when the Claimant was hauling for the Signal & Communication on the previous day. The other operator reported the damage to the Manager so as prevent himself from being the subject of an Investigation.

According to the Manager, the Claimant was charged with GCOR Rule 1.1.3 because the Claimant did not report the damages, and the Manager first learned of the damage through the other material truck operator. The Manager testified that any incident regarding railroad property must be immediately reported. The Claimant was charged with Rule 1.1.3, and said rule only requires a worker to report accidents, personal injuries, defects in tracks, bridges, or signals, or any usual condition that may affect the safe and efficient operation of the railroad. There was no evidence that dent affected the safe and efficient operation of the railroad. The terms incident and accident are not synonymous. The Agreement does not define the term “accident” in the rule, and there is a disagreement about its interpretation. ("I hit someone or something/ someone hit me" v. "incident"). An incident is an occurrence of event, and does not carry any connotation of fault, culpability, or avoidance. If the language intended to cover any occurrence of any kind, an incident, every employee would potentially have something to report after every shift, and little, if any, of it would be serious. Moreover, the drafters of the rule could have used the word incident rather than an accident but did not. The Board further notes that the

hearing officer framed most of his inquiry in terms of an incident rather than accident. Not all incidents are accidents; an incident is the occurrence of an event, whereas an accident is the occurrence of a preventable event.

The Claimant describes the incident as normal wear and tear on the maintenance vehicle traveling on “hard” road. According to the Claimant, he was aware that the rule requires reporting of an accident and in his opinion after 23 years of service, an accident was when he hit something or something hit him. The Carrier presented insufficient evidence of an accident, but only damage to a vehicle, an incident. The Board finds that the Carrier failed to meet its burden of proof as to a violation of GCOR Rule 1.1.3.

According to the Manager, the Claimant violated GCOR Rule 1.2.7 and 1.4 because he failed to initially report the damage. The record establishes, and the Manager does not deny, that the Claimant wrote his statement when asked and otherwise answered the Manager’s questions regarding the incident. The Manager does state that some responses were vague but the Claimant, himself, was speculating on where and how the damage occurred. The Claimant was forthright in stating that the damage occurred on his watch. There was no evidence that the Claimant was negligent in the handling of his vehicle in these circumstances. The Board finds that the Carrier failed to meet its burden of proof as to a violation of GCOR Rule 1.2.7 and 1.4.

According to the Manager, the Claimant violated Rule 1.6 because he failed to report, and therefore he was dishonest. There was no evidence of dishonesty established in the record. The Board finds that the Carrier failed to meet its burden of proof as to a violation of GCOR Rule 1.6.

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.