

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43677
Docket No. MW-45156
19-3-NRAB-00003-180686**

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

**(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference**

PARTIES TO DISPUTE: (
(Iowa Interstate Railroad

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [twenty (20) day suspension] imposed upon Mr. R. Whisenand, by letter dated September 7, 2017, for violation of multiple Carrier rules in connection with his alleged failure to properly secure the tamper heads resulting in severe damage on August 10, 2017 was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File IIR-2018-D040-2 IIS).**
- (2) The claim* as appealed under date of September 27, 2017 shall be allowed as presented because the Carrier failed to schedule and hold a conference to discuss the matter, in accordance with Rule 19G, prior to issuing a denial of the appeal.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant R. Whisenand shall have his record cleared of the charges leveled against him and he shall be compensated for all wage loss suffered.**

***The initial letter of claim will be reproduced within our initial submission.”**

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 is the same employee involved in Third Division Award 43676. In this case, the record shows that the Claimant again failed to secure his Mark III Tamper— this time the clamp frame – which caused damage to the Tamper at the Old Portland Road crossing on August 10, 2017. As a result, Claimant received a 20-day suspension.

Substantial evidence shows that the Claimant engaged in the charged misconduct. The Claimant admitted to the charged misconduct. Claimant testified (Tr. 26, 29):

“Q. Did you secure the clamping frame on the MARK III Tamper prior to operating the tamper over this road crossing?

A. I believed I had, but apparently no.

Q. Did the claim frame come in contact with the road crossing at Milepost 377.9 when you operated the tamper over the road crossing?

A. Yes.

* * *

Q. Did it cause any damage to the tamper?

A. Yes.

Q. What type of damage?

A. It broke two lift cylinders and a slew cylinder.

* * *

Q. ... [D]id you apply the locking device before you left the area that you were tamping?

A. I thought I had, but I didn't. ...”

Given the results in Third Division Award 43676 which upheld a five-day suspension given to the Claimant, under the circumstances, a 20-day suspension in this matter was progressive and not arbitrary.

The Organization again argues that the Carrier improperly denied the claim before the appeal conference. The record shows that on September 27, 2017 Organization appealed the Carrier's September 7, 2017 assessment of discipline (Organization Exhibit A-2); on October 20, 2017, the Carrier denied the appeal (Organization Exhibit A-3); conference was held on October 31, 2017 and on November 20, 2017, the Carrier reaffirmed its prior denial (Organization Exhibit A-4).

For reasons discussed in Third Division Award 43676, that argument does not change the result for these cases.

As this Board stated in Third Division Award 43674:

“... On the procedural argument raised by the Organization, the Carrier issued denials both before and after the conference and because a denial was also issued after the conference, technical compliance with Rule 19(G) was achieved. However, for the future and to avoid unnecessary disagreements between the parties, Rule 19(G) should be interpreted as it reads – i.e., that “[t]he Appeal Officer will issue a written decision within 30 days after the date of the conference.” Issuance of denials before the conference will not be considered to be in conformance with the rule.”

That same holding applies to this case.

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 18th day of June 2019.