

**BEFORE PUBLIC LAW BOARD NO. 6367**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

**AND**

**BANGOR & AROOSTOOK RAILROAD COMPANY**

**Case No. 2**

**STATEMENT OF CLAIM**      Claim of the System Committee of the Brotherhood that:

- (1) The thirty (30) day suspension assessed Welder A.T. Cullen for his alleged responsibility in connection with the derailment of Engine 79 on the Millinocket Mill Lead on July 14, 1999 was without just and sufficient cause, based on an unproven charge and in violation of the Agreement.
- (2) As a consequence of the violation referred to in Part (1) above, Welder A. T. Cullen must be paid all wages lost as a result of Mr. Hicks' letter of discipline and this letter of discipline dated August 20, 1999 must not be made a part of Mr. Cullen's personal file.

**FINDINGS:**

Claimant A.T. Cullen was employed as a Maintenance of Way Welder at the time of this claim. On July 14, 1999, the Claimant entered the Millinocket Mill to perform welding on switch point No. 11. As he drove into the Mill, he saw the Carrier's First Switcher locomotive sitting at the wet lap switches, which are located up hill from the switch point on which he was to perform the welding. However, no crew member was present. After proceeding to his work location, Claimant placed a red flag and derail to protect himself 114 feet from the spot where he was working.

Subsequent thereto, at approximately 9:00 a.m., the Carrier's First Switcher, while handling two locomotives and eight cars, headed down the Millinocket Mill lead track in a northerly

direction to perform switching operations. As it headed down the lead toward Switch No. 11, the First Switcher was unable to stop short of the Claimant's red flag and derail, and the First Switcher's lead engine (No. 79) ran over the red flag and derail, derailing three axles of the locomotive.

By letter dated July 20, 1999, the Claimant, as well as the crew of the First Switcher, were notified to attend a formal investigation to determine their responsibility, if any, in connection with the derailment of Engine No. 79, which resulted in damage to the track and equipment.

Following a hearing on August 11, 1999, the Carrier notified the Claimant that he had, in fact, failed to properly place the protective red flag and derail, which caused or contributed to the derailment of Engine No. 79. He was found guilty of violating Carrier's System Rule 40.1, Safety Rules 9000 and 9001, and Time Table No. 1 Rule 1102 and was assessed a thirty (30) day suspension.

The Organization filed a claim on behalf of the Claimant. Preliminarily, it contends that the Board should not reach the merits of the claim because the Carrier committed a fatal procedural error that denied the Claimant due process. Specifically, the Organization submits that Article IV, Section 1 was violated when the same Carrier agent, Larry Hicks, rendered the Carrier's decision of discipline, responded to the Organization's appeal, and further denied the instant claim at conference. In the Organization's view, Mr. Hicks' multiple roles denied the Claimant a fair hearing and impartial review.

Should the Board reach the merits, the Organization submits that the Claimant, who had a seven-year unblemished record, took prudent and practical steps both to protect himself and provide the Switcher with sufficient notice that he was working on the track ahead. In this regard, the Organization asserts that, given the layout and steepness of the tracks, if the Claimant

had placed the red flag and derail 100 yards from switch No. 11 on the Millinocket Mill lead, Engine No. 79 would not have been able to see it from 300 yards away.

The Carrier contends that the Claimant willfully disregarded the Carrier's Rule 40.1, which states that "when practicable, such [protective] signals must be placed at least 100 yards from the working point and where there will be a clear view of them from an approaching train or engine of 300 yards if possible." The Claimant took a shortcut, ignored a rule that he knew was designed for his protection, and contributed to the derailment and resulting damage to the track and equipment. The Claimant's excuse that it was "not practical" to adhere to Carrier's Rule 40.1 was, in the Carrier's view, without merit because there were no operation or physical conditions that impeded compliance with the Rule. The Carrier further submits that given the seriousness of the Claimant's safety violations, the discipline assessed was reasonable and in compliance with prior cases involving similar offenses.

It is the Carrier's additional position that it did not commit any procedural violations and that the Claimant had the benefit of a full and fair hearing.

**Opinion:**

The Carrier's proofs on the merits are compelling, and were it not for the serious procedural errors it made, this Board would have disallowed the claim. After careful consideration, however, the Board must find that the multiple roles played by the Carrier's agent denied the Claimant an independent, impartial review, in violation of Article IV, Section 1 of the Collective Bargaining Agreement.

The relevant contractual language states as follows:

## ARTICLE IV – DISCIPLINE AND GRIEVANCES

\* \* \*

**Section 1.** (a) No employee will be disciplined or dismissed without first being given a fair and impartial hearing before an officer superior in rank to the officer preferring the charges.

\* \* \*

(e) An employee's right to appeal is hereby established. The Brotherhood's representative will have the right to appeal in succession up to and including the highest official designated by the Management to handle such cases....

This language clearly contemplates a right of appeal to successively higher levels of managers who will fairly consider a case and render an independent judgment at each level. In the instant case, however, it is undisputed that Larry Hicks conducted the investigation, assessed the discipline of a thirty-day suspension, and conferenced the claim. While there is no doubt that Mr. Hicks performed his duties competently and that he reached a decision supported by the Record, the multiple roles he performed were inconsistent with the appellate review process envisioned by the Agreement.

This Board is mindful of the importance of the Carrier's safety rules. It also does not hesitate to state that the Claimant did not offer a valid reason for placing the red flag and derail only 114 feet from the point at which he was working when Rule 40.1 specifies a distance of 100 yards. The Claimant's mistake, however, does not relieve the Carrier of its obligation to adhere to the Agreement's procedural requirements. The right to appeal is rendered meaningless when the same person investigates the alleged misconduct, imposes discipline, and then reviews his own decision on appeal. As was stated in Third Division Award 23427:

The right of appeal is neither technical nor mechanical. It is an important and meaningful right that is not to be regarded lightly or ignored. The obvious purpose of the appeals machinery is to provide Claimant with independent consideration of his

appeal at each appellate level. See Fourth Division Award  
No. 2642.... (emphasis in original).

For the foregoing reasons, it is the Opinion of this Board that the Claimant's due process  
rights were violated, and on that basis, regardless of the merits of his case, his claim must be  
allowed.

**Award:**

The claim is sustained. The Claimant shall be paid all wages  
lost as a result of his suspension, and the letter of discipline  
dated August 20, 1999 shall be removed from the Claimant's  
personal file.

  
JOAN PARKER  
Neutral Member

  
CARRIER MEMBER

DATED: 6/4/01

  
ORGANIZATION MEMBER

DATED: 6-11-01