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Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 6356
Docket No. 6142
2-WT-CM-'72

The Second Division consisted of the regular members and in addition Referee Irving T. Bergman when the award was rendered.

Parties to Dispute: (System Federation No. 106, Railway Employees'
(Department, A. F. of L. - C. I. O.
((Carmen)
(
(The Washington Terminal Company

Dispute: Claim of Employees:

- 1 - That under the current agreement, Car Repairman, R. H. Winstead, was unjustly dealt with when he was assessed with a thirty (30) calendar day suspension from the service commencing September 20, 1970.
- 2 - That accordingly, Car Repairman, R. H. Winstead, is entitled to be compensated for all wage loss that resulted from his unjust thirty (30) calendar day suspension from the service.

Findings:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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 waived right of appearance at hearing thereon.

Claimant was charged as follows, Employees' Exhibit A: "Failure to properly secure the cars in #1 Express Warehouse, during your tours of duty, which eventually resulted in the uncontrolled movement of eight cars out of #1 Express Warehouse into 31 track mailhouse at approximately 3.50 a.m. on July 16, 1970."

The hearing disclosed that during his tour of duty from 8 a.m. to 4 p.m. on July 15, 1970 claimant failed to provide air throughout the track. On July 14, he had applied air to the first car at the south end and air worked north. On July 15, he noticed that 2 more cars had been added at the north end and the cars had been shoved down the track from their position on July 14. He coupled the air hose between the cars that had been attached at the north end but had no air. He made no further check, p.8, Employees' Exhibit B. The hearing also disclosed that the first

car at the south end had been removed at 10 p.m., 6 hours after claimant went off duty. At about 3.50 a.m., almost 12 hours after claimant went off duty there was an uncontrolled movement of the cars which resulted in extensive and costly damage.

Carrier contends that claimant's failure to maintain air on the draft of cars during his tours of duty on July 14 and 15 was a breach of duty which was the primary cause of the accident on July 16, Carrier's Submission p.2.

It is conceded by the Carrier that the yard crew was negligent and contributed to the cause of the accident when it removed the car at 10 p.m. but contends that it has the right to apportion responsibility for the accident, Carrier's Rebuttal p.1. A Carrier's witness, retired General Car Foreman testified that the Steam man should have been called when a move of cars was made and that on Warehouse No. 1 track, it was imperative to do so, Employees' Submission, Exhibit B, p.10, 11.

Primary or proximate cause for the accident is not the same as apportioning the responsibility. These are inconsistent theories. The intervening factor of car movement and control by the yard crew while removing a car disturbs the flow of events and raises a question as to proximate cause. The Crew Conductor or Yard Master did not alert the Steam man regarding the movement at 10 p.m. on July 15, in an imperative situation such as existed on Warehouse track No. 1 which is a through track.

Claimant was suspended for 30 calendar days because his neglect was judged to be the proximate cause. It is not for this Board to fix the penalty for partial fault but to act only as to the charge as stated against claimant and as to the penalty imposed against him as the alleged primary wrongdoer. In this case, we do not believe that the evidence is sufficient to place that burden on the claimant beyond a reasonable doubt or by a preponderance of the credible testimony.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:

E. A. Killeen

Executive Secretary

Dated at Chicago, Illinois, this 14th day of July, 1972.