

**Award No. 3752**

**Docket No. 3766**

**2-C&O-FO-'61**

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**SECOND DIVISION**

**The Second Division consisted of the regular members and in addition Referee Richard F. Mitchell when award was rendered.**

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**PARTIES TO DISPUTE:**

**SYSTEM FEDERATION NO. 41, RAILWAY EMPLOYES'  
DEPARTMENT, A. F. of L. - C. I. O. (Firemen & Oilers)**

**CHESAPEAKE AND OHIO RAILWAY COMPANY**

**DISPUTE: CLAIM OF EMPLOYES:** 1—That under the current agreement, Laborer Everett C. Clark was unjustly dismissed from the service of the carrier, effective at the regular starting time of 7:00 A. M., on September 16, 1959.

2—That accordingly the carrier be ordered to reinstate this employe with all seniority and employe rights unimpaired and pay for all time lost retroactive to 7:00 A. M., September 16, 1959.

**EMPLOYES' STATEMENT OF FACTS:** On April 9, 1943, the carrier employed Everett C. Clark, hereinafter referred to as the claimant, as a laborer at Clifton Forge, Virginia.

Under date of September 3, 1959, Master Mechanic Lushbaugh charged the claimant as set forth in letter of that date and requested him to attend investigation set down for hearing at 1:00 P. M., Friday, September 4, 1959.

Formal investigation was held on September 4, 1959, as scheduled.

On September 16, 1959, Master Mechanic G. W. Lushbaugh, Clifton Forge, Virginia, advised the claimant by certified mail that he was dismissed from the service of the carrier for not properly positioning controls on Diesel Unit 5963.

Since April 9, 1943, until dismissed, claimant established an excellent service record.

This dispute has been handled with the carrier up to and including the highest officer so designated by the carrier, with the result that such officers have declined to adjust the dispute.

The agreement effective September 30, 1938, and revised to June 16, 1953, and subsequently amended, is controlling.

from No. 3 to "idle" positive by the impact. Foreman Capps further testified, however, that the impact could not have changed the position of the reverser or the generator field switch. Electrician Weigartz made the same statement with respect to the reverser control.

The testimony of Electrical Foreman Capps reveals that the inspection of the locomotive immediately following the accident failed to disclose any mechanical trouble with the locomotive.

While the employees suggest that diesel unit 5963 moved under its own power as a result of mechanical failure, all of the statements made at the investigation by qualified and competent personnel fail to support such contention. To the contrary, this expert testimony discloses that the locomotive did not move because of mechanical failure.

The conclusions of the officers conducting the investigation are obvious. When the unit was placed on the washer, it was left with the controls properly positioned. Clark performed service on the unit and contends that he moved the throttle to No. 3 position, consumed approximately 25 minutes washing one side of the unit, and without reentering the cab had begun washing the other side of the unit when it started to move. This, obviously, could not have happened. More probably, Clark washed one side of the unit and then found it necessary to move the unit a short distance in order to get the battery box open, to make the hose reach, or for other such reason, and after moving the unit failed to reposition the controls to the proper setting. There was no one else on or about the locomotive immediately prior to the accident and the accident could not have occurred had conditions been as stated by Clark.

Clark was guilty of gross negligence and did not give the true facts at the investigation. The decision to the effect that Clark was guilty of the charges is fully justified by the evidence adduced at the investigation and under the circumstances his dismissal from the service is warranted. Clark not only damaged property, but was the direct cause of personal injury to himself and three of his fellow employees. That the loss of life or limb did not occur was not due to any diligence on the part of Clark. Such carelessness cannot be condoned and the carrier urges that your Board deny the claim of the employees.

**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 employees 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 were given due notice of hearing thereon.

The claimant was assigned to the diesel shop as a Laborer, his assigned duties being to clean engines in the diesel shop and wash engines that are brought to the washer.

On the day in question, Engine Supplyman McCoy stated that he had left the controls of engine 5963 in the "off" position, that is, the throttle was idle, reverser or center, generator field cut off and dynamic brake handle in "off" position.

Prior to washing engine, Clark testified that he checked the brakes and put the throttle in No. 3 position but did not check the other controls on the engine. He then washed the north side of the engine which took between 20 and 25 minutes, and started washing the south side, when the diesel moved from its position on washer, running into three employees and damaging three diesel units.

Clark was charged with not properly setting the controls on diesel No. 5963 for the work that he was performing resulting in personal injury to himself and other employees, and damaging certain diesels.

While the Employees contend that the investigation was not a fair and impartial one, the record shows that it was held in accordance with the agreement rules, and every right Clark was entitled to was granted him.

There is no evidence in the record that claimant did not properly position the controls on the diesel prior to washing the engine. Clark denied that he moved the engine, and there was no reason for him to do so, as it had been spotted correctly on the washer.

Claimant testified that it was between 20 and 25 minutes after he left the cab of the engine that the diesel moved. The parties agree that the diesel unit 5963 would not have remained still for more than one and one half to two minutes, without moving, if the controls were in "on" position.

Since it was between 20 and 25 minutes since Clark had been in the cab of the locomotive, there is no evidence that he was responsible for the moving of the diesel.

The burden of proof was upon the carrier, it has failed to meet same.

The claimant (1) was unjustly dismissed and (2) carrier is ordered to reinstate claimant and to pay him for all time lost, less any amounts he has earned.

#### AWARD

Claim (1) sustained.

Claim (2) sustained as per findings.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman  
Executive Secretary

Dated at Chicago, Illinois, this 12th day of June, 1961.

#### DISSENT OF CARRIER MEMBERS TO AWARD 3752

The evidence in the record of this docket does not support the findings of the majority. The Carrier in its submission has shown substantial evidence in support of its action, and the claimant's personal denial of any negligence was his only defense. The very testimony of the claimant did not deny the essential contentions of the Carrier as to what happened to diesel 5963 on September 1, 1959, which resulted in extensive damage to diesel 5963 and

other diesels and injuries to himself and other employes. The claimant did not deny that he was the only employe working on diesel 5963 at the time of the accident. The Carrier's witnesses at the investigation stated that the diesel did not experience any mechanical failure, and no reference was made that an "Act of God" was the cause of the accident. The Carrier's witnesses statements were not refuted by the claimant.

In First Division Award 12043, with Referee Babcock, we read —

"The Carrier is only required to conduct a fair and impartial investigation and is bound by no requirement to sustain claimant's responsibility beyond any reasonable doubt. There was nothing unfair about the investigation. Every opportunity was accorded claimant to present his defense. It was the judgment of Carrier that claimant's conduct required his dismissal. There is nothing to indicate the Carrier's action was wrong."

In our opinion, Award 12043 would equally apply to the instant dispute.

The claimant could not and did not offer any proof as to his innocence of the Carrier's charge of his negligence which resulted in the accident except for his personal statement of denial, which the majority accepted in its fullness as a fact even though the Carrier did present evidence which proved that only the claimant could have been the responsible party.

The claimant sought leniency and received instead exoneration.

For the reasons outlined above, the Carrier Members dissent.

/s/ P. R. Humphreys

/s/ H. K. Hagerman

/s/ David H. Hicks

/s/ William B. Jones

/s/ T. F. Strunck