Award No. 3762
Docket No. 3514
2-MP-MA-'61

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Howard A. Johnson when the award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 2, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L.-C. I. O. (Machinists)

MISSOURI PACIFIC RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES: 1. That under the current agreement, Machinist Helper H. W. Hemminger was unjustly dismissed from the service of the Carrier on July 25, 1958.

2. That accordingly the Carrier be ordered to compensate the aforesaid employe for all time lost between July 25, 1958 and December 15, 1958, the date he was reinstated to service, and restore all vacation rights unimpaired.

EMPLOYES' STATEMENT OF FACTS: Machinist Heleper, Mr. H. W. Hemminger, hereinafter referred to as the claimant, is employed by the Missouri Pacific Railroad Company, hereinafter referred to as the carrier, at the Kansas City, Missouri East Bottom Shops. The claimant entered the service of the carrier on February 3, 1941, was promoted to machinist helper on October 24, 1941 and has worked in that capacity in continuous service since that time.

On March 29, 1958, the claimant had the misfortune to sustain a personal injury during his regular tour of duty, necessitating his being absent from his job three months, five days (March 29th to July 4th, 1958) at which time he resumed his duties. However, on July 10, 1958, approximately six (6) days after returning to work, Mr. Hemminger, the claimant, was advised to report to the office of Master Mechanic McCaddon on Monday, July 14, 1958, for formal investigation to develop the facts and place responsibility in connection with the personal injury he sustained on March 29, 1958. Local Chairman C. E. Thompson, in his letter to General Foreman E. V. Baume under date of July 10, 1958, requested postponement of the investigation, but was advised by Master Mechanic J. W. McCaddon in his letter of July 10, 1958, that the carrier was not agreeable to a postponement. But on July 12, 1958, Master Mechanic McCaddon addressed another letter to Mr. Thompson advising that the carrier was agreeable to postponing the investigation until Friday, July 18, 1958, at 8:30 A. M. On July 16, 1958, Mr. McCaddon addressed a letter to the claimant, stating that it was necessary to again postpone the investigation, setting new date for the hearing at 8:30 A. M. Monday, July 21, 1958. Local Chairman Thompson then requested a postponement but was advised

regulations in effect on this property and which he was also obligated to do under the provisions of Rule 43(a) of the shop crafts' agreement, applicable to him, reading:

> "PROTECTION OF EMPLOYES: RULE 43.(a) Employes will carefully observe the rules of the Company, designed to avoid accident and personal injuries."

All matters contained herein have been the subject of discussion in connection or through correspondence between the parties on the property.

For the reasons fully set forth in this submission, there is no basis for the claim now before your Board and it must therefore be denied.

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 were given due notice of hearing thereon.

After an investigation Claimant was dismissed from Carrier's service on July 25, 1958 for failure to exercise proper safety precautions, resulting in the laceration of one finger and the loss of a joint of another. He was restored to service on December 15, 1958 with full seniority rights.

The claim is for all time lost and restoration of vacation rights unimpaired, which in the Employes' Ex Parte Presentation are stated to be "his earned vacations for the years 1958 and 1959".

The Carrier has a Safety Plan with eight General Rules including the following:

> "1. Safety is of the first importance in the discharge of duty.
>
> "2. In case of doubt or uncertainty, the safe course must be taken.
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> * * * * *
>
> "7. Employes who are careless of the safety of themselves and others will not be retained in the service."

These rules are not unreasonable, but are for the protection of all concerned, including the employes and travelling public.

The contention is not correct that the investigation was held "because he had the misfortune to sustain an injury"; it was held to determine whether the incident involved negligence or violation of safety precautions. While Claimant was the one injured in this instance, negligence is costly to the Carrier as well as the one injured, and also endangers other employes and the public. The Carrier is not justly subject to criticism for investigating an employe's conduct merely because he was the person injured. On the contrary it might well be criticized for failing to make such investigation.

The question is whether the discipline imposed was justified, or was so immoderate as to constitute an abuse of discretion. The contentions are that the record contains no evidence of Claimant's negligence, but shows that the accident was due to insufficient light and the want of a screen over the air exhaust holes in the generator under the air reservoir. The record does not show the existence of such a screen over the air exhaust holes in the generator on any of the diesel units, or a similar accident.

Each party submitted a photograph. While the record does not show technical proof sufficient to entitle either to admission in a court of law, both were obviously taken under substantially the same circumstances, they tend to corroborate each other, and together they afford a clear picture of the scene of accident. One shows the generator and air reservoir against the wall to the left, a door in a wall at right angles to it, and a light above the door. The other was taken from in front of the equipment and shows the reservoir about six or eight inches directly above the generator and the shut-off cock.

The generator is somewhat shorter and of substantially smaller diameter than the reservoir, but is not shaded by it, for the light, while 6½ or 7 feet above the floor, is about 2 feet to the right and 4 feet in front of it, so as to shine down on it at an angle. The shut-off valve which Claimant should have turned, was at the right end of the generator, several inches from it, entirely out from under the air reservoir, in plain sight, and not over ten feet from the light. On a few of the diesels the reservoir is below the generator, and the shut-off cock is below the air reservoir, and therefore not near the generator air exhaust holes; but on most diesels the installations are like this one, with the air reservoir in full sight above the generator and the shut-off cock in full sight at the right of the generator. Claimant had been an employe of the Carrier for 17 years, the last two of them in air work on diesels; he must have been well acquainted with these installations; from the location of the air reservoir he should immediately have identified the type of unit and the location of the shut-off cock.

Even failing such knowledge he should have seen it immediately. There was nothing to shade it from the light. The walls were painted white or aluminum color, and at a distance of not over ten feet the 50-watt globe should have supplied adequate light. There is no suggestion that it was smeared or not burning.

The two holes in question are in the front plate of a housing under the generator just above a small platform only two or three inches above the floor. A generator tie-rod is slightly above and in front of the holes and does not hide them, but partly intervened between them and the light globe. These holes are only ⅞ inch wide and about two inches long. For his fingers to enter the holes Claimant must have been crouching directly in front and in plain sight of reservoir, generator and shut-off cock.

The light was clearly sufficient, the shut-off cock was in plain view, and there is no apparent reason why Claimant should have reached near the holes.

It is objected that Claimant was the only one testifying about the accident; but he was the only one present when it happened and, to say the least, it was entirely reasonable to conclude from his testimony and the physical facts that he was guilty of gross neglect of his own safety, unless he stumbled, fainted or had a momentary lapse of some kind, which was not claimed.

Under the circumstances the Carrier cannot justly be accused of malice, unfairness or abuse of discretion. The fact that at first he was discharged and then 4½ months later was restored to service in the belief that he had learned his lesson and had been sufficiently disciplined is no indication of malice; it may well have been felt that the lesson would thus be better impressed than merely by an initial suspension. The fact that the Carrier made a cash settlement of Claimant's damage suit is not admission of its fault in the premises or of Claimant's freedom from fault.

However, in view of Claimant's restoration to service in the belief that he had been sufficiently disciplined, the Board considers that he should not be compensated for time lost, but that he should receive such vacation rights as he earned under the Rules.

AWARD

Claim sustained as to restoration of vacation rights earned.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois this 16th day of June 1961.