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**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13601

Docket No. 13481

01-2-99-2-83

The Second Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

(International Association of Machinists and
(Aerospace Workers

PARTIES TO DISPUTE: (

(Springfield Terminal Railway Company

STATEMENT OF CLAIM:

- “1. Springfield Terminal Railway Company violated Rule 15 of the controlling Agreement, effective June 1, 1995, as amended, when by letter dated October 14, 1998, the Carrier arbitrarily, capriciously and unjustly suspended Machinist Phil Davis for three (3) days after an Investigation/Hearing held on September 18, 1998.
2. Accordingly, the decision should be reversed, Machinist Davis exonerated of the charge(s), his record and personnel files cleared of any reference thereto. And he be made whole for any and all losses suffered as a result of Carrier’s arbitrary, capricious and unjust actions, including but not limited to, time spent at formal Investigation/Hearing of September 18, 1998.”

FINDINGS:

The Second 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.

This is the fourth in a series of claims filed on behalf of Claimant P. Davis, a Machinist at the East Deerfield Engine House. At issue here is whether the Claimant was properly issued a three-day suspension for failing to restore the derail to its derailing position after moving a locomotive into the Engine House.

The record of the Investigation Hearing shows that on July 28, 1998, Manager P. S. Walsh observed the derail in the off position. The Claimant and his co-worker, Machinist P. Howes, were both issued failed STOP's for the violation. The Claimant was subsequently notified to attend an Investigation in connection with the cited violation.

The Claimant admitted that he failed to replace the derail to its proper position. He testified, however, that he had just brought a locomotive into the Engine House when he was called in for a meeting in the manager's office. Before he had a chance to return to the derail, a co-worker repositioned it. The Claimant stated that the derail was properly in place less than five minutes after the locomotive was moved into the Engine House.

Both the Claimant and his co-worker, Mr. Howes, testified that they are not aware of any time limit for a derail to be put back in position. Moreover, they stated that the Engine House was fully protected whether the inner derail was up or not because the outer derail was in place.

After careful review of the record in its entirety, the Board concludes that the evidence substantiates the charges and that the discipline assessed was warranted. Mechanical Department policy requires that the derail be left in the derailing position when not in use. The derail prevents any equipment on the track from being moved into the shop. It is there to protect employees from being struck by equipment that either intentionally or accidentally moves toward the Engine House.

There is no dispute that the Claimant knew of the proper procedure for replacing the derail. The record shows that he has performed this procedure on many prior occasions. In addition, the Claimant acknowledged at the Hearing that he was familiar with the Carrier policy in this regard.

The Board is unpersuaded that extenuating or mitigating circumstances exist so as to justify overturning or modifying the discipline imposed. Although the Organization appeals the determination on grounds that the derail was left unprotected for only a few minutes, the fact remains that the Claimant concededly did not fulfill his obligation to replace the derail to its proper position. The derail was repositioned properly only because another employee noticed that it was in the off position. Moreover, whether or not an outer derail was in place does not relieve employees from their responsibility to protect the inner derail. The Carrier policy concerning the positioning of the derails is in accordance with federal regulations which protect employees under Blue Flag Regulations. It is simply not an employee's call to decide that the placement of the inner derail can be disregarded before leaving the work area.

The Organization's remaining arguments are also without merit. As in the other cases before the Board involving the Claimant, the Organization has argued that the Claimant was disciplined not for any particular action or omission on the date in question, but for an accumulation of failed STOP's. The Organization submits that this accounts for the disparate treatment afforded the Claimant when compared to his co-worker, Mr. Howes, who was not issued discipline despite committing the same infraction. The Board's findings and conclusions regarding this contention are set forth in Second Division Award 13600, and they are adopted in full in this Award. Suffice it to say that in order to prove disparate treatment, the Organization must establish not only that an employee was treated differently than others; it must also show that the circumstances were substantially like those of individuals who received no penalty or a more moderate penalty. Here, unlike his co-worker, the Claimant had accumulated a record of failed STOP's and had been informed that future violations would result in discipline. No unfair or improper distinction has been proven under these facts.

Finally, it is the Organization's position that the Claimant has been singled out for discipline as punishment for his testimony in a previous Hearing. That argument would be more persuasive if the Organization had established that the discipline imposed was specious or wholly unwarranted. That is not the case, however. The Claimant admitted to the violation and the discipline imposed was not unreasonably harsh. The Board will not impute improper motive absent more probative evidence. Accordingly, the claim must be denied.

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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 Second Division

Dated at Chicago, Illinois, this 3rd day of May, 2001.