

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award **Number** 20134
Docket Number MW-20129

Joseph A. Sickles, Referee

PARTIES TO DISPUTE: ((Brotherhood of Maintenance of Way **Employees**
(Louisville and Nashville Railroad Company

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

(1) The demotion of Machine Operator W. V. Hunter from Rank 3 to Rank 5 was without just and sufficient cause; on the basis of unproven charges; in abuse of the Carrier's discretion; and thereby in violation of the Agreement (System File 1-12/D-103757 E-306-18).

(2) Machine Operator Hunter's seniority in Rank 3 be restored and payment be made for loss of earnings since he was unjustly demoted.

OPINION OF BOARD: On October 6, 1971, when a tie shearer operated by Hendrix stopped on the track, it was hit from the rear by Claimant's tie handler.

Claimant was charged with responsibility in connection with the accident, resulting in personal injury. Subsequent to investigation, Claimant was demoted from Rank 3 to Rank 5 because of his:

"...responsibility in connection with accident involving tie handler and tie shearer...resulting in personal injury to... Hendrix."

The claim seeks restoration to Rank 3 and payment of loss of earnings since the "unjust demotion."

The Organization argues that because the decision to demote was motivated by the alleged personal injury which Carrier never proved - the claim must be sustained.

The record does not clearly establish if the **gravamen** of the charge was the personal injury, or if that factor was included as a matter of **aggravation**. Without **immediate** regard to proof of "personal injury", we are of the view that Carrier unquestionably established Claimant's responsibility for an accident, and that the charge is **broad** enough for this Board to sustain such a finding. Hendrix's machine was stopped, and Claimant's machine, although traveling **very** slowly, came into contact **with** it. Claimant was aware of a safety rule requiring him to operate "...prepared to stop with less than one-half the range of vision." Obviously, he did not do so. Thus, upon the entire record, we find that substantial and credible evidence was presented at the investigation, including Claimant's own testimony, to establish his responsibility for the accident,

Because the record indicates that personal injury had a bearing upon the quantum of discipline assessed, we are compelled to review the record in that regard.

For instance, on October 25, 1971, Carrier issued a Discipline Bulletin No. 299 stating:

"A Machine **Operator** has been demoted from Rank 3 to Rank 5 account his responsibility **in** connection with accident involving tie handler and tie shearer, resulting in personal injury to a fellow employee." (underscoring supplied.)

On the same date, Carrier advised Claimant:

"The attached ...**Bulletin** [cited above] refers to you in connection with your responsibility in connection with accident.... resulting in personal injury to...." (underscoring supplied)

Throughout handling on the property, and in documents presented to the Board, Carrier confirmed that the "personal injury" was material to its **assessment** of discipline. For example, in direct reply to Claimant's request for restoration, Carrier noted the "overriding consideration" of the legal responsibility placed on management for the safety of its employees and the obligation to guard against accidents and personal injuries. Carrier also stressed "heavy financial liability under the law."

In documents prepared after the investigation and assessment of penalty, both parties present widely divergent views of the injuries received by Hendrix, if any. But, information not submitted at the investigation is not properly considered by this Board. Award 19808 (**Blackwell**). See also Awards 17595 (Gladden), 15574 (Ives), and 9102 (Stone).

Limiting, as we must, our review solely to matters presented at the investigation, we question that Carrier established, by a substantive preponderance of the evidence, that Hendrix received personal injuries as a result of the accident. Two witnesses, in addition to Claimant, testified that the "collision" was rather minimal. The regular tie shearer operator (a disinterested individual) was of the view that the "collision" was not severe enough to hurt anyone or anything. While that testimony may be conclusionary in nature, it tends to show that the meeting of the two machines was so slight that personal injury appeared unlikely. No witness heard Hendrix make any protestation of injury at the time of the incident. The only direct testimony of personal injury submitted at the investigation was a statement by Hendrix that it was not until he "...**bent** over to pick up a spike maul...that's when I noticed my back was hurting." He did not specify the time lag from the collision to the time he attempted to pick up the spike maul, nor did he specify the type or nature of the "hurting." Although **t'** may be an inference of causation, Hendrix, himself, did not draw any such **conclusion** in his testimony.

It is conceded that Hendrix Left work to visit a doctor about an hour after the incident. Yet, Hendrix failed to state the result of that visit, and the transcript of investigation is totally void of any indication of the nature and extent of the injury, or the medical assistance received.

Claimant suggests that Hendrix might very well have suffered an injury when he assisted in placing the "Spike Puller" on the track, after the incident. Hendrix denies that he assisted in that chore, but two witnesses, in addition to Claimant, insisted that he did.

In addition to the four men who testified, there were two other employees at the scene of the accident, however, they **were** not witnesses at the investigation.

Assuming an injury, it is not unreasonable to conclude that some medical information or reports were available to Carrier on the date of the hearing (October 12, 1971). Yet, Carrier was content to rely on the one isolated statement by Hendrix, which failed to establish causation.

If Carrier desires to **rely** upon personal injury as an aggravating factor in assessing punishment, it must establish that factor by substantive evidence. Hendrix may or may not have been injured and it may or may not have been a result of the accident. While this Board may draw all conclusions reasonably inferred from the record properly before it, we may not engage in speculation. To determine that Carrier established, at the hearing, a personal injury as a result of Claimant's action, would require us to make a number of assumptions. This Board is not prepared to do so.

We are **well** aware that this Board **should** not substitute its judgment for that of the Carrier, and that extreme caution must be exercised in disturbing an assessed penalty. Award 19433 (**Blackwell**). But, when the entire record establishes that Carrier has, in part, based the quantum of punishment upon a serious assertion which has not been established by substantive evidence, we are compelled to view the discipline in that context.

Claimant's seniority in Rank 3 shall be restored. We are not prepared, however, upon a review of the entire record (including certain prior difficulties by Claimant regarding machine operation) to sustain the claim for Loss of earnings.

Accordingly, we will sustain the claim to the extent of restoration of **Claimant's** seniority in Rank 3, but we shall deny the claim for compensation of wage Loss.

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FINDINGS: The Third Division of the **Adjustment Board**, upon the **whole** record and **all** the evidence, finds and holds:

That the **parties** waived oral hearing;

That the Carrier and the **Employees** involved in this dispute are respectively Carrier and **Employees** within the **meaning** of the Railny Labor Act, as apprwed June 21, 1934;

That this Division of the **Adjustment Board** has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

A W A R D

Claim sustained to the extent stated in Opinion of Board.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST :

A.W. Pauler
Executive Secretary

Dated at Chicago, **Illinois**, this 31st **day** of January 1974.