

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21649
Docket Number m-21512

William G. Caples, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way ~~Employees~~
(
(Soo Line Railroad Company

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

(1) The Carrier's action **in** permanently relieving Mr. Duane Kempf from his duties as Rail Gang Foreman was without just and sufficient cause (~~System~~ File 800-16-B-58).

(2) The charges assessed against claimant shall be removed, with his record cleared and he shall not be permanently barred from holding a position of Rail Gang Foreman in the future.

OPINION OF BOARD: The Claimant became the regularly assigned foreman of the R-1 Rail Gang on March 28, 1974 but was on sick leave for several weeks prior to August 6, 1974 and did not return to work until August 7, 1974.

On August 6, 1974, R-1 Rail Gang consisting of an Acting Foreman, five Assistant Foremen, several laborers and one timekeeper was returning to Carpio, North Dakota upon completion of work on August 6, 1974, when Laborer Worms fell from an anchor machine and was fatally injured.

A formal investigation of this accident was held in the depot at Donnybrook, North Dakota on August 22, 1974 "to develop facts in connection with the fatal accident." The ~~Claimant~~ who was not working the day of the accident, and nine men on the crew the day of the accident, including the Acting Foreman and five Assistant Foremen, who were working the day of the accident were noticed of the hearing and were **advised** of their right of union representations. The men had union representation.

On September 5, 1977 Claimant was advised by the Carrier:

"Facts developed during the investigation . . . revealed that Claimant' was 'aware that employees other than the machine operators were not to ride on machines. This was evidenced by your statement that you knew as a result of reading the M/W Rule Book and that you had been so instructed by RR Officials. In addition, in 1974 you did not instruct men under your jurisdiction concerning not riding machines but in fact did instruct your Assistant Foreman to ride some of the machines.

In view of your violation of safety practices and in particular violation of Rule #913, you are effective immediately and permanently relieved of your duties as Rail Gang Foreman."

It is the position of the Organization (1) that the Carrier "totally ignored the fact the claimant was not the foreman of the Rail Gang at the time of the fatal accident" and had been on sick leave for several weeks prior to it and, therefore, cannot be held responsible for the accident; and (2) the Carrier failed to produce any proof that the claimant's actions while on sick leave or prior thereto could have any association with the fatal accident of August 6, 1974, therefore, the discipline levied against claimant is capricious and unwarranted.

It is the position of the Carrier that (1) there has been no abridgment of Claimant's rights, and (2) the evidence supports the finding that the Claimant was remiss in his responsibilities and duties and (3) the removal of Claimant from the position of Rail Gang Foreman was not unreasonable.

The Board has before it a case in which an employee has been given a severe discipline for an accident, admittedly of the most extreme consequence, death, on a day that he was neither on the job nor responsible for any work arising thereon. No case was cited to us of a comparable situation where an individual, under similar circumstances, on sick leave with his scheduled position occupied by another qualified and responsible foreman was charged with responsibility of an **occurrence** and disciplined for failure to discharge it.

The Board does not lose sight of the fact safety is of the greatest importance or that no accident, no matter how minor, may be taken lightly but it appears from the record probative evidence is lacking that Claimant was responsible and to hold him responsible appears unreasonable, capricious and unwarranted. (See Third Division Award 10582).

The Board, thus, finds:

- (1) The discipline imposed by Carrier was arbitrary, unreasonable and without foundation.
- (2) That the record of Duane ~~Kempf~~ be cleared and he shall not be permanently barred from holding a position of Rail Gang Foreman after this order.

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 Railway Labor Act, as approved June 21, 1934;

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

That the Carrier violated the Agreement.

A W A R D

Claim sustained in accordance with Opinion.

/ NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 18th day of August 1977.