

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 22812
Docket Number **MW-22840**

Paul C. Carter, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way **Employees**
(The **Denver** and Rio **Grande** Western Railroad Company

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

(1) The discipline assessed to Machine Operator Thyril L. Johnson **was** arbitrary, capricious **and** without just cause (System File **D-41-77/MW-4-78**).

(2) **Machine** Operator Johnson be reinstated back to service with seniority and all other rights unimpaired and he be **compensated** for all wage loss in accordance with Rule 28 of the Agreement."

OPINION OF BOARD: Claimant, with about **four** and one-half **years** of service with the Carrier, was employed as work equipment operator. On October 28, 1977, he was assigned as such on a piece of equipment described in the record as a Bantam D-34 Crane. He stood on top of the **crane's counter-balance** - which is at the rear end of the cab and about five feet above the **ground** - while he cleaned the crane's engine. At **about 11:30 A.M.** he finished the cleaning and jumped off the counter-balance **to the ground**, injuring his leg when he hit the ground.

Claimant was immediately aware of the injury **and** could have advised his superior **but** reported the injury on **October 29, 1977**. **He** was notified to **attend** investigation **on** November 8, 1977 at **9:30 A.M.** at Grand Junction:

".... to develop facts and place responsibility, if any, in connection with personal injury sustained by **Thyri11 L. Johnson** at **11:30 A.M.**, October 28, 1977, while working as operator of D-34 at **Grand Junction**..."

A copy of the transcript of the investigation has been **made** a part of the record. On November 18, 1977, claimant was dismissed from service:

".... for your failure to adhere to that portion of the General Notice **and** Rules as follows:

'Safety is **of** the first importance in the discharge of duty.'

'Employees who are careless of the safety of themselves or others, or guilty of acts of disloyalty, dishonesty, desertion, intemperance, immorality, insubordination, incompetency, willful neglect of duty, inexcusable violation of the rules, making false reports or statements or concealing facts concerning matters under investigation will be subject to dismissal.'"

X-1" It **is** well settled in discipline cases that the parties to the dispute and the Board itself are restricted to what is developed in the investigation, **and** neither party is free to supplement that record subsequent to the **investigation**.

In the investigation evidence was presented that there were ladders **and** walkways for use in getting on and alighting from the **crane, and** that it was not a safe practice to jump **from** the counter-balance.

Based on our review of the record properly before us, the Board concludes that discipline was warranted, but that permanent dismissal was excessive. We will award **that** claimant be restored to **service** with seniority and other rights unimpaired, but without any compensation for **time** lost while out of service.

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 discipline imposed was excessive.

A W A R D

Claim sustained to the extent indicated in Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:;


Executive Secretary

Dated at Chicago, **Illinois**, this 18th day of April 1980.