

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23944  
Docket Number MW-24131

Irwin M. Lieberman, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes  
(  
(Consolidated Rail Corporation

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

(1) The suspension of ten (10) days imposed upon I&R Foreman J. F. Scimone, Jr. for alleged failure to detect certain 'FRA defects' on the 'Washington Secondary' was without just and sufficient cause (System Docket No. NH-27).

(2) The claimant's record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered."

OPINION OF BOARD: Claimant was an I&R Foreman who's responsibilities included a weekly inspection of the Washington Secondary Track. On August 28, 1979 Claimant inspected the track in question and his report indicated no defects. On August 30, 1979 a derailment occurred on the track segment involved and Claimant was charged with failure to detect and take corrective action with respect to eight FRA defects on the Washington Secondary. Following a hearing, Claimant was found guilty of the charges and assessed a ten-day suspension.

Carrier maintains that the derailment was caused by one of the FRA defects, a wide gauge, and that Claimant clearly was negligent in his failure to report that defect as well as the seven others specified. Petitioner takes the position that discipline was improper since the FRA report, upon which the discipline was based, was not introduced into evidence nor was there any testimony from the FRA Inspector. Further, the Organization argues that the report of the derailment committee was improperly omitted from the record; thus, much of Carrier's case was based on hearsay evidence.

The Board finds that the Carrier's conclusions were based in part on second-hand (or hearsay) evidence. The only direct evidence with respect to the charges found in the record was that of Assistant Division Engineer Sutton, which was contested, at least in part, by Claimant. It is clear and well established that in discipline disputes such as this, Carrier has the burden of establishing Claimant's guilt. In this case, that proof is not evident or conclusive on all the points made by Carrier. For example, there is no clear evidence of the existence of at least some of the defects on the day of the derailment. As an essential ingredient of fairness and due process, the Claimant herein should have the right to cross examine the witnesses who's testimony established his alleged guilt; since the principle witnesses did not testify, he was denied this right.

It is evident, however, on careful evaluation of the testimony, that Claimant's reports concerning the trackage in question were inadequate. Thus, some culpability for the noted deficiencies must be attributed to Claimant. He should be disciplined, but a more appropriate measure of discipline, under the circumstances, would be a reprimand.

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 was excessive.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST: Acting Executive Secretary  
National Railroad Adjustment Board

By Rosemarie Brasch  
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 14th day of July 1982.