

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25854  
Docket Number CL-25733

David P. Twomey, Referee

PARTIES TO DISPUTE: ( *Brotherhood of Railway, Airline and Steamship Clerks,  
Freight Handlers, Express and Station Employees*  
( *Missouri Pacific Railroad Company*

STATEMENT OF CLAIM: "Claim of System Committee of the Brotherhood (GL-9862) that:

1. Carrier violated the agreement between the parties when it arbitrarily and injudiciously dismissed Clerk L. Garcia, Jr. from its service beginning March 18, 1983.
2. Carrier's action in dismissing Clerk Garcia from service was unjust, arbitrary and an abuse of discretion.
3. Carrier shall now be required to expunge the record of investigation from Clerk Garcia's personal record file and compensate him for all wage and other losses sustained account Carrier's action."

OPINION OF BOARD: The Claimant, Mr. L. Garcia entered the service of the Carrier on May 27, 1956. At the time of the imposition of discipline appealed in this case, Mr. Garcia was assigned as an Operator/Clerk in the Carrier's office, Bloomington, Texas.

By a notice dated March 9, 1983, Mr. Garcia was advised to attend a Formal Investigation. The notice stated in part:

"Report to the trainmaster's office in Bloomington, Texas on Monday, March 14, 1983, at 10:30 AM, for formal investigation to develop the facts and determine responsibility in connection with your alledged failure to properly protect track out of service, resulting in derailment of two engines and three cars of L343-08, at about 12:50 PM on March 8, 1983, on Seadrift Industrial Lead.

Operator L. Garcia, Jr., is being held out of service pending results of this investigation, which will include a review of his discipline record.

If you desire witnesses or representatives, you must arrange therefore in accordance with applicable scheduled agreements.

W. T. Farr, Asst. Superintendent."

The Formal Investigation was held as scheduled on March 14, 1983 at Bloomington, Texas. As a result of the evidence adduced at the Formal Investigation, Mr. Garcia was notified that his actions on March 8, 1983 were found to be in violation of the Carrier's Rules. Consequently, Mr. Garcia was dismissed from the Carrier's service. Mr. Garcia was notified as follows:

"L. Garcia

March 18, 1983

You are hereby advised that your record has this date been assessed with dismissed from the services of the Missouri Pacific Railroad for your violation of General Rule 'E', 'L', and 'N' of the Uniform Code of Operating Rules and Rules '4' and '76' of the Rules and Instructions for Train Dispatchers and Operators for your failure to properly protect track out of service, resulting in derailment of two engines and three cars of L343-08, at about 12:50 P.M. on March 8, 1983 on Seadrift Industrial lead. Your record now stands dismissed from the services of the Missouri Pacific Railroad, effective at 12:01 A.M., March 18, 1983.

/s/

J. L. Riney, Superintendent"

Subsequently, during the appeals process, the Carrier's General Manager, reduced Mr. Garcia's discipline from dismissal to a sixty day actual suspension.

Although the Organization contends that the Carrier injudiciously and arbitrarily disciplined Mr. Garcia, we find substantial evidence of record to support both a finding of a Rules violation and the imposition of discipline. The record contains ample evidence supporting the Carrier's determination that Mr. Garcia failed to take action necessary to protect the track out of service on March 8, 1983.

A review of the record reveals several facts which support a finding that on March 8, 1983, Mr. Garcia was informed by Track Foreman, D. V. Flores that a section of track on the Seadrift Industrial Lead would be out of service. For example, Mr. Flores testified at the Formal Investigation that before commencing work on the track, he told Mr. Garcia that the track would be out of service because some rail had to be replaced. Specifically, Mr. Flores testified:

"Q. After you began your work on March 8th, working on the wye track on the Seadrift main, approximately what time did you render this track out of service by removal of rail?

A. Well, first, I talked to the Operator, Garcia, and it was a little after 7. And, I asked him if he had any trains to go into the Seadrift main, and he said no, the only trains that was to go into there was the noon job. So, I figured myself that being as that was the only train to go in there, that I could work until about 2:30 in the evening. So, that's when I mentioned to him that I had to change rail in there.

Q. Again, my question was, Mr. Flores, approximately what time did you begin your work and the track was rendered out of service and unsafe for use?

A. I'd say it was about 7:20 when I started to pull spikes on the rail. About 7:30.

Q. Mr. Flores, how did you afford protection for this unsafe condition of the Seadrift Industrial Lead?

A. Well, like I said, I mentioned it to Mr. Garcia and I told him that I would be working on that track and I figured that from then on the time that the noon job would go to work in there."

Mr. Flores further testified:

"Q. Will you state for the record exactly what you told Operator L. Garcia in reference to the work you would be doing on the Seadrift Industrial lead?

A. Well, I mentioned to him that I was going to change rail.

Q. Did you indicate to Mr. Garcia that you wanted protection in the form of verbal communication with all train crews to not use the Seadrift Industrial lead?

A. Well, we always do that. I just mentioned to him that we were going to change rail and that he would let the trains know. We've always done this in the past."

The Claimant, Mr. Garcia testified that Mr. Flores never told him that the Seadrift Industrial Lead was to be taken out of service. Despite Mr. Garcia's denial, however, the record contains evidence in addition to the testimony of Mr. Flores which supports a finding that Mr. Garcia was aware the track was out of service. His denial notwithstanding, Mr. Garcia himself testified that he "presumed" Mr. Flores and his gang would be working on the track. Mr. Garcia stated upon questioning from the conducting officer:

"Q. Did you have any knowledge or any understanding that he would be doing any track work on the Seadrift Industrial lead on the date under investigation?

A. Well, I presumed that he might be doing some work with the question he was asking about the trains.

Q. So therefore, from what you saying as I understand it, is that with your experience as operator with the extent of the conversation you had with Mr. Flores is that you believe that he would have been working out on the Seadrift Industrial lead, is that correct?

A. Well, as I said, I presumed he was. I mean he might have was going to do some work because he was asking about that train when it was going to be moved, or, what train was going to go that way."

Furthermore, Mr. S. A. Austin, the Carrier's Manager of Customer Service testified that he spoke to Mr. Garcia shortly after the March 8, 1983, derailment on the Seadrift Industrial Lead. According to Mr. Austin, Mr. Garcia stated that he was aware of Mr. Flores' presence on the track but he had not notified any train crew. Mr. Austin testified:

"Q. You already stated that you were on duty at Bloomington at the time of the occurrence of the derailment at 12:50 pm. After the derailment did you at any time have any conversation with Section Foreman Flores or Clerk/Operator Garcia in reference to crews having been informed of the track work being done on the Seadrift Industrial lead?

- A. I talked to Luciano Garcia at the Canteen where he was eating lunch and asked him if he knew about the work being done on the Seadrift lead. He said he knew that D. V. [Mr. Flores] was going to be out there.
- Q. After acknowledging the fact that from your conversation that Mr. Garcia was aware of the work, did you ask Mr. Garcia if he had notified any train crews as to the work being performed on the Seadrift Industrial lead?
- A. I asked him if he had told the 12 noon switcher about the track work and he said he didn't notify them."

Mr. Austin also testified that Mr. Flores stated that he had informed Mr. Garcia that the track would be out of service. Mr. Flores' insistence that he had informed Mr. Garcia that the track would be pulled was also noted by Mr. N. J. Kirk, the Carrier's Assistant Trainmaster. Mr. Kirk testified that Mr. Garcia informed him that he had not advised the train crew of the condition of the Seadrift Lead.

Although the Claimant, Mr. Garcia, has denied any knowledge that the Seadrift Lead was to be taken out of service on March 8, 1983, we hold the record contains substantial evidence to support a finding that Mr. Garcia was aware of the work being performed, but took no action to protect a track out of service. To be sure, the record contains conflicting testimony. Nevertheless, the Board does not make credibility determinations, but reviews the record to ascertain if the Carrier has met its burden of proof by substantial evidence. In this case we find such substantial evidence.

Given the severity of the incident which prompted the discipline in this case and Mr. Garcia's past disciplinary record, we do not find that the imposition of a sixty-day suspension was excessive or arbitrary. We do believe that the culpability of the Operator is less than that of the Track Foreman. But, because of Mr. Garcia's past disciplinary record, we believe the sixty-day suspension was justified.

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 Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

  
Nancy J. Dover - Executive Secretary

Dated at Chicago, Illinois, this 13th day of January 1986.

