

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26437
Docket Number MW-26419

Elliott H. Goldstein, Referee

(Brotherhood of **Maintenance** of Way **Employees**

PARTIES TO DISPUTE: (

(Consolidated Rail Corporation

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

(1) The ten (10) days of suspension imposed upon Machine Operator B. L. **Blount** for alleged 'Violation of Rule 3140 A and F, Conrail Safety Rules for Maintenance of Way Employees, Form **S7-C** while pulling spikes at Neil **Drive**, Philadelphia, Pa. on September 26, 1983' was without just and sufficient cause and on the basis of unproven charges (System Docket CR-586-D).

(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 employed as a Machine Operator at Carrier's Philadelphia, Pennsylvania, facility when the incident giving rise to the instant dispute occurred. On September 26, 1983, during the time that his regularly assigned brush cutter machine was being repaired, the Claimant was assigned to perform work with a gang that was clearing up the right-of-way at Neil Drive. While pulling spikes, Claimant sustained a minor bruise on his right thumb which was caused, according to the Claimant's testimony, by the inadvertent use of a defective claw bar. However, Claimant's Supervisor, testified that after Claimant was injured, the broken spike head could not be located. Moreover, Claimant's Supervisor stated that all the claw bars on the job were inspected and **none** was found to be **defective**.

Carrier submits that substantial evidence was presented at a fair and impartial Hearing to establish that Claimant violated Rules 3140 (9) and (f) of the Conrail Rules of Safety for Maintenance of Way Employees. Although Claimant alleges that the claw bar he was using was defective, there is no proof of this allegation, Carrier asserts, and thus the only logical explanation for the incident is that Claimant's negligence caused the injury. Carrier emphasized that it has the right and responsibility to ensure the safe conduct of its operations, and when **employees** violate the Safety Rules, the imposition of discipline is warranted.

The Organization maintains that Carrier did not present evidence to support the charges leveled against the Claimant. Carrier's sole witness, the Supervisor, was not present at the time of the injury and had no direct knowledge of the manner in which Claimant was performing his work assignment. **Moreover**, the Organization notes that the fact that Claimant sustained a "injury does not, in **and** of itself, show that Claimant was responsible for the injury or that Claimant was guilty of violating any Safety Rules. Accordingly, the Carrier has not met its burden of proof in this case, the Organization argues, and the Claim should be sustained in its entirety.

After careful review of the record evidence and Submissions of the parties, the Board finds that the evidence does not support the Carrier's conclusion that Claimant's injury was the result of his own negligence. The mere fact that Claimant injured himself in the course of his assignment does not prove that it was his misconduct that caused the accident or that he violated the relevant Safety Rules. Numerous Awards have so held on this point. (See, e.g., Third Division Awards 12535, 16600, and Award 27 of Special Board of Adjustment No. 541.) There is no evidence that Claimant did not follow procedures or instructions in regard to his assignment, and no supervisory **employee** or other witness presented additional facts to show precisely how Claimant's performance failed to reach the level of the average reasonable **employee** in his position. Although Claimant's Supervisor claimed that no defective part could be located after the incident occurred, it is also true he did not inspect the parts prior to or during the time Claimant was performing his work assignment. The absence of a "smoking gun," so to speak, is insufficient proof that Claimant was at fault so as to merit a disciplinary suspension. We will accordingly sustain the Claim as submitted.

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

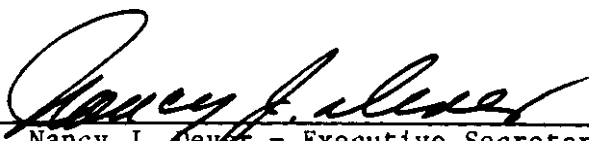
That the Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest::


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 24th day of August 1987.