

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26575  
Docket Number **MW-27105**

Elmer F. Thias, Referee

(Brotherhood of Maintenance of Way Employees  
PARTIES TO DISPUTE: (**Missouri-Kansas-Texas** Railroad Company

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

(1) The discipline imposed upon Section Foreman N. W. **Roberson** for alleged violation of General Rules 'L', 'N' and Basic Rule 1, was without just and sufficient **cause**, on the basis of unproven charges and in violation of the Agreement (System File **9-29/2579**).

(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: The Claimant in this dispute had been in the employ of the carrier for some twenty years, held the position of Section Foreman but was working as a Machine Operator at the time of the incident in question. The Claimant sustained an on-duty injury and was charged with violating the following Rules:

"Rule L (Part reading) "Constant presence of mind to insure safety to themselves and others is the primary duty of all **employ-**es and they must exercise care to avoid injury to themselves and others...."

Rule N (part reading) "**...Employees** must not be:  
1. Careless of the safety of themselves and others.  
2. Negligent...."

Rule 1 (part reading) "Rules cannot be written to **cover** every possible situation that may arise in connection with each and every individual task connected with your work: therefore, certain definite responsibilities rest upon you, namely:  
(a) Protection of yourself...."

A Hearing was held on January 29, 1985, with the Claimant and his representative present. In addition to the Claimant, three other **employees** were called upon to testify at the Hearing. We add that the Claimant **was** the only eyewitness to the incident where he sustained the injury.

Under the circumstances, we believe the following portions of the Claimant's testimony at the Hearing are pertinent:

Conducting Officer Q: For the record of this hearing, would you state what you were doing at the time of the incident and just how it happened?

Claimant A: Walking towards I-70 bridge north. When train came, I walked as far as I could to get out of the way of train within two pole lengths and I walked up on the bank there and stood on a tie. and inspected the train as it went by. After train went by, I stepped off the tie and where I was standing I stepped in a hole that was obscured by weeds.

\* \* \* \* \*

Conducting Officer Q: Could you **see** the hold that you stepped into?

Claimant A: I did not even see the hole after I stumbled and got up. Looked like there was weeds growing right out of the hole, but you couldn't tell it was a hole.

The Organization **takes** the position that the Claimant was not responsible for the injury he sustained. It argues further that the Claimant did not violate the Rules stated in the charges. The Organization points to testimony contained in the record in support of its contentions. On the other hand, the Carrier takes the position that the Claimant did not exercise proper precaution, was not constantly alert and careful to avoid injury to himself when he stepped down from the tie on which he had been standing.

Upon the record which is before **us** in this dispute, the position of the Carrier cannot be upheld. The Carrier's argument that the Claimant did not exercise proper precaution, was not constantly alert and careful to avoid injury is but speculation. There is no evidence in the record that the Claimant failed to use due care while performing his duties on August 21, 1984. Therefore, we find that the discipline imposed on the Claimant has not been substantiated on the record.

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 Employes involved in this dispute are respectively Carrier and Employes 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 30th day of September 1987.