

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26594
Docket Number MW-26314

Elliott H. Goldstein, Referee

(Brotherhood of Maintenance of Way Employes

PARTIES TO DISPUTE: (

(Missouri-Kansas-Texas Railroad Company

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

(1) The ten (10) days' deferred suspension imposed upon Truck Driver G. W. Church for alleged violation of General Notice, Paragraphs 1 and 3; General Rules 'L' and 'N'; and Basic Rules 1(a) of the Uniform Code of Safety Rules was unreasonable, unwarranted, on the basis of unproven charges and in violation of the Agreement (System-File O-97/2579-23).

(2) Mr. G. W. Church shall be afforded the remedy prescribed within Article 23, Rule 6 of the Agreement."

OPINION OF BOARD: Claimant is employed in Carrier's service as a truck driver. He was assigned to Extra Gang 160 when the **disputed** incident occurred.

On December 12, **1983**, **Claimant** sustained an on-the-job injury. On December 30, 1983, he was instructed to appear for formal investigation to determine his responsibility, if any, in connection with the injury he sustained when he fractured the small finger on his left hand while loading a Bolt Machine on the back of a maintenance truck near Mile Post 260, Pole 20, in the vicinity of Clinton, Missouri. In its notice, Carrier charged Claimant with violation of the following Rules:

General Notice (part reading) . . . "Safety is of the first importance In the discharge of duty."

"In case of doubt or uncertainty, the safe course **must** be taken."

General Rules L (part reading) . . . "Constant presence of mind to insure safety to themselves and others is the primary duty of all **employees** and they must exercise care to avoid injury **to** themselves and others."

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

Basic Rules 1 (a) (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."

At the Hearing, Claimant testified that he wrapped the chain around the bolt machine between the gear box and the engine and hooked the other end of the chain onto the bucket pin of the backhoe. He then told the backhoe operator to raise the backhoe about six feet off the ground. However, as the Claimant took the socket end off the bolt machine up over the side of the truck, the machine dropped on Claimant's finger.

Claimant's Foreman freely admitted at Hearing that the backhoe **operator** was at fault, not the Claimant. According to the Foreman, Claimant violated none of the Safety Rules in connection with the incident at issue. Moreover, the Foreman stressed that Claimant was one of the more "safety conscious" employees under his supervision.

Nevertheless, the Carrier maintains that Claimant was careless and did not exercise proper care to avoid the injury he sustained while assisting in loading the bolt machine. Carrier discounts the Foreman's forthright testimony concerning the incident, arguing that his testimony was mere opinion and personal belief that should not be considered probative on the issue of Claimant's negligence. Carrier further asserts that while Claimant may not have had control over the operator of the backhoe, it was his responsibility to make **sure** that he, personally, was not careless or did not disregard the safety precautions necessary in the performance of his assigned duties. In the Carrier's view, Claimant's carelessness arises from his failure to issue concise and unambiguous instructions to the backhoe operator. He should not now be permitted to shift the blame for his own omission to the backhoe operator. In sum, it is the Carrier's position that Safety Rules are meant to be followed at all times to protect employees from injury. Claimant's failure to abide by those Rules warranted the discipline imposed herein, and therefore Carrier requests that the Claim be denied.

The Board has carefully reviewed the entire record, and finds itself in complete agreement with the Organization's view that Carrier **has** failed to sustain its burden of proving by substantial evidence that Claimant did indeed commit the Rule infractions of which he stands accused. Herein, it is apparent that the testimony presented by the Carrier witness supports the Organization's position and establishes that Claimant was not negligent in the performance of his duties. Moreover, we fail to see what additional instructions should have been issued by the Claimant to the backhoe operator. It should not have been necessary for Claimant to instruct the operator to refrain from dropping the machine on his hand.

Undoubtedly the **Claimant** was injured as shown on the record. But that fact alone **is not** sufficient to show a violation of the Safety Rules. This principle has been reiterated time and time again by the Board. See, e.g., Third Division Awards 12535, 16600.

We note that during the handling of this case on the property and in its Submission before the **Board**, the Organization raised a procedural objection, contending that Carrier failed to timely notify the Claimant of its decision following the investigation, pursuant to Rule 5 of the controlling Agreement. That argument is unpersuasive. It is well established that the postmark and postal stamped "Receipt For Certified Mail" have been accepted by the parties as proof of mailing notification and satisfy the requirements of the Rule. In this case, according to the evidence of **record**, the decision and notification of discipline was deposited on the 9th day, and was therefore within the ten day limit prescribed by Rule 5. Accordingly, this Claim will not be upheld on procedural grounds. However, as set forth above, It will be sustained based upon Carrier's failure **in this** instance to meet its burden of proof.

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. Oliver - Executive Secretary

Dated at Chicago, Illinois, this 27th day of October 1987.