

The Third Division consisted of the regular members and in addition Referee John C. Fletcher when award was rendered.

(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 dismissal of Machine Operator P. C. Smyczynski for alleged '... Violation of Conrail Safety Rules 3300 and 3302, Paragraphs B & C ***' was without just and sufficient cause, on the basis of unproven charges, excessive and in violation of the Agreement (System Docket CR-2177-D/D-4000).

(2) The claimant shall be reinstated with seniority and all other rights unimpaired, his record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employees within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Claimant was moving a crane consist to clear the main line to allow an Amtrak train to pass his work site. He was proceeding behind a burro crane which was about a mile or a mile and a half ahead. While enroute to the siding he was unable to maintain adequate speed. Claimant determined that a drag was resulting from the brakes of the consist caboose being set. Often times consist caboose brakes are manually set when the crane is working. The caboose was occupied by a flagman but Claimant was unable to gain his attention to release its brakes. Claimant decided to release the brakes himself. He disengaged the pulling gear of the crane, (which only slowed the consist but did not stop it), lowered himself to the trailing idler flat car, walked its length, crossed over to the caboose and released the brake. He then kicked the chain several times to make sure that the brakes were free. He returned to the cab and proceeded to a siding and placed the equipment in the clear.

Claimant was observed at the caboose by one of Carrier's Assistant Division Engineers who happened to be traveling along side the line on an adjacent Thruway in an automobile. Claimant's supervisor was contacted by the Assistant Division Engineer and both met Claimant at the siding. The Assistant Division Engineer told Claimant that he had witnessed him being out of the cab and back by the caboose while the consist was moving. Claimant admitted that he had gone back to the caboose to release its brakes. He was immediately removed from service.

Notice of formal investigation was mailed to Claimant. He claims that he never received this notice. However, he did appear at the appointed time of his investigation, stating that he had been advised by his representative of the date and time of the hearing.

At the investigation neither Claimant nor his representative requested a postponement. When asked if they were willing to proceed Claimant's representative answered:

"We are not willing to proceed but will do so
under protest"

The investigation continued to a conclusion. Claimant was subsequently notified that he was determined to be in violation of several operating rules for his involvement in the incident and was dismissed.

Before this Board the Organization advances a number of procedural matters which it argues require that the discipline be modified. In the circumstances of this case we do not find these procedural considerations to be persuasive. While it is true that Claimant did not have his own copy of the charges before him when he appeared at his trial he nonetheless was there at the appointed time and place and did not specifically ask for a postponement. And, while his representative stated that they would proceed under protest, he too, did not specifically seek a postponement. (In this regard it should be noted that Claimant's representative had already requested and received one six day postponement.)

The transcript of the investigation conclusively indicates that both Claimant and his representative were well aware of the scope of the precise charges resulting from the incident, the nature of the matter being investigated and the rules alleged to have been violated. They offered testimony in Claimant's defense and introduced circumstances of mitigation. (From the time of the incident through the conclusion of the investigation basic facts concerning Claimant's physical acts in leaving the control cab of the crane and crossing to the caboose and then returning to the cab have never been disputed. The only item in dispute seems to be the speed of the consist at the time. Claimant contends that it slowed to seven or eight miles per hour while Carrier witnesses estimated its speed at the time to be approximately fifteen miles per hour.) Accordingly, we do not find the investigation to be procedurally defective.

On the merits of the matter we find that it was adequately established at the investigation that Claimant was guilty of misconduct when he left the cab of his crane while it was underway. Under any circumstances this would be an exhibition of extremely poor judgment. Carrier is not obligated to retain in a responsible machine operator position an employee who exhibits such a disregard for his own safety, as well as that of others.

Severe discipline for this proven instance of misconduct is not inappropriate.

We do note, though, that Claimant holds trackman seniority. We feel that the purposes of discipline will be served if he is returned to service with Carrier as a trackman. Accordingly, it is our decision that Claimant's dismissal be converted to a disqualification as Machine Operator and a suspension without pay for the time already out of service. He shall promptly be returned to service as a trackman with seniority and other rights unimpaired but without compensation for time out of service.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 25th day of April 1988.