

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29755
Docket No. MW-29586
93-3-90-3-548

The Third Division consisted of the regular members and in addition Referee Dana Edward Eischen when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(CSX Transportation, Inc. (former Seaboard
(Coastline Railroad Company)

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

1. The discipline imposed on Trackman D. M. Dennis for his alleged '... violation of CSX Transportation Safety Hand Book Rules 1 and 386.' was arbitrary, unwarranted, on the basis of unproven charges and in violation of the Agreement [System File 89-76/12(89-1043) SSY].
2. The discipline assessed to Trackman D. M. Dennis shall be rescinded, all reference to this matter shall be cleared from his record, and he shall be compensated for all wage loss suffered as a result of the unwarranted and unproven charges."

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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 waived right of appearance at hearing thereon.

Claimant is employed as a Trackman. The claim before this Board is an appeal of discipline assessed to the Claimant who was charged in connection with his alleged failure to adhere to Rules 1 and 386 of the CSX Transportation Safety Rules. Prior to this

dispute, the Claimant had a 20 year unblemished disciplinary record.

On Sunday, September 17, 1989, Claimant was assigned to work a special assignment of building an unloading ramp and the untying of approximately 10 pieces of machinery. The Claimant had already untied four pieces of equipment by himself. While in the process of assisting a fellow worker in untying another machine, the Claimant sustained an injury to his left arm when a cable used to tie down equipment struck him as he loosened it.

Subsequent to his injury, the Claimant was instructed to attend a Hearing at Waycross, Georgia, having been charged with:

"...violation of CSX Transportation Safety Handbook portion of Rule 1 and portion of Rule 386, which read as follows:

Rule 1. 'Safety is of the first importance in the discharge of duty. Employees must exercise care to avoid injury to themselves.... The Company does not expect, and will not permit any employee to take any unnecessary chance in the performance of duty....'

Rule 386. 'Before handling materials or objects, determine the best place to take hold. Place hands in the proper position and take a grip to hold sufficiently to prevent the material or object from falling from the hands or getting out of control....'

Subsequent to the Hearing, the Division Manager notified the Claimant:

"If you had exercised proper care and properly complied with Rule 386, this injury could have been avoided. I am therefore, issuing this to you as a letter of reprimand to be placed on your personal record file."

It is the Carrier's position that the facts of record "clearly establish the Claimant's guilt." Carrier points to the following colloquy between the Hearing Officer and the Roadmaster:

"Q. Have you ever before instructed Mr. Dennis to assist in unloading equipment from machine flats?

A. He has assisted before, yes sir.

Q. Was he knowledgeable how to accomplish the task that you asked him to do that day?

A. Yes sir."

"Q. Did you inspect the cable or pins that he allegedly hurt himself on?

A. Yes sir.

Q. Did you see anything abnormal about the way it was assembled?

A. No sir."

The Carrier further asserted that had Claimant closely examined the situation he would have realized that "the admitted unconventional tie-down arrangement represented an unusual situation that required extra caution and diligence on his part." Finally, the Carrier submitted that the discipline in this case was "extremely lenient" and was intended to be "corrective rather than punitive."

Claimant offered the following testimony with relation to his injury:

"Q. What were you assigned to do that day?

A. To assist in untying the machine.

Q. Had you ever done that task before?

A. Yes, I have.

Q. Do you remember how long ago it was?

A. Whenever I was on the rail gang about the first of the year. I used to you know do it quite often.

Q. Then you were aware of what tools it would take and how to go about removing it from your own knowledge?

- A. Yes, but whenever we, we never used this same procedure, no, even on the rail gang and way up, I never untied one hooked up like this.
- Q. When you say hooked up like this I don't understand?
- A. The time when I unhooked they always have the right you know hookup. It's the first time I ever attempt to unloosen the cable with the crossing pin wrapped up in the cable is what I'm saying."

The Organization maintains that Carrier failed to present "any probative evidence to prove the Claimant violated Safety Handbook Rules 1 or 386." Further, the Organization submits that the Carrier "failed to prove that the Claimant was negligent or responsible for his injury." Finally, the Organization notes that the Roadmaster was not an eyewitness to the incident in question, and in fact, was not even present when Claimant sustained the injury. For the foregoing reasons, the Organization stated that "the Carrier has imposed discipline in violation of the Agreement."

Claimant was injured on Sunday, September 17, 1989, when a cable used to tie down equipment struck him in the left arm. There is no dispute concerning the circumstances of the accident nor any probative evidence, save "Monday-morning quarter-backing" and speculation that he might have avoided injury by seeking assistance. In short, not every accident is a result of negligence and not every injury is a result of carelessness. In that connection, we find the following holding from SBA No. 541, Award 27 on point:

"It may be that Claimant was negligent and should be subjected to discipline but the record, consisting almost entirely of Claimant's testimony, does not adequately establish the necessary facts to support those conclusions. The mere fact that Claimant injured himself in the course of his work does not prove that he was sufficiently at fault to merit a suspension, even if due emphasis is given to the absence of any prior accident on the machine in its over 16 years of operation. There is no evidence that Claimant violated specific safety procedures or instructions that he had been given in regard to the operation of the circular saw 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 working man in his position. Carrier must support costly discipline to an employe upon clear persuasive proof and not upon mere suspicion, assumption and argument."

As the charging party in this discipline case, Carrier has the burden of proving by substantial evidence that Claimant violated Safety Rules. A thorough and objective analysis of the transcript does not support the charges placed against Claimant. Since the record does not clearly show Claimant was guilty as charged, the reprimand was not reasonable. See Third Division Awards 24336, 22008, 26089, 25600 and 26267. It is the opinion of this Board that the Claimant was not culpable of violating any Safety Rules and that his injury was the result of a regrettable accident for which he cannot fairly be the subject of discipline. Absent any proof of culpability or negligence discipline of this Claimant is arbitrary and cannot stand.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:

Catherine Loughrin
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 20th day of September 1993.