

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30557
Docket No. MW-31107
94-3-93-3-96

The Third Division consisted of the regular members and in addition Referee M. David Vaughn when the award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
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(MidSouth Rail Corporation

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

- (1) The discipline imposed upon Mr. N. D. Keeton for alleged failure ' ... to have your machine (Tie Handler TC10) under control which resulted in Tie Handler striking Tie Insertter causing extensive damage to Tie Insertter (TI22), Tie Handler (TC10) and personal injury to R. L. Boyd, Machine Operator, at approximately 2:30 p.m., September 23, 1991 ... ' was unreasonable, arbitrary, capricious and excessive (Carrier's File 91-051-MW).
- (2) As a consequence of the violation referred to in Part (1) above, the discipline imposed upon the Claimant shall be ' ... reduced to fifteen (15) working days. Also employee Keeton should be made whole with all rights unimpaired for all days suspended in excess of fifteen (15) days. * * * "

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 employee 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 Machine Operator. He had 16 years of service with the Carrier (four years) and its predecessors. He had no prior discipline. On September 23, 1991, Claimant was assigned to operate a tie handling machine as part of a production tie gang. As the gang was traveling from one location to another, Claimant was operating the machine, maintaining a safe distance behind a tie inserting machine. The latter machine slowed, then stopped in preparation for being turned on the crossing; Claimant assumed that the machine in front of him would not stop and "took his eye off it". When he looked back, the machine was too close for him to stop; and he struck the machine, causing damage to both in the amount of approximately \$5,000.00 and serious injury to another employee which required hospitalization, surgeries, several months of lost time, and ongoing rehabilitation.

It was a common practice to turn equipment on crossings; and, although it was also common practice to tell employees on the crew in advance where and when such turning would occur, it was neither universal nor required that such notice be given.

The Carrier convened an investigatory hearing at which the above facts were ascertained. Following the hearing, the Carrier assessed Claimant a 90 day suspension for violation of its Safety Rules 133 (requiring employees to be alert for approaching equipment and to protect the safety of themselves and fellow employees) and 335 (requiring employees not to operate self-propelled equipment in a careless or reckless manner). The Organization appealed the discipline; and, when the appeal was unsuccessful, brought the dispute to this Board.

The Organization introduced evidence at the hearing that another named employee (A. L. Powe) had been involved in an accident in which the switch tamper he was operating struck a civilian vehicle when he slowed and sounded his horn, but apparently did not stop, approaching a road crossing, and collided with a car which he had not seen. The tamper was missing a mirror which might have facilitated his seeing the car. The Carrier suspended Mr. Powe for 15 days.

The Organization argues that the discipline imposed was excessive, in light of Claimant's long and unblemished service and was disparate and unduly harsh as compared with the other, similar incident. It urges that the claim be allowed.

The Carrier argues that Claimant's guilt is clearly established and that his reckless inattention to duty and the serious consequences which resulted warrant the penalty imposed. The Carrier asserts that the offense could have supported dismissal

and that it exercised principles of corrective discipline in imposing a suspension, It asserts that the accident involving Mr. Powe was less serious, and Mr. Powe less culpable, than Claimant. It urges, therefore, that the incidents are not similar so as to require similar discipline. It also urges that the seriousness of the accident warranted suspending Claimant, pending investigation and render reasonable the resulting 120 days total suspension. It asserts that, by whatever standard of review of the penalty might be applied, the quantum of discipline assessed by the Carrier was appropriate. It urges that the Claim be denied.

The record clearly establishes Claimant's violation of the Rules cited. Claimant's misconduct was reckless, and the consequences of his actions serious. The Board is not persuaded that the length of suspension imposed by the Carrier was arbitrary or excessive.

Of the Organization's argument that the Carrier subjected Claimant to disparate treatment because Mr. Powe received only a 15 day suspension, the Board is not persuaded. The principle that similar penalties should be imposed for similar offenses is well-established, but each offense includes its own unique elements which must be separately assessed. The burden of establishing that two offenses are similar so as to require similar penalties rests with the Organization. In this case, the Organization not only failed to meet that burden, but the record establishes that the culpability of Claimant and the nature and consequences of his accident were greater than for Mr. Powe. The mitigating circumstances present in Mr. Powe's case were not present in Claimant's accident. The Claim must be, and is, denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

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NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 9th day of November 1994.