

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30558
Docket No. MW-31115
94-3-93-3-99

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 Employes
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(Kansas City Southern Railway Company

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

- (1) The thirty (30) day suspension from service imposed upon Crane Operator C. D. Muse for alleged violation of Rules 'B', 'L', 'N' and 681, in connection with the derailment and damage to equipment inside of Karnack Longhorn Ammunition Plant, Karnack, Texas on June 4, 1991 was without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement (Carrier's File 013.31-448).
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be paid for all wage loss suffered from August 23 through and including September 21, 1991 and his record shall be cleared of the charges leveled against him."

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 by the Carrier as a Composite Machine Operator. He has approximately 23 years of service and, prior to the incident here at issue, had not been disciplined.

On June 4, 1991, Claimant was assigned to operate a locomotive crane, as he had regularly done in the past. He was working alone, since his regular assistant was on medical leave. Claimant was directed to tie up the crane and a flat car on a track which was already occupied by six company service cars. In order to locate the crane clear of insulated joints, Claimant was obliged to move the cars further up the track. He coupled onto the cut of cars and was able to pump air to the braking system of two of the cars, but lacked sufficient air capacity to activate the braking system of the other four cars. Claimant then walked the cut to ensure that all six were coupled and the handbrakes released. He concluded that they were. Claimant then returned to the crane, and, according to his testimony, moved it toward him sufficiently to take out the slack and move all six cars, thereby verifying that the cars were coupled. He then shoved the cars in the other direction to move them far enough for the crane and car to clear the joints.

When Claimant applied the brakes on the crane and two cars, the last four cars came uncoupled from the cut and rolled down grade. The action indicates that the coupling between the second and third cars of the cut was not secure. Although Claimant testified that he chased the cars, he was not successful in catching them; and they rolled approximately two miles downgrade, onto the restricted grounds of a military ammunition installation, and collided with two military locomotives, derailing them and one of the cars and causing considerable damage to equipment and adjacent structures.

Claimant testified that, if he had been working with an assistant, as he usually did, the assistant could have ridden the cut and activated handbrakes on the cars to bring them to a stop if they had run away. However, Claimant could have tested the couplings by himself by setting the handbrake on the car farthest from the crane, then taking the slack and pulling on the cut. He did not do so.

The Carrier notified Claimant of an investigatory hearing "to ascertain the facts and determine your responsibility, if any, in connection with derailment and damage to equipment inside of Karnack Longhorn Ammunition Plant, located in Karnack, Texas, on June 4, 1991, at approximately 7 p.m." During the course of the hearing, although not before, the Carrier identified Rules B, L, N and 681, which relate various safety obligations and procedures, and had Claimant confirm his familiarity with each Rule. The Organization had opportunity to put in additional evidence and make argument concerning the Rules.

Following the Hearing, the Carrier suspended Claimant for 30 days for violating each of the previously-identified Rules. He was brought back to work by the Carrier after having served four days. The Organization protested the Carrier's action.

The Organization argues that the Carrier's action must be overturned because the Carrier failed to afford Claimant a fair hearing, since the charge letter did not apprise him of the Rules which the Carrier believed him to have violated. It also argues that the Carrier failed to prove violation of any Rules and that it failed to establish Claimant's actionable negligence, since an accident and damage do not, as such, establish negligence. The Organization urges, therefore, that the claim be sustained.

The Carrier argues that the record clearly establishes that Claimant failed to use proper procedures to safeguard the Carrier's property, thereby violating the cited Rules and causing damage, and risk of injury. The Carrier also argues that it complied with Rule 13 of the Agreement, in that it notified Claimant in advance of the basis for the investigatory hearing. It urges that Claimant was aware of the nature of the hearing so as to be able to prepare and present a defense. It points out that Claimant served only four days of the suspension imposed. The Carrier urges, therefore, that the Claim be denied.

Claimant was entitled to notice of the charges against him; and the procedures utilized on many properties include in the letter summoning employees to the investigatory hearing a listing of the Rules which the Carrier believes were violated. However, the essential purpose of the notice is to allow the employee sufficient notice of the purpose of the hearing to afford him and his organization opportunity to prepare his defense. We are persuaded that the notice letter in this case, which advised Claimant of the investigatory hearing and identified the incident under investigation with specificity, met the Carrier's burden. We are further persuaded that the nature of the incident and the Carrier's description of it in the notice letter were sufficient to apprise Claimant that he was obligated to defend against violations of safety rules of which he was admittedly aware. Indeed, until the facts and Claimant's responsibility had been ascertained, a listing of the Rules actually violated might be inaccurate or incomplete.

We note that, during the course of the hearing, the Carrier did list the Rules for which Claimant was subsequently found to have violated; and the Organization had opportunity to submit additional evidence and argument with respect to those Rules. We are not persuaded that the Carrier's procedures violated Claimant's

rights to due process and a fair hearing.

With respect to the merits of the dispute, Claimant is responsible for the safe movement of cars under his control, including keeping them under positive control and not allowing them to roll free on a downgrade. The potential risks of injury to persons and damage to equipment and property for failure to do so are obvious. The evidence demonstrates that the coupling between the second and third cars of the cut was not secure, Claimant's inspection notwithstanding. While the difficulty of testing the integrity of the couplings was increased by the fact that Claimant was working alone, it was still possible to test that integrity by setting the brake on the end car of the cut and attempting to move the cut. Indeed, given the lack of a second employee to ride the cut of cars and apply brakes, the importance of ensuring that the cut was securely coupled became even greater. We conclude that Claimant violated the cited Rules.

For reasons not a part of the record, the Carrier annulled 26 of the 30 days of disciplinary suspension. There is no indication that it did so on the basis of leniency. We note the Claimant's long and previously unblemished service. Under such circumstances, we are persuaded that Claimant's disciplinary record should reflect the length of the actual suspension and not the period originally assessed.

Claimant was afforded due process and a fair hearing. He was guilty of the violations charged. However, Claimant's disciplinary record should reflect the penalty served rather than the penalty imposed, but later reduced for reasons not a part of the record. The Carrier shall amend Claimant's record to reflect a disciplinary suspension of four days instead of thirty days for his conduct. Claimant shall continue service with seniority unimpaired and made whole for all wages and benefits lost, less the four day period of the suspension actually served.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

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