

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30562
Docket No. MW-31210
94-3-93-3-113

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
(The 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 of Composite Operator R. T. Arnold, for alleged violation of Rules 'L' and '844', in connection with the derailment of CTIE 800155 at West Lake Charles, Louisiana, on June 12, 1991, was without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement (Carrier's File 013.31-449).
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be paid for all wage loss suffered from September 7, 1991 through and including October 6, 1991 and his record 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 an Composite Operator. At the time of his suspension, he had 42 years of service with the Carrier and had no prior discipline. On June 12, 1991, Claimant was assigned to operate a pile driver. Pursuant to direction, he coupled a gondola car loaded with prefabricated switch components for movement to a designated location. The longest ties of the prefabricated switches were approximately 17 feet long; and the panels were loaded on end and braced. As placed on the gondola,

the height of the longest ties from the rails was approximately 20 feet and eight inches. That height was not above the standards set by the Carrier; and no special instructions were issued to Claimant or others in connection with the movement of the gondola.

The railroad requires that all overhead wires be placed no lower than 28 feet from the top of the rail. Notwithstanding the Carrier's requirement, and for reasons not a part of the record, a non-railroad overhead telephone cable had been placed across the tracks near the crossing with Louisiana Highway No. 108 at a height of 19 feet, substantially less than the minimum 22 foot clearance required. Claimant, his Conductor, and a Helper all observed the cable as they approached the busy highway crossing at a speed of approximately three miles per hour. Neither the Conductor nor the Helper notified Claimant of a problem with the overhead clearance. The crossing was on a curve; and Claimant, observing the movement from the inside of the curve, could not see the cable. One of the 17 foot long ties snagged the cable, which overturned and derailed the gondola and damaged the cable.

The Carrier convened an investigatory hearing at which the above facts were ascertained. Following the hearing, the Carrier assessed Claimant a 30 day suspension for violation of its Maintenance of Way and Signals Rules 'L' (presence of mind to insure safety is the primary duties of all employees; they must exercise care to avoid injury and must observe the condition of equipment they use; employees must inform themselves as to the location of obstruction where clearances are close and exercise caution to avoid injury) and '844' (before beginning each tour of duty, operators must inspect work areas for overhead lines and always operate clear of such lines). Claimant was returned to service after having served four days of the suspension, at least in part because he requested, and used, vacation to cover the period. The Organization appealed the discipline; and, when the appeal was unsuccessful, brought the dispute to this Board.

The Organization argues that the Carrier failed to meet its burden to establish Claimant's lack of safety. It asserts that the existence of an accident is not sufficient to establish unsafe conduct. It points to the Carrier's failure to promulgate any special instructions concerning movement of the gondola, to the unauthorized low height of the cable, to Claimant's inability to see the cable, and to the failure of the employees who did have a clear view to warn him. The Organization argues that the Carrier's reduction of the 30 day suspension to four days points to the Carrier's own assessment as to Claimant's culpability; but it urges that, if allowed to stand, the record would still indicate a lengthy suspension. It urges that the Claim be sustained.

The Carrier argues that record clearly established that Claimant was responsible for the movement, was responsible to check overhead clearances, and that he was, therefore, responsible for

the derailment and damage and, therefore, guilty of the charges. It urges that the penalty for Claimant's conduct of 30 days suspension, of which only four were served, is neither arbitrary or excessive. The Carrier urges, therefore, that the Claim be denied.

The derailment and damage was the direct consequence of a cable hung across the tracks lower than the minimum clearance required by the Carrier. Ensuring safe vertical clearance was a responsibility shared by the Carrier and those of its officials responsible to protect vertical clearance requirements, as well as all the members of the crew, including the Conductor and Claimant. However, the record establishes that the Carrier was likely unaware of the clearance violation, and certainly did nothing to alert the crew to the problem. It also establishes that Claimant was, as a result of his performance of other, necessary duties and his viewing position on the pile driver, in a poor position to see the cable problem. It also establishes that the Conductor and helper did nothing to advise him of the problem.

Under such circumstances, the Board is not persuaded that Claimant should be absolved from all responsibility for the accident. However, his responsibility was considerably less than that assigned to him by the Carrier. The Board concludes, therefore, that the penalty was arbitrary and excessive and should be reduced to a letter of warning. Claimant's records shall be amended to reflect the Award and Claimant shall be made whole for all wages and benefits lost as a result of the Carrier's action.

AWARD

Claim is 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.

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NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of the Third Division

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