

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 31806
Docket No. MW-32405
96-3-95-3-272**

The Third Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(CSX Transportation, Inc.**

STATEMENT OF CLAIM:

"Claim on behalf of the System Committee of the Brotherhood that:

- (1) The five (5) day suspension of Mr. L. Henson, Jr. for allegedly being responsible for the personal injury he sustained while operating a rail lifter on April 25, 1994 near Middletown, Ohio was unreasonable, excessive and in violation of the Agreement [System File C-TC-5830-SPG/12 (94-590) CSX].**
- (2) The Claimant shall be '*** compensated for all loss wages [from] the date he was taken out of service and we also request that these days be accredited for vacation and retirement.'"**

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 were given due notice of hearing thereon.

On May 2, 1994, Claimant was advised to report for an Investigation on May 11, 1994. The notice charged Claimant with responsibility for the personal injury he sustained on April 25, 1994. The Hearing was postponed to and held on June 2, 1994. On June 22, 1994, Claimant was notified that he had been found guilty of the charge and had been suspended for five days.

The Organization contends that Carrier failed to prove Claimant's responsibility for the injury. The Organization argues that the fact of an accident does not establish the employee's responsibility. In the Organization's view, the injury in the instant case resulted, not from Claimant's negligence, but from Carrier's failure to provide Claimant with the proper equipment and from an unexpected failure of the hydraulic jack on the rail lift machine. Carrier, on the other hand, contends that it proved Claimant's responsibility by substantial evidence.

There is no dispute concerning the facts leading up to the accident. At the time of the accident, Claimant was replacing ties on 100 pound rail. A rail lift machine had raised the rail. Claimant attempted to use a rail fork to place the tie plate under the rail. The fork Claimant had been furnished, however, was designed for larger rail plates and Claimant found it difficult to use it on the plates in question. Consequently, Claimant used his hands to align the rail plate. Unfortunately, the hydraulic jack on the rail lifter bled off and the rail dropped, injuring Claimant's finger.

It is true that if the jack had not bled off, Claimant would not have been injured. However, Claimant, by using his hands to align the plate, placed himself in jeopardy of injury. Claimant should not have used his hands. He should have used a tool to position the plate. If the rail fork that had been provided was inadequate, rather than placing his physical safety in jeopardy, Claimant should have contacted supervision for instructions. The record showed that a new rail fork was fabricated to fit the smaller plates the following day. Although Claimant took steps to minimize the risk to his hands, for example by making sure he did not place them under the rail, Claimant's using his hands at all, instead of advising supervision of the problem, displayed a disregard for his own safety. Accordingly, we conclude that Carrier established the violation by substantial evidence. In light of the seriousness of the misfeasance, we are unable to say that the penalty imposed was arbitrary, capricious or excessive.

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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.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 26th day of December 1996.