

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 32487
Docket No. MW-32964
98-3-96-3-314

The Third Division consisted of the regular members and in addition Referee Robert Perkovich when award was rendered.

(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(The Kansas City Southern Railway Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The discipline [five (5) day suspension] imposed upon Mr. J. L. Brewer for alleged '... violation of General Notice, Rules L, H-191 and H-338 of the Rules and Regulations for the Maintenance of Way and Signal Department ...' in connection with the June 23, 1994 notice '... for a formal investigation to ascertain the facts and determine your responsibility, if any, in connection with an incident that occurred on June 13, 1994, at approximately 1125 hours, at Mulberry, Mo., MP 119.1, in which you allegedly sustained a personal injury while working as Track Laborer on Extra Gang 491.' was unwarranted, without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement (Carrier's File 013.31-500).
- (2) As a consequence of the aforesaid violation, the Claimant shall be reimbursed for all time lost 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 were given due notice of hearing thereon.

The Claimant, a Track Laborer with approximately 19 years of service, was working in that capacity as a member of Extra Gang 491 on June 13, 1994. The Gang was replacing ties and tie plates at Mile Post 119.1 near Mulberry, Missouri. More specifically, the Gang was utilizing a tie inserter that they did not ordinarily use and the tie inserter used that day obstructed the view of the Operator as he raised and lowered rails. Thus, as the rails were raised and lowered, the Operator relied on the Track Laborers, including Claimant, to signal when he could do so. Once the rails were lifted the Claimant and the other Track Laborer slid tie plates into position, signaled the Operator to lower the rails, and the rails were lowered into place. In lifting the rails, the tie inserter ordinarily clamped onto the ball of the rail. However, on this occasion the clamps attached to a weld strap so that the hold on the rail was not as tight as it would have been in the absence of the weld strap. Accordingly, as the rail was lifted and the Claimant slid the tie plate into position the rail broke loose from the clamp and fell to the ground striking the Claimant's hand and causing him injury.

Upon investigation the Claimant was charged with violating various Rules regarding safe working conditions and was assessed a five day suspension.

The Organization argues that the Claimant could not have done anything to prevent the accident from occurring and thus the discipline was meted out only because an injury was assessed, a basis for discipline that is unwarranted and without just cause. The Carrier disagrees and asserts that the Claimant was responsible for signaling to the Tie Inserter Operator and because he allowed the Operator to raise the tie despite the inadequate hold on the tie he allowed the accident to happen. Thus, the discipline was not because an accident happened, but rather because the Claimant allowed the accident to happen.

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Upon careful examination of the record we agree with the Organization. Although it is true that the Claimant and his fellow Laborer were responsible for signaling the Tie Inserter Operator when he could raise and lower the tie, the record is clear that in doing so he was not able to see the point at which the tie inserter clamped onto the rail. Therefore, he was not able to see that there was a risk that the tie would loosen and fall. Accordingly, even if he were to perform as the Carrier believes he should have, he could not have avoided the accident. Since he cannot be charged with failing to avoid an accident, we must conclude that he was disciplined only because an accident took place. Prior precedent of this Board is clear that any such basis for discipline is not appropriate. (See e.g., Third Division Awards 26594, 16600 and 12535.)

AWARD

Claim sustained.

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 23rd day of February 1998.