

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32757
Docket No. MW-33835
98-3-97-3-277**

The Third Division consisted of the regular members and in addition Referee James E. Conway when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Southern Pacific Transportation Company (Eastern Lines)**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The discipline [ten (10) day suspension] imposed upon Track Laborer R. A. Cervantez for alleged violation of Rules 1.1, 1.1.2 and 1.6 in connection with the personal injury sustained by him on November 14, 1995, was on the basis of unproven charges and in violation of the Agreement (System File MW-96-53/MW D96-21 SPE).**
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be allowed the remedy prescribed in Article 14, Section 7."**

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.

Claimant Cervantez, a Laborer in Carrier's Dallas Street Yard at El Paso, Texas, was injured on the afternoon of November 14, 1995 when a large chain fell from the raised bucket of a front end loader and struck him in the neck while he was removing rail anchors from the track. Following Investigation, Claimant was found to be in violation of the safety rules cited above and suspended from service for a period of ten days.

The Organization challenges Carrier's disciplinary action on two grounds: first, Carrier's decision following Investigation held on February 1, 1996 was not received until February 20, 1996, and thus does not comport with Article 14, SECTION 4, which requires that such decisions "be rendered within fifteen (15) calendar days after completion of the investigation." Secondly, on the merits the Organization asserts that the discipline imposed was based upon "unproven charges" of violating rules "of which the Claimant had no prior knowledge."

The Rules implicated here provide in pertinent part as follows:

"Rule 1.1 Safety:

. . . It is the responsibility of every employee to exercise care to avoid injury to themselves . . . working safely is a condition of employment with the Company. The Company will not permit any employee to take an unnecessary risk in the performance of duty."

"Rule 1.1.2 Alert and Attentive

Employees must be careful to prevent injuring themselves or others. They must be alert and attentive when performing their duties and plan their work to avoid injury."

"Rule 1.6 Conduct

Employees must not be:

- 1) Careless of the Safety of themselves or others**
- 2) Negligent**

Any act of . . . misconduct . . . or negligence affecting the interests of the Company or its employees is sufficient cause for dismissal. . . .”

The record reveals that on the day he was injured, Claimant was engaged with Extra Gang 385 in installing two 250 foot long track panels, using a large front end loader to prepare the site and move the panels into place. In its bucket were two 12 foot heavy duty chains, both attached to opposing edges of the bucket for use in raising the rail panels. One of the chains was attached to a pair of rail tongs.

At approximately 3:15 P.M., as the front end loader was attempting with its bucket to position one of the two panels of rail, the panel became snagged on the rail anchors of the existing track. Neither the chain nor the rail tongs were in use at the time. Claimant asked Machine Operator Nava to stop his machine to permit him to remove the rail anchors. He did so, and as Claimant was knocking off the anchors with the bucket raised above his head level and tilted slightly, a short section of chain slipped from the bucket and struck him on the back of the neck, causing a minor contusion.

The Board finds the Organization’s procedural arguments unpersuasive. Carrier’s decision to assess discipline was dated February 15, 1996, within the time limits prescribed by Rule 14. Claimant signed the return receipt on February 20, 1996. It is Claimant’s burden to establish that Carrier’s decision was not posted timely. The most probative evidence of untimely dispatch - the date stamped envelope used by Carrier to transmit its decision - was solely within Claimant’s control. His failure to produce it at a minimum raises the presumption that had it been produced, it would have been adverse to the claim of untimely mailing.

On the merits, Carrier’s primary concern with Claimant’s activities on the day of injury appear to center on the contention that he worked too close to the front end loader that housed the chain which fell on him. It suggests he could have avoided the accident had he instructed Nava to back his machine up while he removed the anchors. Claimant testified without contradiction that the bucket was three to four feet overhead and that he worked in a two foot hole with his head a foot or two in front of the bucket. The machine was stopped when some eight lengths of the chain and a hook weighing a total of ten pounds fell from the bucket, apparently having become loosened in travel. The only witness to the incident - the machine operator - refused to characterize Claimant’s behavior as negligent. The Carrier’s management representative who assessed discipline did not see the accident, and did not suggest that Claimant had

improperly stored the chain, but argued that Claimant could have directed Nava to back his machine up further while he worked. No disciplinary action was taken with respect to Machine Operator Nava.

While no serious observer could quarrel with Carrier's Operating Rules, microscopic examination of the transcript of Carrier's Investigation does not disclose the kind of substantial evidence of negligence that would normally be required to support the charges asserted here. The Rules are clear and the injury is clear, but Carrier's allegations that Claimant was not alert or attentive do not appear to be clearly supported on the record. To be sure, not every injury is a result of carelessness, and this one appears to be as easily characterized as an unforeseen and unforeseeable fluke accident. Thus, while the Board and the parties are sympathetic to the views of the Carrier with regard to the need for stringent enforcement of Safety Rules, we are not persuaded that the facts on this record support findings of laxity or neglect, serious charges against a Claimant with 22 years of unblemished service. In sum, we conclude the Carrier has not borne its burden of establishing specifically how Claimant violated the Rules.

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 September 1998.