

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32961
Docket No. MW-33603
98-3-97-3-46**

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin 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 [sixty (60) day suspension] imposed upon Mr. W. R. White for alleged violation of General Notice, Rules B, D, N, FF, H-22, H-54, H-56 and H-338 of Rules and Regulations for Maintenance of Way Department in connection with the personal injury sustained by B&B Mechanic K. D. Hester on April 14, 1994 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (Carrier's File 013.31-517).**
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be compensated 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 discipline in this case arose out of Claimant's alleged failure to ensure that employees under his supervision used fall protection equipment while removing longitudinal braces from the Little River Bridge at mile post 444 near Winthrop, Arkansas. FRA Regulations as well as Carrier's documented Rules require the use of such equipment whenever working at heights more than 12 feet above the ground. One of Claimant's gang members lost his balance and fell off the bridge sustaining multiple and serious personal injuries.

Several important facts are undisputed. The requisite fall protection equipment was readily available but the gang was not using it while two employees attempted to remove the brace between the No. 16 and No. 17 bents on the bridge. Claimant was well aware of the 12 foot height regulation and he was trained in the use of the fall protection equipment. Neither Claimant nor his crew members actually measured the ground to work height distance; they made only a visual inspection and assumed the distance was less than 12 feet. The terrain under the bridge was irregular and varied in depth by several feet under the general area where the work was performed. The area was also littered with piling cut-offs and other debris as well as construction materials.

The Organization challenged the discipline on several grounds. Its procedural challenge, that the Carrier's disciplinary decision was unreasonably delayed, lacks Rule support and must be rejected.

Regarding the sufficiency of the evidence, the actual fall distance was the subject of considerable testimony during the Investigation. Our review of the record, however, reveals substantial evidence that the fall distance of the injured employee exceeded 12 feet. According to the transcript, the measurement was made from the spot from where Claimant told the B&B supervisor he had seen the injured employee lose his balance. This was approximately two to three feet from the bent No. 16 end of the brace between the No. 16 and No. 15 bents. Claimant had participated in the taking of the measurements, which were both in excess of 14 feet, and he had initialed the measurement record. Accordingly, Carrier's determination of Claimant's culpability has the requisite evidentiary support.

The Organization also challenged the severity of the discipline in light of Claimant's 21 years of satisfactory service. It cited several prior Awards from the

Second and Third Divisions of this Board in support of its contention that Carrier had not followed the concept of progressive discipline. As we have said many times, this Board will not disturb Carrier's determination, in cases where substantial evidence supports the finding of culpability, unless it is shown that Carrier's penalty assessment was unreasonable to the extent that it constituted an abuse of discretion.

The FRA regulation in this case was promulgated to protect employees from accidents that would fall on the most serious end of the injury spectrum. It is readily seen that violations of the Rule in question could result in accidents leading to loss of life or, if survivable, serious permanently disabling injuries. We do not find that Carrier acted unreasonably when it decided not to treat the violation lightly. The penalty is found to be properly related to the gravity of the offense. It is also noted that Claimant sought and was granted the ability to use some of his accrued vacation credit to partially defray the income loss.

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 23rd day of November 1998.