

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 33017
Docket No. MW-33876
99-3-97-3-385

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

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

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The twenty (20) day suspension imposed upon Assistant Foreman T. W. Cary for his alleged negligence and failure to perform his duties properly in connection with a personal injury sustained by employe L. Sims on May 6, 1996 was unwarranted, on the basis of unproven charges and in violation of the Agreement [System File 21(17)(96) /12(96-699) CSX].**
- (2) The twenty (20) day suspension imposed upon Spike Driver Operator G. J. Seib for his alleged negligence and failure to perform his duties properly in connection with a personal injury sustained by employe L. Sims on May 6, 1996 was unwarranted, on the basis of unproven charges and in violation of the Agreement [System File 21(18)(96) /12(96-700)].**
- (3) As a consequence of the violation referred to in Part (1) above, Claimant T. W. Cary's record shall be cleared of the charge leveled against him and he shall be compensated for all wage loss suffered.**
- (4) As a consequence of the violation referred to in Part (2) above, Claimant G. J. Seib's record shall be cleared of the charge leveled against him and he shall be compensated for all wage loss suffered."**

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.

Claimants Cary and Seib hold covered positions as Assistant Foreman and Machine Operator, respectively. On the date set forth in the claim, both were assigned to laying rail with a gang working near Huntsdale, North Carolina, under the supervision of Supervisor of Gangs F. H. Hendricks. Shortly before noon, Seib's spiker/gauger machine derailed. Claimants and Trackman Sims conferred and the three determined that the most effective way of re-railing the machine would be to raise it with the on-board turntable, push the rail over with a track jack to realign it beneath the machine and then lower the spiker onto the rail. While this process was underway, Sims got down on his hands and knees inside the rails to assist with guiding the machine back down onto the track. As he did so, the rail slipped off the tongue of the jack and onto Sims' hand, fracturing a finger. On June 5, 1996 both Claimants were assessed 20 day suspensions.

The Organization contends that the Carrier failed to meet its burden of proof inasmuch as re-railing had been accomplished safely on the property numerous times in the past in exactly the same manner. It further contends that even if negligence were established, the discipline was harsh and excessive in view of Claimants' work records and long service. Lastly, the Organization asserts that Claimants were denied a fair and impartial Hearing in accordance with the controlling Agreement.

The Carrier argues that it established a clear case of negligence warranting the discipline imposed. A proper job briefing was not performed before undertaking the re-railing of the spiker machine. Additionally, the potential hazards involved in placing a track jack on the unstable ballast should have been apparent to the Claimants. Their

failure to utilize the crane on the welding truck to raise the rail was a serious misjudgment. Carrier cites numerous Awards in favor of the proposition that the level of discipline assessed is a matter of managerial discretion, not to be interfered with in the absence of bad faith. It contends that the Claimants were afforded a fair and impartial Hearing and provided all "due process" rights as provided for by the Rules of the Agreement.

The Board reviewed the transcript of the Investigation together with the evidence and arguments of the parties, and makes the following findings.

First, Claimants were provided a timely and sufficiently detailed statement of charges, adequate time to prepare their defense, and a full opportunity to examine and cross-examine witnesses. We find no substantial deprivation of their procedural rights.

Second, the record indicates that Claimant Cary in his role as Assistant Foreman conducted a job briefing that did not include discussion of potential hazards as required. He and his crew used the base of a large track jack positioned at an angle against the ballast in such a way that the further it lined the rail inward, the closer the rail moved toward the edge of the jack's tongue. Sims had his hand resting on a crosstie when the rail slipped off the jack and came down after the rail had moved about two inches, breaking a finger on his right hand. Seib operated the turntable controls while Cary jacked the rail under the wheels and directed him. Gang Supervisor Hendricks testified that in this instance, Cary should have moved the welding truck forward and used its crane to release the tension onto the rail, then positioned the jack properly so that it was securely in contact with a stable surface. He also determined in questioning each employee after the accident that while directing the downward movement of the spiker, Claimant Cary put himself in a position where he was unable to see Claimant Seib as he lowered the machine back onto the rail. And lastly, he testified that the crew should have used the head of the jack to assure that the rail did not slip off, although Claimants contend there was insufficient room to put a jack out far enough to safely do so.

It is the opinion of the Board that the undisputed facts in this case themselves strongly suggest a degree of negligence and bad judgment. Based upon the record as a whole, it is clear that Claimant Cary, although a long-term employee with a clean work record, bears primary responsibility for the incident at issue. It is equally clear that Carrier demonstrated that it had just cause to discipline him for his role in it. Claimant Cary conducted a deficient job briefing and directed a re-railing operation that could have been accomplished safely with more forethought. Unfortunate as his injury was,

Trackman Sims' actions in squatting between the tracks with his hand on a tie beneath a rail is also fairly black and white negligence.

Claimant Seib's role, however, is in our view distinguishable and does not warrant identical treatment. Nothing in the record suggests that Seib did anything other than what he was directed to do in lifting his spiker machine and letting it down again under Cary's directions. He did not even witness the accident, and the only infidelity to his obligations for which he could be considered responsible was in helping Cary raise the jack without questioning his Supervisor's judgment in positioning the jack as he had. While mindful of the numerous Awards cautioning against intrusion into severity of discipline issues, for a 19 year employee the Board concludes that a 20 day suspension under the circumstances is excessive.

For the reasons stated above, the claim of Claimant Cary is denied. Seib's suspension shall be reduced to five days and he shall be compensated for the remaining 15 days lost.

AWARD

Claim 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.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 25th day of January 1999.