

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33019
Docket No. MW-33182
99-3-96-3-610**

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 of the System Committee of the Brotherhood that:

- (1) The dismissal of Machine Operator D. Kuszmaul for his alleged responsibility in connection with an accident that occurred on August 13, 1995 between a tamper and an anchor tightener machine at Mile Post BF243.6 near Confluence, Pennsylvania was arbitrary and in violation of the Agreement [System File SPG-D-9443/12(95-1122) CSX].**
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be reinstated to service with seniority and all other rights unimpaired, his 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.

On August 13, 1995, the Claimant was operating a tamper when he collided with the rear end of an anchor squeezer, resulting in injury to two employees on the anchor squeezer. On August 22, the Carrier sent a letter to the Claimant directing him to report for an Investigation on August 29, 1995 concerning his responsibility in connection with the accident. The Claimant received the letter on August 24, and the Organization received its copy of the letter on August 28. The Investigation was held, as scheduled. On September 18, 1995, the Carrier notified the Claimant that he had been found guilty of the charge and was dismissed from service.

The Organization contends that the Notice of Investigation violated the Agreement because it did not contain a precise statement of the charge and because it was not filed within the ten day time limit specified in the Agreement. The Organization maintains that the Claimant did not receive the notice until 11 days after the incident under investigation and that the Organization did not receive its copy until the day before the Hearing.

On the merits, the Organization contends that the Carrier failed to prove the charge against the Claimant. The Organization further argues that dismissal was arbitrary and excessive.

The Carrier contends that the notice stated the charge with sufficient precision to enable the Claimant to prepare a defense. The Carrier further argues that the charge was filed within the ten day period set forth in the Agreement, because it was deposited in the mail nine days after the incident.

On the merits, the Carrier contends that it proved the charge by substantial evidence. The Carrier urges that the Claimant acted negligently and violated the Carrier's Rule requiring that he be prepared to stop within one-half the range of vision. The Carrier maintains that dismissal was appropriate in light of the seriousness of the incident.

We consider the procedural arguments first. The charge was sufficiently precise to enable the Claimant and the Organization to prepare their defense. We reject the Organization's contention to the contrary.

The timeliness of the charge depends on whether it is considered filed on the date the Carrier mailed it or on the date the Claimant received it. Both parties cite several Awards that they claim support their positions.

Rule 39, Section 2 provides:

“Whenever charges are preferred against an employee, they will be filed within ten (10) days of the date violation becomes known to Management.”

The Awards cited by the Organization are not on point. On the other hand, there is precedent that a charge is filed when it is deposited in the mail. See Third Division Awards 28462 and 26401. Accordingly, we find that the charge was filed in a timely manner.

Turning to the merits of the dispute, we find that the Carrier proved the Claimant's responsibility for the accident by substantial evidence. The evidence established that the Claimant was following too closely and the Claimant admitted that he did not react properly to stop short of striking the anchor squeezer. However, considering all surrounding facts and circumstances, we find that dismissal was an excessive penalty. Accordingly, we will order that the Claimant be reinstated with seniority and other rights unimpaired, but without any compensation for time 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.