

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33432
Docket No. MW-34114
99-3-97-3-660**

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

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

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

(1) The thirty (30) day suspension imposed upon Assistant Foreman D. E. Peters for his alleged negligence and failure to perform his duties properly, in connection with an incident which occurred on August 5, 1996 was unwarranted, on the basis of unproven charges, harsh and excessive [System File 21(57) (96) /12 (96-1268) CSX].

(2) As a consequence of the violation referred to in Part (1) above, Claimant D. E. Peters’ 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.

As of the date of the incident in question, the Carrier had employed Claimant for a period of approximately 22 years. At the time of the incident, Claimant was an Assistant Foreman.

The facts in this case are essentially not at issue. On August 5, 1996, Claimant was the Assistant Foreman regularly assigned to oversee the day-to-day operations of SPG Gang 5XT1. SPG Gang 5XT1 was a mobile gang that worked away from home. The gang worked 10 hours a day, Monday through Thursday with Friday, Saturday and Sunday off. At approximately 2:00 P.M. on August 5, 1996, near Mossyhead, Florida, Claimant was inspecting gauges when a spike driver machine passed by, driven by Machine Operator E. Lymuel. Claimant stopped Lymuel and asked him for a ride towards the front of the area where the gang was working. Lymuel stopped the spike driver, Claimant got on and sat next to Lymuel. They continued on and as they approached the desired location, Lymuel attempted to stop the vehicle. However, a patch of oil appeared on the track and Lymuel could not stop the machine in time, causing a collision with another spiker machine. This collision caused a minimal amount of damage (a broken hitch) and no injuries. The spiker machine which had been struck continued to be used with the hitch turned. At that time, Claimant counseled Lymuel regarding the incident and work resumed immediately. Claimant did not discipline Lymuel, nor did he report the incident to the supervisor.

By letter dated August 15, 1996, Claimant was instructed to attend an Investigation on August 22, charged with negligence of his duties and/or failure to properly perform the duties safely and properly as the Assistant Foreman on the 5XT1 team. The Investigation took place as scheduled on August 22, 1996. As a result of the Investigation, on September 11, 1996, Claimant was suspended for 30 days from September 16, until October 25, returning to work on October 28, 1996.

The Organization claims that the suspension was unjust. According to the Organization, the Carrier failed to sustain its burden of proof to establish that the Claimant's action either contributed to the accident or that he failed to perform some action that would have avoided the accident. In addition, the Organization indicates that the Claimant acted properly in that it was within his authority to have a coaching/counseling session with Lymuel and that this was all the discipline that was necessary. According to the Organization, it was not necessary to report the incident to his supervisor. Further, the Organization claims that Claimant did not receive a fair and impartial Hearing, as he did not receive a notice of a specific Rule violation at the

Investigation. At the Investigation, Claimant's representative indicated that he did not have proper notice of the charges against him.

The Carrier claims that Claimant did not act appropriately by engaging in a "coaching and counseling session." It argues that the type of incident involved here did not lend itself to such a session. Rather, the Carrier claims that Claimant was required to report the incident to his supervisor. Further, the Carrier claims that based on the nature of the accident, Claimant failed to keep a proper lookout, leading to the accident. The Carrier argues that the Claimant received a fair and impartial Hearing. It contends that it is not required to cite a specific Rule violation as long as Claimant is reasonably apprised of what his charges are. In this case, the Carrier contends that Claimant was reasonably apprised of the charges.

In discipline cases, the Board sits as an appellate forum. We do not weigh the evidence de novo. As such, our function is not to substitute our judgment for the Carrier's, nor to decide the matter in accord to what we might or might not have done had it been ours to determine, but to pass upon the question whether there is substantial evidence to sustain a finding of guilty. If the question is decided in the affirmative, we are not warranted in disturbing the penalty unless we can say it appears from the record that the Carrier's actions were unjust, unreasonable or arbitrary, so as to constitute an abuse of the Carrier's discretion. (See Second Division Award 7325, Third Division Award 16166).

We have reviewed the relevant policy here. The CSXT ENGINEERING POLICY ON UNSAFE ACTS/WORKMANSHIP ERRORS/VEHICLE ACCIDENTS provides, in relevant part, in relevant part:

"Unsafe Acts (not resulting in personal injury or property damage):
Unsafe acts are a primary cause of personal injury. It is desired that co-workers will correct unsafe acts without intervention of management whenever possible in order to achieve increased safety awareness.

* * *

Vehicle Accidents

After a vehicle accident, an employee must make an immediate oral report to his/her supervisor, if physically able to do so, and must complete

required written reports as soon as possible. Prompt medical attention, if required, is the first priority.”

On the question of whether Claimant was negligent and/or failed to properly perform his duties as an Assistant Foreman when the accident occurred on August 5, the Board finds that there was substantial evidence to support Carrier’s position that Claimant failed to properly perform his duties as an Assistant Foreman. On the issue of failing to properly perform his duties as an Assistant Foreman, we specifically find that the Rule on unsafe acts is very clear that in the event of a vehicle accident, an employee must make an immediate oral report to his/her supervisor. The Rule does not distinguish between major and minor accidents.

Here, there is no question that Claimant was personally involved in a vehicle accident, no matter how minor. Because the Rule is clear, Claimant should have notified his supervisor, Wilkerson. While his attempt at coaching/counseling Lymuel was made with good intentions, that does not relieve Claimant of his responsibilities. Thus, there was substantial evidence to prove that Claimant was in violation of the Rule.

As to the question of whether there was substantial evidence that Claimant was negligent by not keeping a proper lookout, the Board cannot find that the Carrier sustained its position. In order to sustain its position, the Carrier would have had to provide substantial evidence that Claimant was not keeping a proper lookout while riding with Machine Operator Lymuel. However, a review of the transcript shows it did not prove such matter at the Investigation. There was no evidence presented at the Investigation that Claimant should have been able to see the oil on the track. It is clear that there was oil on the track. However, there was simply no evidence presented that Claimant was not properly observant in his specific actions, and therefore could have prevented this accident. It appears that this conclusion was reached simply because of the nature of the accident and Claimant’s position. However, the fact that Claimant was involved in an accident, does not in and of itself, provide substantial evidence of failing to maintain a lookout (See Third Division Award 29195). Thus, there was not substantial evidence to support the Carrier’s position on this point.

On the question of whether the Claimant was denied a fair and impartial Hearing, we find that the Organization has not proven that the Claimant was denied a fair and impartial Hearing. The Organization claims that Claimant was not given a specific indication of his Rule violation and thus he did not receive a proper Hearing. However,

a review of the letter of August 15, 1996 sent to Claimant prior to the Investigation indicates that the accident involving the spiker machine was being investigated and that he failed to report the incident to his supervisor in a timely manner. We believe that this letter, while not identifying certain Rules, was specific enough to place Claimant on notice of the allegations against him and give him a fair opportunity to present his case. (See Third Division Award 30017, Second Division Award 8001 and First Division Award 17047). The Board finds that the Claimant did receive a fair and impartial Hearing.

Thus, based upon the entire record, the Board finds that Carrier's position is sustained in part. Carrier was correct that Claimant should have reported the incident to his supervisor and that Claimant received a fair and impartial Hearing on August 22, 1996. However, the Board finds that there is not substantial evidence to uphold Carrier's position that Claimant failed to keep a proper lookout on August 5, 1996.

As noted above, if there is substantial evidence to uphold Carrier's position, we are not warranted in disturbing the penalty unless we can say it appears from the record that the Carrier's actions were unjust, unreasonable or arbitrary, so as to constitute an abuse of the Carrier's discretion. However, in this case, Claimant was given a 30-day suspension based upon two transgressions (failure to maintain proper lookout and being negligent and/or failing to perform his duties as an Assistant Foreman). However, only one (negligence, the more serious) transgression was substantiated at the Investigation. Because there was substantial evidence for only the more serious of the two allegations, the Board reduces the 30-day suspension to a 20-day suspension.

AWARD

Claim sustained in accordance with the Findings.

Form 1
Page 6

Award No. 33432
Docket No. MW-34114
99-3-97-3-660

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 August 1999.