

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 33433  
Docket No. MW-34142  
99-3-97-3-691**

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig 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 discipline [ten (10) day suspension] imposed upon Machine Operator P. C. Parker for his alleged negligence and failure to perform his duties properly on July 16, 1996 was without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement [System File S-TC-2176 /12 (96-1316) CSX].**

**(2) The Claimant’s record shall be cleared of the charges 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.**

Claimant is regularly employed as a Machine Operator assigned to operate a ballast regulator. At the time of the incident, he had been employed for over 22 years.

On July 16, 1996, Claimant was the operator of ballast regulator BR 9451 and was involved in the replacement and surfacing work in the vicinity of MilePost BA-28.9. In performing his duties that day, Claimant had already performed his duties as a Ballast Regulator Operator at two platforms and had been able to clear them without incident. However, when he approached a third platform that day at Milepost BA 28.9, Claimant struck the platform with the plow of the ballast regulator. Claimant presumed that he would clear this platform as he had previously cleared the other two. However, he did not closely observe this third platform and Claimant struck this third concrete platform with the machine's plow, sustaining \$1,500 in damage to the plow of the ballast regulator.

By letter dated July 26, 1996, Claimant was instructed to attend a Hearing charged with negligence and/or failure to properly perform the duties of an equipment operator. Due to mutual consent, the Hearing was postponed twice. The certified letter containing the rescheduled date (September 5, 1996) arrived at the Claimant's post office on Saturday, August 31, 1996. However, Claimant did not check his mail on that date and left the following Monday to return to work. Thus, he claims that he had not been informed of the Hearing on September 5, 1996.

The Hearing went ahead as scheduled on September 5, 1996. As a result of the Investigation, on September 25, 1996 Claimant was suspended for 10 days from September 30, until October 11, returning to work on October 14, 1996.

The Organization claims that the suspension was unjust. It claims that the Carrier found Claimant guilty of negligence simply because he had been involved in an accident. According to the Organization, there was no other credible evidence of negligence. In addition, the Organization claims that his supervisor should have told him that this particular platform was narrow and that he should watch out for it. Conversely, the Carrier claims that it was primarily Claimant's responsibility to keep the ballast regulator clear of the platform and he did not fulfill that responsibility.

Further, the Organization claims that Claimant did not receive a fair and impartial Hearing. The Organization claims that Claimant did not have proper notice of the Hearing and had no advance notice of the Investigation. Thus, the Organization

claims that the Claimant was denied a fair and impartial Hearing. The Carrier contends that it fulfilled its responsibility to notify Claimant and that Claimant in fact received a fair and impartial Hearing.

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).

The Board will first address the question of whether Claimant was negligent and/or failed to properly perform his duties as a Machine Operator when the ballast regulator's plow was damaged. We find that there was substantial evidence in the record to sustain the Carrier's position. The Claimant admitted, in answer to questions from his own representative, that he alone was responsible for the operation of the ballast regulator. Claimant admitted that he did not look at the platform before trying to clear it. Claimant indicated that he automatically assumed that he would clear it, as he had cleared the other two platforms on the same day. Claimant admitted that it was his responsibility, while operating the ballast regulator, to be on the lookout for any and all obstructions be they dwarf signals, platforms, signal masts, etc.

It is the Board's opinion that Claimant was not disciplined simply because he was involved in an accident on July 16, 1996, as the Organization claims. Rather, the Board finds that there was substantial evidence that it was Claimant's responsibility to insure that the ballast regulator cleared the platform. However, Claimant did not properly fulfill this obligation and was negligent. It cannot be said that the Hearing Officer was arbitrary and capricious when he found that Claimant had been negligent when he damaged the plow (See Third Division Award 26024). Thus, we find that there was substantial evidence that Claimant was negligent and failed to properly perform his duties.

As to the question of whether Claimant was denied a fair and impartial Hearing, the Board finds that the Organization has not proven that the Claimant was denied a

fair and impartial Hearing. The Carrier is not at fault here. It appears that Claimant did not pick up his mail on the date that the Notice of Investigation arrived (August 31) and left the following Monday, presumably, before the post office had opened. The Organization alleges that this "lack of knowledge" of the Hearing precluded him from obtaining a fair and impartial Hearing. However, the record of the Hearing shows that Claimant was present with his representative and that Claimant's case was properly presented. According to his own representative, Claimant was notified by the Timekeeper prior to the Investigation. Based on the record of the Hearing, both Claimant and his representative appear to have been well prepared and went forward with the Hearing. The Awards offered by the Carrier indicate that not only did the Carrier fulfill its responsibility by mailing the notice in a timely fashion, but also that Claimant was not prejudiced by not viewing the actual notice prior to the Hearing (See Public Law Board No. 4724, Award 6, Special Board of Adjustment No. 910 Award 647). The Board finds that the Claimant did receive a fair and impartial Hearing.

As to the severity of the penalty, as indicated above, we will not overturn a 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 discretion. Here, we cannot say that the discipline imposed constituted an abuse of discretion.

Thus, the 10-day suspension imposed in this matter is upheld.

#### **AWARD**

**Claim denied.**

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**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 August 1999.**