

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35086
Docket No. MW-31089
00-3-93-3-59**

The Third Division consisted of the regular members and in addition Referee Martin F. Scheinman when award was rendered.

**(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(SouthRail Corporation**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The ninety (90) day suspension imposed upon Mr. R. N. Hodges for the alleged violation of Safety Rules B, C, F, H, GR-3, 400, 404 and Operating rules A, E, H and M, in connection with the personal injury of Machine Operator B. L. Davis on March 30, 1992, was arbitrary, capricious and excessive (Carrier’s File 92-048-MW).**
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be ‘ . . . made whole with all rights unimpaired for all days suspended in excess of sixty days. ***’”**

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 Claimant was suspended commencing April 23, 1992 for a period of 90 days for allegedly concealing facts and violating the Carrier's Safety Rules in connection with the personal injury of Machine Operator B. L. Davis on March 30, 1992 while the Claimant was serving as Foreman on a Mobile Track Gang. Davis injured himself while striking a rail punch with a spike maul, causing a metal chip to break from the spike maul and hit him below his lower lip. It is undisputed that the correct tool for the job was a munday maul. The Carrier asserts that the Claimant attempted to conceal the fact Davis had used the wrong equipment.

According to the Organization, the 90 day suspension given to the Claimant was arbitrary, capricious and excessive. It maintains that the Claimant should not have been suspended more than 60 days. There is no record evidence, the Organization argues, to support a finding that the Claimant actively concealed any information about the incident from the Carrier's investigators. The Organization concedes that the Claimant gave the investigators false information, but insists that he did not do so intentionally. The Organization argues that the Claimant made a false statement purely because he was misinformed.

In any case, the Organization argues, the Claimant committed no greater wrong than did Trackmen C. Smith and J. L. Gardner, who were charged and found guilty of the identical offenses. Smith and Gardner, the Organization points out, each were suspended 60 days. This constitutes a "dual standard" and a "terrible injustice," the Organization argues. The Organization asks that the Claimant's suspension be reduced to 60 days.

The Carrier, on the other hand, asserts that the Claimant conspired to hide Davis' use of an improper tool. It asserts that the entire gang concealed the fact Davis used the spike maul by discarding the tool in nearby bushes. The Carrier points to the following testimony by the Claimant at the formal Hearing which, it argues, constitutes an admission of the wrong-doing with which he is charged:

"Q 84: Did you conceal facts or make false statements about the injury to Mr. Davis?

A. 84: Well I guess, in a way, I did. We said that he used a munday maul.

Q. 85: And he actually used a spike maul?

A. 85: A spike maul.”

Thus, the Carrier argues, the Claimant admitted to conspiring with his fellow employees to make false statements and conceal facts surrounding the incident. The Carrier states that this “blatant deceit” was a direct violation of several Safety and Operating Rules which could have justified dismissal. The Carrier asserts that it elected instead to suspend him for 90 days as corrective rather than punitive discipline. According to the Carrier, the suspension was appropriate under the circumstances, which include two prior disciplinary warnings. It further asserts that the 90 day suspension placed other employees on notice that the flagrant disregard for the Carrier’s Rules will not be tolerated. In short, the Carrier asks the Board to affirm its disciplinary action against the Claimant.

After reviewing the record evidence, we have determined that the Organization’s claim should be granted in part. We agree that the Claimant may have misled the Carrier’s investigators when he told them Davis had used a munday maul, when in fact the Claimant did not have first-hand knowledge about the incident. The record, however, simply does not support a finding that the Claimant knew, when he gave the statement, that Davis had actually used a spike maul.

The only direct evidence that the Carrier cites in support of a finding of concealment is the Claimant’s response to the compound question: “Did you conceal facts or make false statements about the injury to Mr. Davis?” The Claimant gave a qualified response, “Well I guess, in a way, I did. We said that he used a munday maul,” which we find is inconclusive with respect to the issue of concealment. Indeed, as argued by the Organization, the Claimant’s response fairly establishes only the fact that the information he gave investigators was false. The Claimant’s testimony does not show that he knew the information was false at the time he gave it. We searched the record for any evidence from which we might conclude that the Claimant knowingly deceived the Carrier’s investigators, and we find none. Accordingly, we conclude that the record does not support a 90-day suspension in light of the other suspensions imposed.

The Claimant shall be made whole with all rights unimpaired for all days suspended in excess of 60 days.

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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 15th day of November, 2000.