

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 35330
Docket No. MW-34997
01-3-98-3-692

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Consolidated Rail Corporation)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The forty-five (45) day suspension imposed upon Machine Operator J. Massengill for alleged violation of Safety Rule 63.3 and Operating Rule 81.3 on February 24, 1997 was without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement. (System Docket MW-4768-D).**
- (2) As a consequence of the violation referred to in part (1) above, Machine Operator J. Massengill shall receive the remedy prescribed by the parties in Section 4 of Rule 27.”**

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 February 24, 1997, the Claimant, a Machine Operator, was part of a rail gang proceeding westbound near Marshall, Illinois. The Claimant was operating a spike puller and his was the third machine from the end of the work group. At about 1:15 P.M., near Mile Post 84.9, the machine operated by the Claimant collided with the scrap separator that was fourth from the end. At the time of the impact, the scrap separator was stopped in order to allow the Foreman to dismount from the machine and pick up empty spike kegs. As a result of the collision, the spike puller derailed, and the Claimant suffered an injury that required medical attention.

The Carrier concluded that it was the Claimant's responsibility to stop his machine prior to colliding with the scrap separator. Accordingly, the Carrier notified the Claimant to attend an Investigation in connection with the charge that he violated Carrier Safety Rules when the spike puller he was operating struck the stopped equipment in front of him on the track. After several postponements, the Hearing took place on June 16, 1997. Following the Investigation, the Claimant was assessed a 45-day suspension.

The basis for the Organization's appeal is that the discipline lacked sufficient cause. The Organization argues that a number of factors are present that should have been taken into consideration by the Carrier. Specifically, the Organization refers to the Claimant's testimony at the Investigation that the sun was in his eyes as they headed west. Additionally, the Claimant stated that he had reduced visibility due to the design of the cab of the spike puller and that these factors contributed to the collision. The Organization further contends that the Claimant was not told of any plans to stop as the group was heading west. Had he known there was an intended stop, or had the machine ahead signaled that it was stopped, the likelihood of a collision would have been reduced. Finally, the Organization objects to several of the statements entered into the Hearing record as exhibits. The Organization argues that the employees who wrote the statements were not present at the Hearing and therefore the credibility and reliability of their accounts could not be assessed.

After careful consideration, the Board is not persuaded that the Organization's arguments have merit. It is undisputed that the Claimant was operating the spike puller at the time of the collision and was subject to the Safety Rules designed to reduce the risk of collision. Safety Rule 63.3, Paragraph 11 states, "When operating self-propelled equipment keep a sufficient distance between equipment to avoid collisions." Paragraph eight of that same Rule states that the employee must "constantly look out for

obstructions or unsafe conditions in the direction you are moving.” Operating Rule 81.3 provides that “operators of Track Cars must regulate their speed to permit stopping short of equipment ahead.” The transcript of the Investigation shows that the Claimant had received training only weeks prior to the February 24, 1997 incident on these same Safety Rules, and therefore he was fully aware of his responsibility to operate the equipment in a safe manner.

The Organization’s principal argument is that there were extenuating circumstances on the date of the incident that should have been considered by the Carrier prior to imposing discipline. In the Board’s view, the circumstances relied upon by the Organization compel a different conclusion. Even if the Claimant’s testimony is fully credited, and he did not hear the job briefing informing employees that there would be a stop to pick up empty spike kegs en route, it was the Claimant’s responsibility to be vigilant, to maintain sufficient distance between equipment, and to be able to stop safely regardless of the reason for the stop of the equipment ahead. While it is possible that the chances of a collision may have been reduced if the machinery ahead of the Claimant signaled the stop, it is not a certainty that the accident here would have been averted because the Claimant admitted that he was not looking ahead at the time of the accident. Moreover, there is no policy or regulation that required employees to signal when stopped. Rather, the Carrier has determined that its first line of defense is to ensure that employees adhere to the pertinent Safety Rules when they are operating vehicles on the track. The Claimant failed to do that here.

By the same token, if the sun was in the Claimant’s eyes, as he testified, or he had reduced visibility, he should have taken the necessary precautions to protect against running into equipment ahead of him. That is the very essence of the Safety Rules at issue.

The fact that witness statements were entered into the record does not serve to vitiate the discipline imposed. The Organization is correct when it argues that a written statement cannot be relied upon to establish the entire truth of the matter, and in a Hearing cannot be given the same weight as oral testimony that is subject to cross-examination. However, the outcome in this case would be the same even if the written statements were accorded no probative weight at all. The Claimant caused this collision. That conclusion is apparent from his own testimony. His asserted defenses merely highlight the necessity for adhering to the Safety Rules.

The Claimant's failure to remain alert and watchful on the date of the incident resulted in a serious breach of the Carrier Safety Rules. His actions clearly placed his own safety and that of others at risk. Prior Awards from various adjustment tribunals have upheld the Carrier's right to issue substantial discipline when an employee exhibits the degree of negligence shown here. See, Third Division Awards 32140 and 32488; Special Board of Adjustment No. 279, Awards 707, 726 and 732. We must therefore conclude that a 45-day suspension under these circumstances was within the range of reasonableness properly afforded to the Carrier in the exercise of its discretion.

AWARD

Claim denied.

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 16th day of February, 2001.