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NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37357
Docket No. MW-37328
05-3-02-3-365

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 twenty-nine (29) days’ actual suspension assessed Machine Operator D. R. Bowen for alleged failure to use fall protection when dismounting his machine on the bridge across the Sandy Creek at Mile Post 101.9 at approximately 11:10 A.M. on May 9, 2001 was without just and sufficient cause, excessive punishment based on the policies in place and in violation of the Agreement [Carrier’s File 12 (01-0345) CSX].
- (2) As a consequence of the violation referred to in Part (1) above, Machine Operator D. R. Bowen shall “***be compensated all loss of wages, benefits and credits for being taken out of service on May 9, 2001 until his return July 1, 2001.’ ”

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.

At the time of the incident on May 9, 2001 Claimant D. R. Bowen was assigned and working as a Machine Operator on Rail Team "6X R-3" under the supervision of Rail Team R-3 Supervisor K. T. Harris.

Many of the basic facts in this matter are uncontested. The Claimant participated in a safety briefing concerning the day's work assignment, which involved working on bridges. Specifically discussed was the use of fall protection, safety equipment to be used while working on bridges.

Later that same morning, the Claimant was operating a piece of track equipment known as a Rail Heater. As the Claimant was crossing the Sandy Creek bridge at Mile Post 101.9, near Meldahls, West Virginia, he became confused about the work directives coming from an Assistant Foreman. The Claimant dismounted his equipment and walked on the outside of the track to meet the Assistant Foreman.

Supervisor Harris observed the Claimant walking on the outside of the track and confronted him about his failure to use fall protection. The Claimant readily admitted that he "just forgot" about the fall protection safety equipment. The Claimant was immediately removed from service.

By letter dated May 9 the Carrier directed the Claimant to report for an Investigation on May 22, 2001 concerning his failure to use the required fall protection while working on the bridge. The Investigation was postponed and eventually took place on June 11, 2001.

In a letter dated June 28, 2001, the Claimant was found guilty and informed that he would receive a 29-day suspension. The Organization appealed this discipline in a letter dated July 17, 2001.

The Organization claims that the discipline imposed upon the Claimant was unwarranted, harsh and excessive. It contends that the burden of proof in a discipline matter such as this is on the Carrier and that burden has not been met.

While the Organization concedes that the Claimant was involved in said incident, it is the Organization's position that the Claimant was unable to leave the equipment in any other way. It contends that the Claimant did not engage in any wrongdoing. Even if he was at fault, based on his 25 years of unblemished service, counseling should have been the most severe penalty imposed upon the Claimant. Finally, and very significantly, because the Claimant was immediately removed from service without a proper Investigation, the Organization claims that the penalty was predetermined and as such, was a violation of Rule 25. According to the Organization, the Carrier should now be required to clear the Claimant's record of any mention of the incident, to compensate him for all lost wages, including lost overtime, and to make him whole for vacation, holidays and seniority.

Conversely, the Carrier takes the position that it met its burden of proof. The Claimant was afforded a fair and impartial Investigation in accordance with the requirements of the Agreement. The Carrier considers the Claimant guilty as charged. According to the Carrier, a review of the transcript developed during the Investigation provides substantial evidence to indicate that the Claimant admittedly violated the Life Critical Rule with which he was charged.

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 with what we might or might not have done had it been ours to determine, but to rule upon the question of 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 its discretion. See Second Division Award 7325 and Third Division Award 16166.

After a review of the record, the Board cannot uphold the Carrier's position. We note that the Claimant was removed from service immediately after the incident on May 9, 2001 and before a proper Investigation was conducted. Rule 25 specifically provides that "... employees shall not be suspended nor dismissed from service without a fair and impartial hearing nor will an unfavorable mark be placed upon their discipline record without written notice thereof." In this case, the Claimant was penalized without a proper Investigation and was denied his Agreement due process rights. Therefore, the discipline must be overturned and the Claimant made whole.

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AWARD

Claim sustained.

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 24th day of February 2005.