

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37360
Docket No. MW-37734
05-3-03-3-77

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 [(1) Ten (10) days actual suspension, (2) Employee must requalify on NORAC Operating Rules and Roadway Worker Rules upon return to active duty status.] imposed under date of March 27, 2002 upon Mr. R. J. Baker for alleged violation of Conrail On Track Safety Rules, Responsibilities of the Employee in Charge, Duties of the Employee Responsible for On Track Protection, NORAC Operating Rules, General Rules B, S, Rules 132 and 140 in connection with allegedly allowing employees to foul Main Track 1 on the Chicago Line at CP 402 in Batavia, New York on two (2) occasions Tuesday, January 22, 2002 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement [Carrier's File 12(02-0181)].
- (2) As a consequence of the violation referred to in Part (1) above, Mr. R. J. Baker shall now "*** be exonerated of the charges, and properly compensated for all lost wages, credits and benefits due to the actions taken by the Carrier in regards to the instant case."

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 January 22, 2002, Claimant R. J. Baker had established and held seniority as a Track Foreman at Rochester, New York, with pristine service dating from July 1974.

On January 22, 2002, the Claimant was placed in charge of a team of Engineering Department employees who were making repairs to the right-of-way at Mile Post CP 402 in Batavia, New York. At approximately 9:25 A.M., U.S. Department of Transportation Federal Railroad Administration (FRA) Inspector R. L. Anderson passed this section of track while making a right-of-way observation from Amtrak Train No. 286. He noticed two employees wearing orange hats dangerously close to the passing train that was traveling at 79 m.p.h. On his return trip on Amtrak Train No. 63 at approximately 3:25 P.M., the Inspector noticed five employees wearing orange hats also positioned perilously close to the passing train.

The Inspector conducted interviews with various CSXT employees. Upon contacting the Claimant, the Claimant acknowledged that he was the Foreman working at Mile Post CP 402 and was responsible for the team's safety. The Claimant was advised that two FRA inspection reports would be filed, recommending that CSXT be cited with the violations observed by the Inspector when he noticed employees near the track, less than 15 seconds before Amtrak trains passed the right-of-way where the Claimant was in charge.

The Claimant was directed to attend a formal Hearing to determine his culpability in allegedly not providing for the safety of employees under his charge.

Following the March 7 Hearing, the Claimant was assessed a ten-day suspension by letter dated March 27, 2002. The Organization appealed the discipline by letter dated April 4, 2002.

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. The Organization contends that the charge against the Claimant was sustained based solely on the hearsay and double hearsay testimony of supervisors who were not present at the time of the incident. According to the Organization, there is no way that the Carrier can sustain its burden in this matter. 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 reveals substantial evidence that the Claimant was responsible for the incident and, therefore, violated the relevant Rules.

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.

The Board cannot find substantial evidence in the record to uphold the Carrier's position. The evidence presented by the Carrier was hearsay and double hearsay. This was insufficient to sustain the Carrier's burden of proof. Based on the fact that the Carrier could not meet its burden of proof, we sustain the claim and find that the Claimant is to be made whole for all lost time, pay and benefits.

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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.