

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21057
Docket Number MW-21261

Irwin M. Lieberman, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(Louisville & Nashville Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Machine Operator Leon Doyle was improper, without just and sufficient cause and on the basis of unproven charges [System File 1-25(8)/D-105312 E-306-117].

(2) Mr. Leon Doyle be reinstated as a Rank 3 machine operator with seniority as such unimpaired and that he be paid at the brush cutter operator's rate for all straight-time and overtime he would have worked as a Rank 3 machine operator until he is reinstated as such.

OPINION OF BOARD: This is a discipline dispute in which Claimant was discharged. Claimant, a Machine Operator, was involved in an accident on January 31, 1974 in which he and a fellow employee were injured and also resulting in extensive damage to a brush cutter and some damage to the engine of a train which struck the brush cutter. After an investigation, Claimant was terminated on April 5, 1975.

Petitioner alleges that Carrier failed to meet its burden of proving the charges against Claimant and that there was no proof of negligence on his part. It is contended by the Organization that it was wholly improper, under any circumstances, to dismiss an employee with twenty-three years of unblemished service for an offense which was essentially the responsibility of another employee.

Carrier asserts that the evidence adduced at the investigation was adequate to establish Claimant's responsibility for the accident and for negligence in the performance of his duties. Carrier argues that its concern for safety is vital and the penalty of dismissal was justified.

It is noted that there are no procedural issues with respect to the investigation before us.

The crux of the dispute is the matter of responsibility for the left wing of the brush cutter which apparently came down as the train approached the machine. There were three employees directly involved on the day in question: Claimant, another machine operator and a track repairman who was temporarily acting in the capacity of foreman for the purpose of securing line-ups. The evidence indicates that the other operator was some distance away from the brush cutter at the time of the accident, being engaged in flagging at a crossing; this employee was normally responsible

for the operation of the left side of the brush cutter (which side was involved in the accident). There is no question but that the two operators are charged with responsibility for the safe operation of the equipment and that there was an accident in which something went wrong with the left wing of the machine causing the injuries and damage from the collision. The evidence is equivocal with respect to the cause of the mishap: there are no hard facts as to the reason the wing came down. Two anomalies are evident in this case. First, there was no information that the crew was informed that a north bound train was due to pass them at the time of accident which omission could have contributed to the mishap; there was no charging of negligence or anything else with regard to this possible error by the operator or dispatcher. Secondly, there was no responsibility lodged with the acting foreman who was on the machine at the time of the accident. Although the acting foreman was along primarily for the radio flagging function, he could have had some responsibility for the lack of information with respect to the approaching train; it should at least have been investigated as a matter of equity. We recognize fully that an employe may not avoid his responsibility for mishaps due to the additional mistakes of others which might have contributed to the incident or accident. However, in this case such fact has a bearing on the reasonableness of the discipline meted out to Claimant. Under all the circumstances of this dispute, Claimant was properly found guilty and certainly must bear some of the responsibility for the accident. Nevertheless, we do not believe that discharge was the appropriate remedy; that penalty we hold was arbitrary and unreasonable in this case. We shall, therefore, order Claimant to be reinstated to his former position, with seniority and all other rights unimpaired, but he will not be made whole for the time off of work.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.



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Claim sustained; Claimant will be reinstated with all rights unimpaired but he will not be compensated for time off.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Pankas
Executive Secretary

Dated at Chicago, Illinois, this 29th day of April 1976.