

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26023

Docket Number MW-25907

George S. Roukis, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(National Railroad Passenger Corporation

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

(1) The forty-five (45) days of suspension imposed upon Trackman R. Castillo because he allegedly 'threw a "rail anchor" at and struck the left door of the speed swing, which was occupied by Trackman Jorge Negrete and "B" Operator Dave Mullenhoff' and he allegedly 'repeated the same offense by throwing a rock and striking the same machine' on February 28, 1983, was without just and sufficient cause, unwarranted, on the basis of unproven charges and in violation of the Agreement (System File BMW-E-D-030).

(2) The claimant's record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered."

OPINION OF BOARD: In this dispute Claimant was assessed a forty-five day suspension, fifteen of which he actually served for throwing a rail anchor and striking the left door of a Speed Swing Machine operated by "B" Operator Dave Mullenhoff. The incident occurred on February 28, 1983 in the vicinity of the 12th Street Bridge, Chicago, Illinois, and the Investigation was held on March 18, 1983. In addition to the aforesaid specification, the Investigation also focused on his alleged repeating of the same offense that day, when he allegedly threw a rock at the same Machine.

In defense of his appeal from the disciplinary assessment, Claimant avers that he did not wilfully throw the rail anchor at the Speed Swing, but merely hit the Machine inadvertently when he threw the anchor. He testified at the Investigation that while removing rail anchors from the track, he picked up the rail anchor and threw it back over the road. In effect, he asserts that he was unaware that the Speed Swing Machine was close by. With respect to the second specification, namely, that he later picked up and threw a rock at the same Machine, Claimant denies throwing the rock, but acknowledges that he made a motion with the rock as if he were going to throw it. It was the Organization's position that the evidence developed at the Investigation, particularly the testimony of Carrier officials, was insufficient to support the asserted charges set forth in the March 7, 1983, Notice of Investigation. The Organization also contends that a pre-trial Carrier conference, which included the attendance of the Investigative Officer was inherently prejudicial and inconsistent with contracted for due process rights.

Carrier maintains that the discipline imposed was just and predicated upon a record that unmistakably established Claimant's wrongdoing. It asserts that the testimony of "B" Operator Dave Mullenhoff clearly shows that Claimant purposely threw the rail anchor at the Speed Swing Machine, which was verified by the damage impact photographs submitted by Mr. Mullenhoff. It observes that Claimant notwithstanding the above incident, later picked up a rock while Mr. Mullenhoff was proceeding southbound on Track 7, and struck the Machine again in the same spot. It avers that a careful review of the Trial Transcript will not only affirm the accuracy of the charges, but will also fully demonstrate that the March 18, 1983, Investigation was fair and in accordance with normative due process requirements.

In our review of this case, we concur with Carrier's position. We find no evidence that Claimant was denied due process at the Investigation, nor precluded from conducting an active thoughtful defense. He had every opportunity to explain his actions on February 28, 1983, and in the process to rebut Carrier's accusations. Upon the record, especially the clear persuasive testimony of "B" Operator Mullenhoff and the evidentiary support damage impact photographs, we find convincing evidence to establish Claimant's culpability. Moreover, Claimant's own actions, wherein he picked-up a rock and motioned to throw it at the Speed Swing Machine, establishes a presumptive aggressive pattern of behavior that, by definition, supports a purposeful state of mind. Within the web of circumstances on the incident date and an objective calculation of the self interest motivations of Claimant and Mr. Mullenhoff, we find the latter individual's version of events more persuasive. In essence, Carrier has met its required proof burden. As to the correlative question of penalty, we find no reason to dismiss the discipline assessed, since Claimant's actions were palpably careless and could have led to more serious consequences. Accordingly, consistent with the decision in Third Division Award No. 14066, wherein the Division noted the high degree of care under which a Carrier must operate concerning matters of safety, we find Claimant's specific actions unsafe, and, as such, the discipline imposed was fair and reasonable under the circumstances.

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 not violated.

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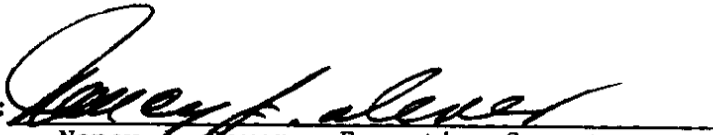
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Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Bever - Executive Secretary

Dated at Chicago, Illinois, this 28th day of May 1986.