

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26672
Docket Number MW-25961

Irwin M. Lieberman, Referee

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 disciplinary demotion of Track Foreman A. L. Brasby, his disqualification as track foreman and the seventeen (17) days of suspension imposed upon him for alleged responsibility in connection with a derailment on '#17 Ore Track' on August 29, 1982 was without just and sufficient cause and in violation of the Agreement (System Docket CR-78-D).

(2) Mr. A. L. Brasby shall be reinstated as a track foreman with seniority as such unimpaired, his record shall be cleared of the charge leveled against him and he shall be compensated for all wage loss suffered."

OPINION OF BOARD: On August 25, 1982, Claimant, a Track Foreman, was assigned with his gang, to repair track damage caused by a previous derailment. Two days later, while still working on the assignment, Claimant was informed by his superior, Track Supervisor Fenton, that he had to have the track that day. Claimant released the track, with a five mile per hour speed restriction, at approximately 3:00 P.M. that day. Two days later in the afternoon a derailment occurred on the same segment of track (there had been two other trains with about 140 cars which had passed over the track prior to the derailment). Claimant, following an investigation, was found guilty of failing to perform his duties properly in restoring the track in question "...without making proper repairs and taking the necessary corrective action to insure safe passage of trains over the track..." resulting in the derailment. He was disqualified as a Track Foreman and also was assessed the seventeen days he had been held out of service as additional discipline.

Carrier asserts that the evidence adduced at the hearing clearly indicates that Claimant failed to perform his duties responsibly resulting in the derailment. Specifically Carrier maintains that Claimant spiked the ties in contravention of prevailing regulations. Furthermore, his actions cannot be excused because the job was to be completed in a hurry. Any negligence by others is irrelevant, according to Carrier. Carrier concludes that Claimant's guilt was established and the penalty was appropriate.

Petitioner charges that the Claimant in this instance was found to be guilty by Carrier based on the testimony of but one witness; this is contrary to long established practice. That fact coupled with the particular

circumstances including the presence of the Track Supervisor when the track was restored to service indicates that the Carrier's conclusion was arbitrary and the charges unproved, according to the Organization. Petitioner argues further, inter alia, that Carrier imposed dual discipline in this case in the disqualification as well as the equivalent of a seventeen day suspension (period held out of service).

The Board notes that in spite of several procedural questions raised by Petitioner, none of Claimant's rights were prejudiced by the conduct of the investigation. Claimant was not precluded from introducing any evidence or calling any witnesses.

With respect to the principle question, the burden of proof concerning the conclusion that Claimant was guilty, the evidence is clear. In addition to the testimony of the Track Supervisor, Claimant himself testified that he failed to follow the governing rules regarding spiking patterns. It must be concluded, therefore, that the evidence supported Carrier's conclusion that Claimant was guilty. However, this dispute has another element which must be taken into consideration. It is evident that the Track Supervisor put pressure upon Claimant to complete the work quickly. Also, there is the presumption that the Supervisor was aware of how the work was being performed. For those reasons, the Board concludes that the Supervisor must share in the culpability for the accident and infraction. Claimant, of course was responsible for the work his gang performed and the condition of the track; this was only the third train over the trackage after the repair work was completed. For the foregoing reasons, the Board concludes that the discipline in this instance was somewhat arbitrary and too severe. Claimant shall be restored to Foreman provided his seniority so allows. The monetary losses he sustained, including the seventeen day suspension, shall constitute the penalty for the infraction.

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 discipline was excessive.

A W A R D

Claimant sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Bever - Executive Secretary

Dated at Chicago, Illinois, this 23rd day of November 1987.