

CORRECTED

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION

Award No. 27889  
Docket No. MW-28289  
89-3-88-3-59

The Third Division consisted of the regular members and in addition Referee Stanley E. Kravit when award was rendered.

PARTIES TO DISPUTE: ( (Brotherhood of Maintenance of Way Employees  
(Union Pacific Railroad Company  
(former Missouri Pacific Railroad Company)

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

(1) The thirty (30) days' actual suspension of Machine Operator Helper J. L. Covington for alleged '... violation of General Rules A, B, K, and Rules 4001 and 4001(A) ... creating a life threatening situation....' was arbitrary, unwarranted and based on unproven charges (Carrier's Files 870093 and 870094).

(2) The Claimant shall be reimbursed for all wage loss suffered, made whole with seniority and all other rights unimpaired and his record cleared of the charges leveled against him."

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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 waived right of appearance at hearing thereon.

Claimant is a Machine Operator Helper. On November 13, 1986, he was charged with stepping from the east main track towards the west main track in front of Engine 2187, creating a life-threatening situation. After investigation he was suspended for 30 days for a violation of General Rules A, B, K and Rules 4001 and 4001 (A). These Rules require employee knowledge of and obedience to safety practices, including expecting the movement of trains, not standing on the track in front of an approaching engine, and taking every precaution to avoid injury to themselves as well as others.

The principal testimony relied on to support the allegations was given by the Fireman operating the engine. He stated that Claimant stepped from between some machinery and that the engine narrowly missed him. In fact, he at first believed he had struck the Claimant. This undoubtedly accounts for the engine's abrupt stop. He stated that the engine's horn and bell were being sounded as it approached the point where he first noticed the Claimant. His testimony regarding the horn and bell was supported by that of the Locomotive Engineer who was also riding in the cab.

Claimant testified that he was standing between two machines. Also, that he only leaned forward to look both ways "and that's when the train came by." He denied stepping out toward the train or being close to being hit "because if I would have come close to being hit, the train would have hit the machines before it hit me." He denied that the engine was blowing its horn or ringing its bell. He alleges he gave the same explanation to his Supervisor when asked about an hour and a half later.

Another Machine Operator testified that Claimant "peeped out from behind the machine" and "all of a sudden there was the train." This was the first time according to this witness that the train horn sounded. Also, that if Claimant "had of stepped out (toward the west main track) he would have gotten hit" because the space between the tamper and the train would not have allowed enough room to have avoided it. Another operator testified that Claimant leaned around the machine to look and "then just pulled back in." This witness also denied that the horn or bell were sounded. However, he did state that when a Foreman asked what happened:

"We told him that (Claimant) was walking between the machines at the same time the train was coming by and that he did not walk out into the path of the train..."

Two additional employees also denied that the train was sounding its bell or horn. These employees also indicated that it is not normal practice for trains which are passing men and equipment on adjacent tracks to sound the whistle or bell.

Two witnesses for the Carrier contradict this testimony to some extent. The Foreman testified that Claimant "stepped out past our machines which would be toward the west track, just as the train passed" and that "he leaped back away from the approaching train." The Foreman conceded he heard no whistle or bell, but attributed this to the fact that engines on the equipment were running.

Claimant's Supervisor testified that, on the morning of the incident, he had cautioned the gang to be particularly careful because of the cold weather, especially with regard to trains traveling on the adjacent track. He told them it would be harder for them to hear and see. While he did not personally see the incident he did question Claimant about it and testified that Claimant "shrugged his shoulders and made no comment."

Since the charge against the Claimant was upheld solely on the basis of the testimony of the Fireman, Locomotive Engineer and Foreman, the issue before the Board is whether their testimony forms substantial competent evidence to justify a 30-day suspension. While credibility is within the purview of the Hearing Officer, the issue is not whether there is any testimony competent to support the charges, but whether the weight of credible, competent evidence justifies disciplinary action. The Hearing Officer is not free to ignore contradictory evidence.

Only the testimony of the Fireman operating the train contains any direct evidence that suggests a possible safety violation. His testimony amounts to an observation that someone stepped out toward the west track, and then "the gentleman proceeded to walk north." This observation was contradicted by the Claimant and at least one other witness. The Foreman's observation was indirect and admittedly "a blur." In the record before us the weight of the evidence is clearly in favor of the Claimant. Although he did project a part of his body out from between two machines, there is insufficient evidence upon which to conclude that he initiated a life-threatening situation.

The Board agrees with Third Division Award 23864:

"We agree that the Carrier has a right to rely on the hearing officer's assessment of credibility and the resolution of conflicts in evidence when such decisions are supported by substantial evidence. In this case, however, the above mentioned portion of the charge was not supported by substantial evidence. In regard to the petition and profane language, the supervisor's testimony differed sharply with that of three witnesses and the Claimant. The supervisor's testimony is not entitled to more weight per se. In resolving conflicts, the Carrier must rely on more than the hearing officer's right to resolve those conflicts. There must be evidence of a rational deliberation, weighing of evidence and a reasonable conclusion. The Carrier must clearly show reliance on factors such as credibility, demeanor, corroborative evidence and other such facets of evidence."

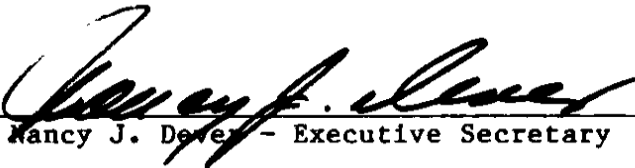
The Carrier has not sustained disciplinary action by substantial evidence. Mere suspicious circumstances are not enough. The evidence in favor of the Claimant has the effect of eroding or detracting from that evidence that might otherwise support discipline. This is more than a conflict in credibility on the record. The suspension of 30 days must be overturned.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

  
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 4th day of May 1989.