

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes  
(  
(Union Pacific Railroad Company

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

(1) The sixty (60) day suspension imposed on Foreman D. T. Towler for alleged responsibility for the derailment which occurred on May 19, 1986 was without just and sufficient cause, arbitrary, on the basis of unproven charges and in violation of the Agreement (System File D-80/860064).

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

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.

On May 19, 1986, at approximately 1:40 P.M., Claimant was Section Foreman in charge of installing ties when a train derailed at his work site. Claimant was removed from service on May 20, and thereafter was notified by letter dated May 29, 1986, to attend a Hearing to consider his alleged responsibility for the derailment in violation of various Rules. Following the Hearing, Claimant was notified by letter of June 11, 1986, that he had been found guilty and was assessed a sixty (60) days suspension.

The Organization argues that Claimant's removal from service was a violation of Rule 48(o) in that no evidence was produced to find Claimant guilty of a "serious" violation of the Rules. It further argues that the charges were expanded beyond the Rules cited in the Notice of Hearing and the Carrier failed to meet its required burden of proof.

It is the Carrier's position that its action and charges were fully supported with sufficient probative evidence. The Carrier holds that Claimant's actions were the cause of the derailment.

A review of the record finds no procedural violations of the Agreement. The charge letter indicated the Claimant was alleged to have violated CE Bulletin 85-387-T which states that "installation of ties must be handled in accordance with the CE Bulletin covering Tie Renewals." The variance between explicit referral to tie renewals in the statement of charges and its embedded mention is not in these circumstances fatal. Claimant was aware of the temperature issue as indicated in the transcript and a procedural error fatal to a finding of guilt did not occur. We also find that the Tie Renewal Bulletin was read to the Claimant and he had knowledge thereof.

With respect to the merits of the case, the Board finds substantial evidence present to warrant a conclusion of guilt. The transcript contains the testimony of two Carrier witnesses that the ties were improperly installed specifically with regard to instructions pertaining to rail temperature. The record indicates that Claimant began installing ties at approximately 10:00 A.M. when the temperature was cool. Although Claimant admits he had a rail thermometer with him and would have tested the rails at Noon, he testified that he did not test the temperature as he was called away. The derailment occurred at around 1:40 P.M. Evidence of record confirms that the rail temperature was 100 degrees at Noon, forty miles away, and 118 degrees at 3:22 P.M. Since the Rules required a slow order at 100 degrees or above, and Claimant neither measured rail temperature, nor issued such an order, the Board finds Carrier's conclusions to have been supported.

In view of the record before this Board, notwithstanding all other probable contributing causes, there is sufficient probative evidence to support Carrier's conclusions that Claimant was responsible for the condition of the track which led to the derailment. Since such is the case, this Board will not disturb the Carrier's determination in this matter.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

  
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 29th day of March 1990.