NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Form 1

Award No. 30017
Docket No. MW-30119
94-3-91-3-553

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(CSX Transportation, Inc. (formerly The
(Chesapeake and Ohio Railway Company)

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

(1) The five (5) day overhead suspension with a sixty (60) day probationary period, imposed upon Messrs. D. C. Hatfield and J. A. Shelton for their alleged violation of Safety Rule 922 on August 7, 1990 was arbitrary, unwarranted, on the basis of unproven charges and in violation of the Agreement [System File C-D-7136/12(90-823) COS].

(2) The Claimants' records, respectively, shall each be cleared of the charges leveled against them."

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 employe 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.

This case involves two Claimants each of whom was assigned as Trackman working on a tie renewal and surfacing gang in the vicinity of Madison, West Virginia. On August 7, 1990, the Claimants were instructed to ride on a spike squeezer machine to a location in the vicinity of MP 43.0 to load bags of rail anchors. While in the process of performing as instructed, Claimant Shelton experi-

enced a pain in his back. He made a timely report of the incident to the proper authority and was given prompt medical attention for the injury.

Subsequently, by letter dated August 13, 1990, both Claimants were instructed to appear on August 24, 1990, for a hearing in connection with the personal injury sustained by Claimant Shelton. The scheduled Investigation was postponed to and held on September 17, 1990, at which time both Claimants were present, ably represented and testified on their own behalf. Following completion of the hearing, each Claimant was notified by letter dated September 27, 1990, that they had been found at fault in connection with the personal injury and were disciplined by the imposition of a five day overhead suspension with a sixty day probation period.

During the progression of the appeal on the property, the Organization argued that Carrier's reliance on a violation of Safety Rule 922 was, in fact, a violation of Claimant's rights because the Rule had not been cited in the hearing notice and was not referred to at any time during the progression of the hearing. The Organization also argued that Carrier erred when it entered into the hearing transcript "statements by several employees" who were not present at the hearing for cross examination. The Organization continued by contending that both Claimants had performed within the scope of the Safety Rules and that the imposition of an overhead suspension was "unjust, unrealistic and harsh" especially in light of Carrier's violation of its own rules by requiring the employees to ride on a piece of equipment which was specifically marked to restrict riders.

The Carrier has argued throughout that both Claimants failed to make the required inspection of the items to be picked up before they attempted to make the lift; that there is no requirement in the Agreement, or otherwise, which requires that a particular Rule must be cited in the hearing notice; that the written statements of the two individuals which were read into the hearing transcript addressed "after the fact" information and there was no need to have these individuals present for cross examination and that, in any event, no exception in this regard was voiced at the time the statements were introduced into the record. Additionally, Carrier argued that both Claimants candidly acknowledged that they had not checked the second bag of rail anchors before they attempt-ed to lift it. Finally, Carrier contended that the discipline as assessed was lenient and was justified by the hearing record.

From our examination of the hearing record, it is our conclusion that the hearing notice met all the requirements of Rule 21 which reads, in pertinent part, as follows:

"(b) Advice of Cause - The employe involved will be notified in writing of the charge against him,- - -."

Nothing in this Rule requires that a particular Rule or Rules must be cited in the hearing notice. This Board may not add requirements to a Rule which the authors of the Rule did not see fit to include therein. At the hearing, both Claimants answered affirmatively when asked if they had been properly notified and if they were ready to proceed with the hearing. They knew exactly what the hearing had been called for. It is too late to complain that the hearing notice was somehow defective.

As for the Organization's contention relative to the inclusion in the hearing record of those statements from individuals who were not present to be cross examined, we are forced to note that the Organization was accorded the opportunity to examine these statements at the time they were introduced into the record and voiced no objection either to the inclusion of the statements or to the absence of the writers of the statements. The time and place for such objections is during the hearing, not thereafter.

As for the Organization's contention relative to Carrier's instructions to the Claimants to ride on a piece of equipment which was specifically marked to restrict passengers, the Board would note that the Carrier is remiss if it permits or instructs employees to use such equipment for transportation and it may well be held accountable under different circumstances or before a different tribunal. However, that wrong does not mitigate the other wrong. The Claimants acknowledged that they did not ascertain whether or not the second bag of anchors was clear of the piece of rail before they attempted to lift it. A situation such as this is exactly why Safety Rule 922(i)(4) was written. Before any attempt is made to lift anything, the load must be analyzed and known to be free of restrictions. In this regard, Claimants erred. We are convinced that the discipline as assessed for the commission of this error has met the purpose and intent of discipline which is to teach and correct. The overhead suspension with a probationary period was not arbitrary, capricious, excessive or harsh. The Organization's contention to the contrary is rejected.

A W A R D

Claim denied.

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NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Catherine Loughrin
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 21st day of January 1994.