

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30058
Docket No. MW-30364
94-3-92-3-81

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
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(Soo Line Railroad (former Chicago Milwaukee,
(St. Paul & Pacific Railroad

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

1. The Carrier's decision to assess Claimant J. Ochoa a letter of censure because he allegedly '*** failed to follow the Assistant Foreman's instructions and failed to wait until a safe way to handle this situation was determined. ***' on May 26, 1990 was without just and "sufficient cause and on the basis of unproven charges (System File C #43-90/8-00009 CMP).
2. As a consequence of the violation referred to in Part (1) above, the letter of censure shall be removed from the Claimant's record, he shall be made whole for the mileage expense incurred to travel to and from the hearing, the witness (J.M. Rodriguez) and the interpreter (N.G. Bernal) shall be reimbursed for lost time and travel expenses incurred as a result of their attending and participating in the hearing held on September 7, 1990."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 sustained a leg injury while cutting rail at a derailment site on May 25, 1990. It is apparent that Claimant cut a section of bowed rail which sprung out and struck him when the tension was released. On June 15, 1990, a Roadmaster issued Claimant a letter of reprimand which reads, in part, as follows:

"On May 26, 1990 you discussed with Foreman Gallo the danger involved in this situation. Then at the derailment site Assistant Foreman Alfaro instructed you not to cut the rail that was damaged in the derailment. Assistant Foreman Alfaro instructed you to wait until the Foreman arrived back at the site and a decision would be made how to handle this rail that was bent like a horseshoe. You elected to cut the rail and sustained your injuries.

That rail should not have been cut until all safety measures had been taken. You failed to follow the Assistant Foreman's instructions and failed to wait until a safe way to handle this situation was determined. Safety is of the utmost importance in the discharge of your duties. You did not take the safe course of action. Your decision to cut the rail was an unsafe act with serious results."

Because this letter of reprimand is considered a disciplinary action, Claimant requested a hearing, which was conducted on September 7, 1990. Our review of the transcript of that hearing shows that Claimant was at the derailment site with his Foreman and Assistant Foreman. Despite the fact that each of these three men had between 15 and 20 years of service, none had seen rail bowed in this manner. The Foreman explained to Claimant that the rail would have to be cut, but pointed out this was a dangerous situation. Although they speculated how the rail might react when cut, none was certain. The Foreman told claimant to go ahead and cut the rail if he thought it could be done safely. He gave Claimant no advise as to where to make the cut or what safety precautions should have been taken. After discussing this with the Foreman, Claimant went to the rail to begin cutting it. The Assistant Foreman told Claimant to wait for the Foreman's instructions, but Claimant replied that he had already talked to him. When Claimant cut the rail, it sprang out, striking him in the legs breaking them.

Based upon the evidence of record, we conclude the letter of reprimand was improperly issued. Although the Assistant Foreman did tell Claimant to wait for the Foreman, it is evident he was not aware Claimant had already discussed with him what was to be done. The Foreman testified he advised Claimant to make the cut and left

it to his judgment as to where the cut should be made. The letter does not criticize Claimant for making the cut improperly. Rather, Claimant was disciplined for acting without authority. The record shows the Foreman gave him that authority. Accordingly, we direct that the letter of reprimand be removed from Claimant's record.

Additionally, the Organization has asked that Claimant be paid mileage expense for traveling to and from the hearing, and that Claimant's witness and his interpreter be reimbursed for lost time and travel expenses. We find no basis for such relief in the Agreement. That portion of the claim, therefore, is denied.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

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

Dated at Chicago, Illinois, this 17th day of February 1994.