

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30491
Docket No. MW-30843
94-3-92-3-673

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(Kansas City Southern Railway Company

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

- (1) The thirty (30) day suspension assessed Machine Operator R. E. Flack for alleged violation of Rules 'L', 93 and 792 was without just and sufficient cause, based on unproven charges and in violation of the Agreement.
(Carrier's File 013.31-43)
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. E. Flack shall be compensated for all wage loss suffered beginning February 15 through March 16, 1991, including any overtime, double time pay lost and holiday pay."

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.

At the outset, the Organization objected to new argument presented to this Board in Carrier's Submission, but not previously raised during the handling of this dispute. The Board has not considered any argument so provided in its determination of this case. The Organization also protested that Carrier committed a serious procedural error when it did not specify the precise Rule violations of which Claimant was charged. Upon a review of the record the Board finds that the notice of hearing was sufficiently specific for Claimant to mount an informed defense at the Investigation. Accordingly, we do not find that Carrier's failure to cite the precise Rules to constitute a fatal procedural flaw in this case.

On December 18, 1990, Claimant was assigned to surface and align the run-around track at Carrier's Port Arthur, Texas, Yard. In the course of performing that task he operated a Tamping Machine. At approximately 9:40 A.M., an empty hopper and the Tamping Machine to which Claimant had been assigned were sideswiped and derailed at the south end of Track No. 5.

By notice of December 23, 1990, Claimant was instructed to be present for a formal Investigation into the incident. Following an Investigation held on January 31, 1991, Claimant was assessed a 30-day actual suspension. That discipline was appealed and processed in the usual manner, up to and including the highest Carrier Officer authorized to handle such appeals.

The Organization points out that Claimant is not the only person responsible for the incident giving rise to this case. A careful reading of the Investigation transcript indicates that some culpability is shared by the crew of the train which hit Claimant's Tamper, thus causing one of the empty cars to derail. By Claimant's own admission, however, his negligence was certainly contributory. At the Investigation, Claimant admitted that, while he had not included Track No. 5 in his work order request, he nonetheless fouled that track by his placement of the Tamper to which he had been assigned.

In light of the potential danger to employees and Carrier's equipment, the Board does not find the quantum of discipline assessed in this case to be either excessive or discriminatory. Accordingly, the instant claim is denied.

AWARD

Claim denied.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 13th day of September 1994.