

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32061
Docket No. MW-32660
97-3-95-3-596**

The Third Division consisted of the regular members and in addition Referee Nancy F. Murphy when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employes
(CSX Transportation, Inc. (former Three Rivers
(Railway Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The discipline [ten (10) day suspension] imposed upon Equipment Operators R. N. Brumley, Jr. and H. Korn, for alleged responsibility in connection with a personal injury sustained by Mr. Brumley on February 25, 1994, was without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement [Carrier's File 12(95-65) TRC].**
- (2) As a consequence of the violation referred to in Part (1) above, Equipment Operators R. N. Brumley, Jr. and H. Korn shall receive the remedy prescribed by the parties in Rule 48(e)."**

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 were given due notice of hearing thereon.

On February 25, 1994, Claimant Brumley was instructed to report to American Oil at Mile Post BLY 49, on the Pittsburgh Subdivision, to relieve Claimant Korn, who was operating a backhoe.

When Brumley arrived at the work sight at approximately 11:15 A.M., Roadmaster R. Baer instructed him to eat his lunch and then relieve Korn. At approximately 12:15, while the Roadmaster and the gang were seated in their trucks eating lunch, Brumley "circled Mr. Korn's left side as he was operating the backend part of the backhoe", to indicate to Korn that he was ready to relieve him.

Korn, who had been digging a trench, noticed Brumley approach the side of the backhoe, stopped digging and idled the machine down with the bucket at the bottom of the trench. Brumley advised him that he would provide relief so that he could eat. As Brumley turned to walk away and Korn rose out of his seat, his chest bumped two levers which raised the backhoe and moved an outrigger onto Brumley's foot. Although Korn immediately raised the outrigger, Brumley's foot was severely injured, rendering him incapable of working for approximately 179 days.

On March 7, 1994, Brumley and Korn each received notification to attend a formal Investigation concerning the incident.

On December 7, 1994, after a nine month postponement to allow Brumley to recover sufficiently to attend, the Investigation was held. Claimants were each found to be at fault in connection with Brumley's injury, and both were assessed a ten day overhead suspension with a six month probationary period effective December 23, 1994.

The Organization protested the assessed discipline premised upon:

- 1) Carrier's decision to discipline two veteran employees, with unblemished records, "based solely on the fact that an injury occurred."
- 2) Claimants were not charged with any safety violations or any misconduct at the time of the accident.

- 3) Rule 48 provides that an employee is entitled to a precise written charge, which neither Claimant received, which, in itself, should prove fatal to Carrier's case.

Finally, the Organization asserted that Carrier was unable to sustain its burden of proving either Brumley or Korn culpable for the accident.

Carrier denied the claim, noting at the outset that Claimants had been afforded a fair and impartial Hearing in accordance with Rule 48 of the Agreement, and that the charges were sufficiently detailed so as to enable Claimants and their representatives to prepare a defense. Carrier further stated that based upon substantial evidence contained in the transcript, safe decisions were not made by Brumley and Korn.

With regard to the discipline assessed, Carrier asserted:

"An overhead suspension serves as a means to communicate to our employees that they must work safely at all times. CSX cannot condone unsafe acts, and, therefore, must address the serious issue of safety with injured employees. The discipline assessed in this case is not excessive, but appropriate to the circumstances and facts presented at the investigation."

Finally, in its Submission to the Board, Carrier maintained that:

"The claim presented to the Board is not in compliance with Circular No. 1 because it is substantively different from the claim handled on the property. The claim docketed with the Board suggests the Organization has attempted to amend the claim to include monetary damages. The RLA prohibits such amendment of the claim."

During the Investigation and on appeal, the Organization alleged that the charges against the Claimants were not specific, and that neither employee received a precise written charge. Although the charges do not mention a specific Rule violation, the reason for Carrier's investigation of this matter is clear; that is whether either, or both Claimants were responsible for acting carelessly and causing Brumley's injury.

Therefore, we cannot find that Carrier's failure to site a specific Rule proved to be harmful to either Brumley or Korn.

For its part, Carrier maintained that the claim the Organization presented to this Board on behalf of Brumley and Korn is not in compliance with Circular No. 1 because it is substantively different from the claim handled on the property. It seems that the only difference would be that the Organization failed to include the word overhead regarding Claimants' suspensions. We cannot conclude that such a trivial oversight, deliberate or otherwise, proves procedurally fatal to the claim, nor does it color or influence our decision with regard to this issue.

Turning to the merits, there is no evidence on this record which leads us to conclude that either Korn or Brumley can be held accountable for the February 25, 1994 incident, which can only be labeled a true accident. Claimants, each of whom have operated a backhoe for over 14 years, with no prior injuries or accidents of record, behaved on February 25, 1994 as they have on innumerable occasions. Brumley, in an effort to relieve Korn, approached the backhoe so that Korn would be aware of his presence. For his part, Korn noticed Brumley as he approached, dropped the bucket into the ditch and idled the backhoe. As Brumley turned away, Korn raised up out of his seat to check the exact location of the bucket, and inadvertently leaned against two levers, which resulted in Brumley's foot injury. While there can be no dispute that safety is of paramount importance to both the Carrier and its employees, legitimate accidents do occur, and it is our opinion that this incident constituted nothing more than an accident, and cannot be construed otherwise.

Finally, it is noted that sometime subsequent to this incident, Carrier promulgated a Rule which calls for machinery, such as the type in this dispute, to be completely shut off prior to any change of operators. However, there is no dispute that the Rule was not implemented until sometime after February 28, 1994. Further, the Roadmaster was on the premises and did not caution either Brumley or Korn regarding the state of the equipment, or Brumley's approach. Claimants cannot be considered culpable of carelessness or failure to exercise appropriate caution. Based on the foregoing, this claim is sustained.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 10th day of June 1997.