

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33018
Docket No. MW-33888
99-3-97-3-406**

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

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employees
(CSX Transportation, Inc. (former Baltimore and
(Ohio - Chicago Terminal Railroad)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The five (5) day actual suspension assessed Track Foreman L. Arroyo for his alleged responsibility in Burro Crane BC-732 striking overhead wires on May 20, 1996 was without just and sufficient cause, based on unproven charges, excessive and arbitrary [System File 1(20)(96) /12(96-0716) BOC].**
- (2) The thirty (30) day actual suspension assessed Machine Operator T. A. Washington for his alleged responsibility in Burro Crane BC-732 striking overhead wires on May 20, 1996 was without just and sufficient cause, based on unproven charges, excessive and arbitrary [System File 1(21)(96)/12(96-0717)].**
- (3) As a consequence of the violation referred to in Part (1) above, Foreman L. Arroyo shall be compensated for all wage loss suffered from May 20 through May 28, 1996 and as a consequence of the violation referred to in Part (2) above, Machine Operator T. A. Washington shall be compensated for all wage loss suffered from May 20 through July 1, 1996. Both employees shall also have their respective records cleared of all charges.”**

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.

Claimant Arroyo, a 25 year Track Foreman, and Claimant Washington, a 34 year Machine Operator, were assigned to duty under Roadmaster P. D. Beinor near Argo Yard in Summit, Illinois, on May 20, 1996, where they were scheduled to pick up scrap and distribute tie plates along the main line maintained by the Carrier. A crane coupled to a scrap rail gondola on its east end and another loaded with tie plates on its west end were to be used for purposes of accomplishing this work.

Track and time authority were obtained. Claimant Arroyo lined the switches and the crane entered the main line. Claimant Washington set its brake, dismounted, and the two men discussed the work to be performed. Arroyo then uncoupled the gondola carrying the tie plates to allow the crane to reach the plates in the near end of the car. While Arroyo proceeded to reline the switches and derails, Claimant Washington proceeded to unload the tie plates. As he raised the boom to pick up the plates, the weight of the scrap rail gondola coupled to the east end of the crane pulled the crane in an easterly direction and down a slight incline. The boom came into contact with and severed an overhead power line. Claimant Washington, concerned for his safety, jumped from the machine, which continued to roll, striking two more power lines and causing a power outage in a nearby community. Following an investigation, Arroyo was suspended for five days and Washington for 30 days.

The testimony and evidence in this case indicates that the crane involved had had its brake shoes replaced on Friday, May 17, 1996. On the day of the accident, it was

being operated with its air brake system partially inoperative and thus was not able to supply air to the brakes of the scrap rail gondola coupled to its east end. The air brake system was scheduled to be restored on May 20, the Monday of the accident.

The evidence of record establishes that Foreman Arroyo obtained proper track and time authority; engaged in a thorough briefing before commencing work which included discussion of possible safety hazards, and was otherwise engaged in discharging his obligation to return switches to their proper positions when the accident occurred. The crane was under the control of Machine Operator Washington, and while it is undeniable that the ultimate responsibility in instances such as this can and does rest with the Track Foreman, the Board finds that there is no support on this record for a finding that Claimant Arroyo was at fault in these circumstances.

The case of Claimant Washington is more complicated. He had personally reported trouble with the crane's brakes on Thursday, May 16; its brake shoes were replaced on May 17; neither he nor the Mechanic who worked on the unit saw any reason to take it out of service; and he had operated the unit safely between that date and the time of the accident. Although there appears to be some confusion in the record, we conclude there are two brake systems on the unit - a foot-actuated running brake and a handbrake that requires the Operator to get off the unit to set. With the crane facing west on the day of the accident, the Claimant was in the process of unloading and spreading tie plates along the tracks from east to west when the slack action in the gondola - brakeless because of the air supply problem - began pulling the crane in an easterly direction, aided by a slight incline. The handbrake accordingly was not set, because the work being performed required crane movement, and the foot brake, which Claimant released as he started to work, was unable to halt the rolling motion of the loaded gondola.

The Carrier assessed discipline based upon the Claimant's unsafe operation of the crane in failing to set its brake; failing to take the crane out of service until it was safe to operate; and striking overhead power lines.

The Board does not lightly or routinely subvert disciplinary action in the absence of failure of proof or a finding of arbitrariness, but in this instance we do not find sufficient evidence in the record to support the Carrier's judgment. The record is clear that the Claimant's crane struck and detached power lines, causing a very dangerous situation. As the cases make evident, however, although many accidents are caused by

wrongdoing, the fact that an accident occurred does not necessarily mean that there was wrongdoing. The Claimant admits he was responsible for the safe operation of the crane, and there is no question that he believed he was doing his job properly when he put the crane in motion. We are constrained to find there was no convincing evidence adduced to suggest he was wrong in this judgment. The combination of new brake shoes, no air brakes on the gondola and the incline on the tracks appear to have come together in a way that materially contributed to the mishap. If there was negligence on the Claimant's part, it was in his failure to have removed the crane from service for safety reasons on May 20 to await repairs on the air brake system, and his ill-advised choice of sites for cutting off the gondola laden with tie plates, given the incline at the location.

While in hindsight there may be a kernel of merit in the suggestion that the Claimant should not have operated the crane on the day of the incident, the Board concludes it would be rash to find negligence solely because there were subsequent repercussions. Had the accident not occurred, the Claimant may have been equally well commended for his dedication to productivity. In general, we are constrained to find that it was not negligence that characterized the Claimant's behavior in this instance, but his well-intentioned efforts to get the job done. Hence, the Carrier has not entirely borne its burden of proof in this instance.

The claim of Foreman L. Arroyo must be sustained. His five day disciplinary suspension shall be rescinded. He shall be compensated for all wages lost on that account and his record cleared of all references to the incident. The claim of Machine Operator T. A. Washington is sustained in part. The 30 day actual suspension assessed for his role in this incident shall be reduced to five days; he shall be compensated for all wage losses for the difference; and his record shall be amended to reflect the reduction in penalty.

AWARD

Claim sustained in accordance with the Findings.

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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 25th day of January 1999.