

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 33157
Docket No. MW-32685
99-3-95-3-627

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

PARTIES TO DISPUTE: (**Brotherhood of Maintenance of Way Employes**
(**Burlington Northern Railroad**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (revocation of foreman seniority) imposed upon Foreman A. L. Tibbetts for alleged violation of Maintenance of Way Rules 30, 550 and 725 on February 14, 1994 was arbitrary, on the basis of unproven charges, excessive and in violation of the Agreement (System File T-D-766-B/MWB 94-08-10AF).
- (2) As a consequence of the violation referred to in Part (1) above:

‘... we are requesting that Mr. Tibbetts be reinstated to his position as Foreman and compensated for any and all lost wages, including overtime. Further, that all mention of this dismissal be stricken from his personal record.’”

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.

The herein Claimant, Mr. Albert W. Tibbetts, began his Maintenance of Way Department service with Carrier on September 21, 1970. Over the years Claimant worked a variety of jobs, including Assistant Foreman and Foreman, the latter position being held for over 19 years. On February 14, 1994, while working as a Foreman, Claimant and a Laborer were clearing snow from switches in the vicinity of Motley and Brainerd, Minnesota. At the time they were not working with a Track Warrant, and they did not have their work area protected by flags. Claimant was using a track broom to sweep switches while the Laborer was using a gasoline powered backpack blower to clean the switches.

At approximately 1:40 P.M., an empty coal train approached Claimant's work location. Neither Claimant nor the Laborer noticed the train approaching. The train's Engineer, upon seeing workers on the track, sounded his whistle. Apparently, because of Claimant's impaired hearing and the noise generated by the Laborer's gasoline blower, the approaching train whistle was not heard by either. When the train was approximately 1300 feet from Claimant and the Laborer, somehow they became aware of its approach, and quickly exited to safety. The Engineer, in the meantime, had placed the train in emergency braking, but was unable to stop until he had passed the area where the switch cleaning had been taking place. As he went past the switch area the Engineer went to the Fireman side window to see if Claimant and the Laborer were safe. Noting that they were uninjured the train was restarted and proceeded on its way.

On February 18, 1994, Claimant was cited to attend a formal Investigation to determine his responsibility in "connection with a near miss" with the empty coal train. Following that Investigation which was held on March 4, 1994, Claimant was notified, on March 28, 1994, that he was disciplined with a revocation of his Foreman's Seniority date. This effectively disqualified Claimant from working as a Track Foreman. The discipline was appealed, as provided in the parties Agreement. While this claim was pending on appeal on the property and to this Board, Claimant, on April 1, 1995, effected a disability retirement.

Before this Board the Organization asks that the discipline assessed by modified on the basis that Claimant was denied due process in his Investigation, and that the Carrier failed to satisfy its burden that Claimant was guilty of any Rule infractions.

The Board has examined with care the contentions made by the Organization with respect to procedure and substance, and do not find them to be persuasive. There is ample evidence in this record to establish that Claimant was lax in his responsibility as a Foreman to be alert for his own safety as well as that of the Laborer that he was directing. It is fortunate, indeed, that the situation resulted in only a near miss, and not something more serious, such as injury or death to Claimant or the Laborer.

The Board is aware that perhaps it was difficult to initially hear the train whistle, because of the noise of the snow blower. Perhaps too, because it was cold, Claimant and the Laborer may have had their ears covered as well. (Also, in 1992 Claimant indicated that he developed a hearing impairment due to noise exposure while working around loud equipment during his railroad career.) But noise and ear covering are not unusual. They are present anytime an employee is using a snow blower to clear switches of snow in the wintertime. In such situations, extra caution is required to insure that employees will not be run down by an approaching train. In this case there is no evidence that even minimum required caution was being taken by Claimant to ensure that a tragic situation would not develop. The evidence is conclusive that his carelessness was responsible for a near miss. The discipline assessed will not be disturbed.

The claim is without merit. It will be denied.

AWARD

Claim denied.

ORDER

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 25th day of March 1999.