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**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37461
Docket No. MW-38069
05-3-03-3-516

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: ((Brotherhood of Maintenance of Way Employees
(Consolidated Rail Corporation

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [thirty (30) days suspension] assessed Mr. J. L. Welsh for alleged violation of Conrail Safety Rules 4.3.1, 4.4 and 4.9 for allegedly performing duties without proper personal protective equipment (safety equipment) at approximately 9:35 A.M. on Monday, November 18, 2002 at Bridgeport Moveable Bridge in Bridgeport, New Jersey was arbitrary, capricious, excessive without merit and in violation of the Agreement (Carrier's File MW-0056D).
- (2) As a consequence of the violation referred to in Part (1) above, the aforesaid discipline shall be stricken from Mr. J. L. Welsh's record and he shall “be compensated on a make whole basis for any and all time that he lost because of the unjust decision by the Carrier.”

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 Claimant is the same employee involved in Third Division Award 37460 where the Board upheld a 30-day suspension given to him for failing to wear safety equipment on November 15, 2002.

This incident occurred three days later, on November 18, 2002. Supervisor of Structures J. F. Kaminski testified that on that date he arrived at Bridgeport Bridge and observed that of the nine men on the job, only one - the Claimant - was not wearing the required hard hat, vest, and safety glasses. Kaminski further testified that he held a meeting with the individuals on the job and pointed out to the Claimant that he was the only one not wearing the required protective equipment. According to Kaminski, the Claimant put on his equipment, but only after stating "I'd like to see them fine me or take me out of service."

The Claimant testified that he observed an individual at the job site he previously worked with and began to speak with him. The Claimant also testified that when Kaminski arrived, although he did not have his safety equipment on, "I should have put it on immediately, but I didn't." The Claimant further testified that Kaminski confronted him about not wearing the safety equipment and told the Claimant that he could be taken out of service and sent home without pay for not wearing his safety equipment. The Claimant viewed Kaminski's comments to him about what could be done because the Claimant was not wearing his safety equipment as "all threats, to me [and] that kind of rubs me the wrong way." According to the Claimant, Kaminski told him "don't let it happen again" and the Claimant told Kaminski "don't worry . . . it will never happen again." The Claimant testified that his failure to put on the safety equipment "was a lapse in my better judgment, I guess, for the moment . . . [and] I should have had it on . . . I agreed with him and I put it on."

Once again, as in Third Division Award 37460, substantial evidence shows that the Claimant violated the Carrier's Safety Rules and engaged in misconduct by not wearing the required safety equipment. Once again, in his testimony, the Claimant admitted to the misconduct when he testified "I should have put it on immediately, but I didn't" and "I should have had it on."

With respect to the amount of discipline, under these circumstances, we do not find another 30-day suspension to be arbitrary or excessive. This incident occurred a mere three days after the incident in Third Division Award 37460. This was not part of the same incident which could have been taken care of by the first 30-day suspension. This was a separate, distinct, flagrant, and repeated violation of the Carrier's Safety Rules. Further, the Claimant's statement to Kaminski a mere three days after the first incident that "I'd like to see them fine me or take me out of service" only serves to show that the Claimant does not understand his obligations to follow the Carrier's Safety Rules. Moreover, while the Claimant testified that he told Kaminski "don't worry . . . it will never happen again," we note in Third Division Award 37460, when confronted by Kaminski about the same misconduct three days earlier, the Claimant stated "[t]hen do what you have to do." We are satisfied that the Claimant needs to be sent a very strong message that he has no choice and is obligated to follow the Carrier's Rules. In this case, another 30-day suspension will serve that function and is neither arbitrary or excessive.

With respect to the Claimant's different view of what transpired, without sufficient reason for doing so, it is not the function of the Board to re-determine the credibility of witnesses. To the extent the Claimant's version of the facts contradicts those relied upon by the Carrier in assessing the discipline, we find no basis in this record to credit the Claimant's different testimony.

The Organization's other procedural arguments have been considered and do not change the result.

AWARD

Claim denied.

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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 19th day of April 2005.