

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41677
Docket No. MW-42113
13-3-NRAB-00003-130050**

The Third Division consisted of the regular members and in addition Referee Michele M. Hoyman when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference**
PARTIES TO DISPUTE: (
(Terminal Railroad Association of St. Louis

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier’s discipline [a total of thirty (30) days suspension, ten (10) days of which are an actual suspension and the remaining twenty (20) days of which are held in abeyance for a period of ninety (90) days] of Mr. L. Mathes issued by letter dated October 4, 2011 in connection with alleged violations of General Code of Operating Rules 1.1. – Safety, 1.1.1 – Maintaining a Safe Course, 1.1.2 – Alert and Attentive, 1.6 – Conduct and Safety Rules 1000 – General Safety Responsibilities, 1050 – Precautions Against Slips, Trips and Falls and 1218 (b) – When Using a Sledge Hammer was arbitrary, unjust and clearly in violation of the effective working Agreement.**
- (2) As a consequence of the violation referred to in Part (1) above, the Carrier shall immediately clear Mr. Mathes’ record of all charges and discipline and pay him for all lost time.”**

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 holds seniority within the Maintenance of Way Department and was working as a Foreman on the date of the events which led to this case. On September 13, 2011 the Claimant was using a sledge hammer to remove a tie plate from a switch. The Claimant lost his grip on the sledge hammer and it went out of his hands. The sledge hammer struck another employee in the face hard enough to result in an injury. The Carrier charged the Claimant with being negligent in the performance of his duties, indifferent to the safety of others, and failure to maintain situational awareness. The Carrier conducted an Investigation on September 27, 2011. The Carrier found the Claimant guilty of the charges and assessed a 30-day suspension – ten days of which was actual and 20 days of which was held in abeyance for a period of 90 days.

The Carrier's position is that it met its burden of proof in demonstrating that the Claimant was negligent and indifferent to the safety of other employees. Specifically, the Carrier alleges that the Claimant violated multiple Rules (1000, 1218) as well as General Code of Operating Rules (1.1, 1.1.1, 1.1.2 and 1.6). Based on testimony derived at the Hearing, with particular reference to the placement of the rail brace, the Carrier concluded that the Claimant had to be using excessive force in order for the sledge hammer to leave his grip in the manner that it did. Additionally, the Claimant's actions were particularly negligent because he engaged in those actions around other employees, which created a safety hazard. The Carrier refutes the Organization's argument that the Claimant's Agreement due process rights were violated by noting that the Agreement does not entitle employees to pre-hearing discovery. Additionally, the Carrier quotes from the transcript wherein it informed the Claimant's representative that he would be granted a recess from the Hearing for any length of time requested if he wished to more closely examine the Carrier's exhibits. It also quotes from portions of the transcript showing that the Claimant's representative did receive a recess to more closely examine pictures in a Carrier exhibit, and that recess ended when the Organization's representatives voluntarily came back into the room. The Carrier additionally refutes the Organization's contention that the charging letter failed to cite a Rules violation by citing many Awards which conclude that a carrier has no obligation to cite specific Rule violations.

The Organization's position is that the assessed discipline was improper due to a series of procedural and substantial arguments. In regards to procedure, the

Organization alleges that the Carrier failed to provide a specific charge in the charging letter as required by Rule 24. It also argues that the Carrier did not conduct a fair and impartial Hearing because it refused to provide the Organization with the evidence it would use at the Hearing in advance, also in violation of Rule 24. These circumstances violated the Claimant's Agreement due process rights. In terms of substantial arguments, the Carrier notes that the Claimant's actions were based on training he had received. In support of this the Organization cites multiple parts of the transcript wherein the procedure the Claimant used was shown to be commonplace and was part of the training he had received from his previous Foreman. The Organization also alleges that the Carrier knew about the safety risks involved with the work practices that the Claimant and others engaged in because it ordered special hammer handles, sprays, and safety gloves to use when performing this type of work.

The Board finds that there is sufficient evidence in the record to support the conclusion that the Claimant was at least partially negligent, particularly in terms of his situational awareness about the safety of co-workers that were around him. However, the level of negligence does not rise to a level which supports the penalty assessed in this case. Therefore, the suspension shall be modified to 30 days held in abeyance rather than ten days actual and 20 days in abeyance. The Claimant is entitled to pay for time lost during the actual suspension period.

AWARD

Claim sustained in accordance with the Findings.

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 18th day of June 2013.