

SPECIAL BOARD OF ADJUSTMENT  
PUBLIC LAW BOARD NO. 3729

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CONSOLIDATED RAIL CORPORATION  
"CARRIER"

and

BROTHERHOOD OF MAINTENANCE OF  
WAY EMPLOYEES  
"ORGANIZATION"

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CASE NO. 3

AWARD NO. 1

STATEMENT OF CLAIM

----- Claim of the Brotherhood (CR-367-D) that:

"(a) The discipline assessed Claimant Sidney J. Dunn, Welder, was without just and sufficient cause, without the benefit of a fair and impartial trial, in violation of Rule 27, Section 1.

(b) The Claimant shall be compensated for all lost compensation during his discipline, including overtime."

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This case arose when the Carrier charged Sidney J. Dunn, hereinafter the Claimant, with violating Carrier safety rules. The specific charges, contained in a Notice of Investigation dated January 10, 1983, were as follows:

"Charge 1 -- That you allegedly violated Safety Rules of Maintenance of Way employees effective June 1, 1981 by relying

on the watchfulness of others and did not protect your own safety which resulted in a personal injury to yourself at approximately 1:30 P.M., January 3, 1983 on the West Seneca Branch.

Charge 2 -- Your alleged violation of Rule 3230 of the Conrail Safety Rules for Maintenance of Way employees effective June 1, 1981 when you performed work in front of a hi-rail car without having a full understanding with the driver and that full protection was not provided which resulted in you being struck by the hi-rail car at approximately 1:30 P.M., January 3, 1983 on the West Seneca Branch."

Rule 3230 states, "Before performing work which requires going under, between or foul of train, self-propelled equipment, machinery, vehicle, or their wheeled equipment, have full understanding with person controlling the movement and know that full protection has been provided."

After several postponements, the hearing was held on August 16, 1983. The Claimant was present and represented by the Organization. By letter dated September 2, 1983, the Carrier notified the Claimant that he had been found guilty of the charges and assessed a five-day suspension. The above quoted claim was then filed on behalf of the Claimant.

The Claimant is a welder who entered the Carrier's service on August 19, 1974. On January 3, 1983, the date of the incident giving rise to this claim, the Claimant was working on the West Seneca Branch.

At approximately 1:30 P.M. the Claimant was using a "wheelbarrow grinder" to grind a boutet weld on the track.

The Claimant saw an I&R car, hi-rail, stop a short distance from where he was working. Gary Jacobs, the foreman present, told the Claimant to clear the track and watch himself when the car arrived but did not say anything concerning whether he should continue working. Jacobs then began talking to the driver of the vehicle, Tony Tabone. The Claimant returned to his work.

Several minutes later Tabone began driving the I&R car away and struck the Claimant in the head, allegedly causing him injury. The Grievant did not see the car coming because he was bent over the rail and did not hear it because of the noise caused by the grinder. Neither Tabone or Jacobs saw the Claimant working on the track.

#### POSITION OF THE PARTIES

The Carrier asserts that the hearing record clearly supports Carrier's determination of Claimant's guilt and the assessment of discipline. Claimant violated Safety Rules 3004 and 3230 when he failed to insure his own safety when working in front of the hi-rail car without remaining aware of what his fellow employees were doing. Claimant's lack of concern for his safety directly caused the accident. His lack of credibility is evidenced by his contradictory testimony concerning whether he was standing or bending over when struck by the car. Many awards from various tribunals have established that in circumstances such as these the Carrier can properly

enforce its safety rules. As the five-day suspension assessed is not expensive for the violation, the claim should be denied.

The Carrier further argues that the Organization's due process defenses are without merit. Assuming the Claimant did not receive a new safety book as alleged, he still should have known that "safety first" is the primary responsibility of each employee. In addition, the Claimant received the prior safety rule book in 1977 and attended daily safety rule readings from the new book.

The Organization initially contends that the charges against the Claimant are procedurally defective. The Claimant had not received the Safety Rule Book containing the rules under which he was charged. He cannot be held responsible for rules that were not issued to him. In addition, the discipline was predetermined by the Carrier, as evidenced by Carrier officials making derogatory references about the Claimant's accident.

Without abandoning its procedural contentions, the Organization also argues that the Claimant is not guilty as charged. The Claimant was not the cause of the accident, as he was doing his assigned work and would not be expected to hear the hi-rail car because of the noise from the grinding machine. Rather, the accident was caused by the carelessness of the foreman and car driver, neither of whom were disciplined. Prior awards clearly establish that it would be improper in these circumstances to allow the Claimant's discipline to stand.

OPINION OF THE BOARD

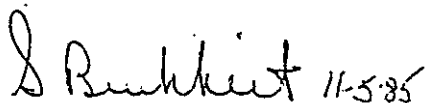
This Board has decided to sustain the claim. The Claimant was at most only partly responsible for the accident. Although it obviously would have been better if he had kept the car within his sight, the foreman did not tell the Claimant to quit working.

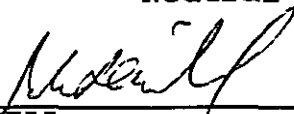
The foreman and car driver were at least equally, if not primarily, responsible for the accident. They did not carefully check to see if the track was clear before driving the car, despite the noise being made by the grinder Claimant was using.

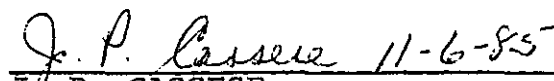
There is no evidence that the Carrier disciplined Jacobs and Tabone as well as the Grievant. The record is also silent concerning why only the Claimant was disciplined. This Board, therefore, cannot conclude that the Carrier assessed discipline with an "even hand". Accordingly, the claim shall be sustained.

AWARD

The claim is sustained. The remedy shall be consistent with Rule 27, Section 4 of the applicable Schedule Agreement. Monies owed, if any, shall be paid within 30 days.

  
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S. BUCHHEIT  
Neutral Member

  
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R. O'NEILL  
Carrier Member

  
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J. P. CASSESE  
Organization Member