

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25491  
Docket Number MW-25519

M. David Vaughn, Referee

PARTIES TO DISPUTE: ( (Brotherhood of Maintenance of Way **Employees**  
(Southern Pacific Transportation **Company** (Eastern Lines)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The ninety (90) days of suspension imposed upon Foreman P. H. Jackson for alleged violation of Rules "M200" and "M531" was without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement (System File MW-83-3/370-52-A).

(2) The charges leveled against the claimant shall be cleared from his record and he shall be **compensated** for all wage loss suffered.

OPINION OF BOARD: Claimant P. H. Jackson is employed by the Carrier as a Track Foreman. On **October** 13, 1982, he was assigned to an extra gang performing track work. The work **was** protected by a "Y" Order restricting train speeds between certain mile posts. The validity of the "Y" Order is not contested.

A Machine Operator under Claimant's supervision operated a ballast regulator outside the limits of the • Y. Order. Although testimony differed as to the circumstances under which the Operator came to perform the **work** outside the limits of the Order, it is clear that he did so with Claimant's knowledge. The significance of operating outside the limits of the Order is that the **work** must be provided proper flag protection. Claimant did instruct a Flagman to accompany the Machine Operator but failed specially to instruct him as to proper flagging procedures or otherwise to observe or supervise his performance.

The Flagman failed to flag properly and was found by two Carrier officials flagging with a red flag approximately 200 feet from the ballast regulator, instead of the two miles required by proper flagging procedures. Although required, no **torpedos** were in use. The failure properly to flag occurred at a **time** when a symbol freight was within approximately ten (10) miles of the machine.

After notice to Claimant, the Carrier suspended him for a period of ninety (90) days for violation of Rules **M200** and **M531**, which state in relevant part:

**"M200.** Trains must be protected against any known condition which may interfere with their safe passage at authorized speed. When track is unsafe for the passage of trains at maximum authorized speed, proper protection of trains must be provided. Protection is the first duty. Repairs must wait until proper signal; have been displayed..

**\*M531.** Foremen must first provide flag protection when any work is undertaken that will impair the track or structure for the safe passage of trains at normal speed:

Claimant requested and received a hearing concerning the incident. Based on the results of that hearing, the Carrier reaffirmed the discipline previously imposed. The Organization thereupon presented a claim on Claimant's behalf, which was denied initially and on appeal by the **Carrier**. The claim was then brought before the Bard.

The Organization argues initially that the Carrier failed to afford Claimant a fair hearing because the Carrier's Hearing Officer prejudged the case. It cites a remark by the Hearing Officer at the conclusion of his questions to Claimant:

"Mr. Jackson you are the foreman in charge and responsible for the safety of the machines working under you and the proper flagging methods applied, apparently you disregarded this responsibility..

The Organization argues **further** that Claimant satisfied his responsibilities in assigning an experienced Flagman to accompany the Machine Operator and that he should not be further held responsible for failing specially to instruct such an **employee** on proper procedures. The Organization asserts that the evidence does not show Claimant to have been negligent in his actions and that the claim should, therefore, be sustained.

The Carrier asserts that a Foreman is responsible for the safety of **employees** working under his supervision and for their compliance with the Carrier's rules, of which safety rules are the highest priority. The Carrier asserts that the record shows that Claimant failed to do all that he could to carry out his responsibilities and that he was, therefore, properly subject to discipline. With respect to the Hearing Officer's conduct, the Carrier argues that the record does not show that he prejudged the case or otherwise interfered with Claimant's fair hearing. The Carrier points out in support of the severity of the penalty that Claimant was involved in two prior safety-related infractions.

The Hearing Officer's statement at the conclusion of his questions to Claimant suggests that he had applied to the incident before him the recognized principle of Foreman responsibility. The quoted comment evidences disapproval of Claimant's conduct. The **comment** does not, however, require setting aside the discipline. A Carrier official serving as a Hearing Officer cannot be judged by the **same** standards as **an** outside neutral. That is not to say that a Carrier's Hearing Officer is free to run the hearing without regard to fairness. A claim may be sustained based on Hearing Officer conduct where the Officer's actions result in the denial of Claimant's opportunity to present substantive evidence or testimony in support of his position or otherwise deny Claimant fundamental due process.

In this case, the factual record appears complete **and** the issues to have been properly joined. The Organization made no assertion at or subsequent to the hearing that it **was** denied the right to introduce evidence, make its arguments, or otherwise build a complete record regarding the incident. There is **no** indication that the Hearing Officer's remark, made at the conclusion of his questions to Claimant, interfered with the Organization's presentation of its case. Under such circumstances, the Organization's argument that the claim must be sustained based on Hearing Officer misconduct must be rejected. See, Third Division Awards 25039 and 25187.

With respect to the merits of the dispute, Board precedent is clear that a Foreman is responsible for the actions of the **employees** under his supervision, including their compliance with all applicable safety rules. Clearly, compliance with safety rules is of the highest priority. A Foreman, under some circumstances, escape discipline **for** noncompliance by employees under his supervision by showing that he did everything possible to ensure compliance and that the violations occurred for **reasons** totally beyond his control. Here, however, Claimant failed to instruct his Flagman **or** otherwise assure that **employee's** proper compliance with flagging procedures under circumstances which he knew or should have known required special precautions: performance of work outside the limits of the restrictive Order during a time in which traffic was expected. Whether the Operator performed the work with Claimant's approval or over his objections is of limited relevance. The Operator performed the work with **Claimant's** knowledge and with at least his acquiescence, and Claimant had an affirmative responsibility to ensure that he was protected by proper flagging. The record shows that was not done.

There is substantial evidence in the record of Claimant's failure to do all that he could to prevent the violation. Under such circumstances, the Board will not substitute its judgment for that of the Carrier that Claimant's conduct constituted a disciplinable offense. See Third Division Award 20238.

The penalty of ninety (**90**) days suspension is severe; however, the importance of safety and the genuine risk of serious accident to which Claimant contributed support the discipline sufficiently that the Board cannot conclude that it was arbitrary or excessive. See Third Division Award 19998. Claimant's two previous safety-related infractions further support the severity of the discipline imposed. Accordingly, the claim must be, and it is, denied.

**FINDINGS:** The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the **Employees** involved in this dispute are respectively Carrier and **Employees** within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

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Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

  
Nancy J. Dover - Executive Secretary

Dated at Chicago, Illinois, this 23rd day of May 1985.

