

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30121
Docket No. MW-30299
94-3-92-3-21

The Third Division consisted of the regular members and in addition Referee Robert T. Simmelkjaer when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(CSX Transportation, Inc. (former
(Louisville and Nashville Railroad Company)

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

1. The dismissal of Relief Foreman P.L. Johnson for alleged violation of CSX Transportation Rules 810, 811, 815, 812, 813 and CSX Transportation Operating Rule 501 on February 12, 1991 and violation of CSX Transportation Operating Rule 500 on February 20, 21 and 22, 1991, was without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement [System File 13(12)(91)/12(91-469) LNR].
- 2) The Claimant shall be reinstated to service with seniority and all other rights unimpaired, his record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered.

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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 waived right of appearance at hearing thereon.

By letter dated February 20, 1991, the Claimant was charged with violation of CSX Transportation Safety Rules 810, 811, 812, 813, 815 and CSX Transportation Operating Rule 501 in connection with his responsibility for being struck by a moving railroad car

on February 12, 1991, at Bessemer, Alabama. The second notice dated February 26, 1991, involved his violation of CSX Operating Rule 500 for being absent from work without authority on February 20, 21 and 22, 1991.

Claimant and two Trackmen had finished cleaning the main line track and were proceeding to clean the yard tracks when a southbound train slowed and appeared to be coming to a full stop. Subsequently, Claimant decided to give the Engineer a proceed signal while standing on adjacent Track No. 6 at the south end of a three car cut. After providing the signal to the Engineer, Claimant was struck by the lead car on Track No. 6.

The accident occurred when a fourth car (a loaded gondola) north of the three standing cars, unbeknownst to Claimant and the Trackmen, started moving south and collided with the three cars. Despite the brake on the three cars and a wheel chock on the loose car, the car still moved the three cars resulting in a shoulder and chest injury to Claimant.

Substantial evidence established that Claimant violated several Carrier Rules. At the time of the accident, Claimant told the Assistant Roadmaster that "he was leaning against the end of the car when it struck him in the chest and knocking him on his butt." The Roadmaster testified that Claimant informed him that "he was struck by the cut while stepping across the yard track No. 6." Moreover, the Engineer testified that an individual whom he believed to be Claimant in giving the proceed signal "...was holding, I know he waved and was sort of leaning out, like peeking around the car...." According greater weight to Claimant's contemporaneous utterances at the time of the incident as distinguished from Claimant's subsequent version of the incident, the Board upholds the Carrier's findings of guilt.

Among the Rules violated by the Claimant were Carrier Safety Rule 810 which states:

"Employees must expect the movement of trains, cars or equipment on any track, at any time, in either direction."

Claimant's negligence also constituted a violation of Rule 811 which states:

"When required to be on or around tracks, employees must be alert and watchful and must keep out of danger... Employees must look in both directions before stepping or getting close to any track."

We find the Carrier's decision that Claimant was guilty as charged supported by substantial evidence. However, the Board finds that mitigating circumstances warrant reduction of the penalty imposed by the Carrier.

A series of unusual events contributed to the mishap, namely: the unexpected movement of a car loaded by a private contractor, the failure of the brakes on that car and three other cars to prevent Claimant from being struck by the lead car, and the likelihood that the movement of the train on the main track masked the sound of the approaching car depriving Claimant of ample warning.

In connection with the second Investigation concerning the charge of unauthorized absence on February 20, 21 and 22, 1991, the Board finds that charge also supported by substantial evidence. However, the Board also finds mitigation. The Claimant was off work on those three days because of the injury sustained in connection with the first charge. He apparently timely and properly furnished the Carrier with the proper injury reports and the Assistant Roadmaster had contact with him on February 20, 1991.

On balance, the Board concludes that Claimant should be severely disciplined, but given the foregoing mitigating evidence, deems excessive the penalty of termination. Applying the principle that discipline should be corrective and progressive rather than punitive, the Board notes that eleven years have elapsed since Claimant's last discipline.

In cases similar to the instant case, the Board "has taken the position that time held out of service is sufficient to impress an employee with the severity of his conduct." See Third Division Award 22965. Accordingly, the Claimant shall be reinstated with seniority and other rights unimpaired, but without backpay.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Catherine Loughrin / lw
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 4th day of April 1994.