

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 32760
Docket No. MW-33877
98-3-97-3-387

The Third Division consisted of the regular members and in addition Referee James E. Conway when award was rendered.

(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(The Kansas City Southern Railway Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The five (5) day suspension assessed Machine Operator C. J. Gholar for his alleged responsibility in connection with the injury he sustained on September 12, 1995 was without just and sufficient cause and based on unproven charges (Carrier's File 013.31-521).
- (2) Machine Operator C. J. Gholar shall now be compensated for all wage loss suffered and his record shall be cleared of the charges and discipline.”

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.

Claimant, a Machine Operator working at New Orleans, Louisiana, injured his foot on September 12, 1995 when he slipped while attempting to board a tie handler. Although he was working with Laborer Doyle Coleman and Foreman Troy Jackson at the time, Coleman was in a truck and Jackson was approximately 100 yards away. Neither saw Claimant lose his footing, which resulted in a cut requiring medical attention at a nearby hospital emergency room.

Upon completing its investigation, Carrier determined that Claimant was guilty of violating the General Notice, Rule L; Rule N; Rule H-168 (c); Rule H-220; and Rule H-338 of the Rules and Regulations of The Maintenance of Way and Signal Department effective October 1, 1993. On December 4, 1995 he was suspended from service for five days. The issue for consideration by this Board is whether that suspension was for good cause.

The evidence and testimony of record reveal that it was raining on the day of this accident. As Claimant was getting on the tie crane he was operating he lost his balance, causing his right foot to slip and go between the swivel deck and turntable. The Carrier takes the position that had Claimant stepped directly onto the non-skid surface of the machine, the accident would not have occurred. In support of that assertion, it offered in evidence nearly three dozen photographs of the accident scene and the tie handler involved, shot from various angles the day of the accident.

The record before the Board, unfortunately, contains only photocopies of those pictures. Because of their poor quality, they are not instructive on the issues before us. Neither party disputes that the machine itself was in good working order and in no way responsible for Claimant's injury. The parties are, however, in sharp disagreement on the question of whether it was necessary to have stepped onto a portion of the lower deck some 24 inches above the ground, as Claimant did, in order to be in position to climb onto the non-skid surface of the step before occupying the seat of the machine. Carrier appears to argue that Claimant could have accessed the machine directly from the non-skid surface, although that position is difficult to reconcile with the testimony of its Manager of Work Equipment during the investigation that an employee needing to get into a machine positioned in the manner of Claimant's on the date of this accident "would have to step on the lower deck and step on the step and climb into the seat."

Carrier's common sensible rules are not in question. Our issue is whether Carrier has satisfactorily borne its burden of explaining specifically how Claimant might

have gained entrance to his machine in a manner that could have avoided this accident. Based upon our review of the evidence and testimony of record, we find that Carrier has failed to meet that burden. To establish the fact that an injury occurred, as this Board has held repeatedly, does not mechanically establish negligence. The Carrier must submit convincing proof on that issue, and while the photographs it sponsored may well have been serviceable on the property in that regard, they were of no assistance to this Board in this case.

For the reasons stated above, the claim is sustained. The five day suspension assessed to Claimant shall be removed from his record and he shall be made whole.

AWARD

Claim sustained.

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 23rd day of September 1998.