Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 33025
Docket No. MW-34094
99-3-97-3-629

The Third Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(CSX Transportation, Inc.

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The discipline imposed upon Machine Operator C. E. Runyon [thirty (30) days' actual suspension and disqualification from operating CSX machinery for one (1) year] for his alleged responsibility in connection with the personal injuries sustained by employes D. E. Salisbury and S. B. Pettit on July 23, 1996 was harsh and unjust [System File S-TC-2161/12(96-1196) CSX].

(2) The Claimant's record shall be cleared of the charge leveled against him. Moreover, he shall '*** be made whole for all monetary loss incurred while held out of service, plus any time lost account not being permitted to operate a "lifting" machinery for one year. In addition, we request that Mr. Runyon be entitled to all days he was held out of service, plus any days he was denied work account of his one year restriction to be counted toward his 1996 and 1997 vacation qualifying time, plus all other benefits.'"

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.

On July 23, 1996 Claimant was operating a gallion crane. Two Trackmen were instructed to gather six kegs of spikes. A length of rail was laying over several kegs of spikes. Claimant used the crane's hook to raise the rail. The Trackmen were retrieving the kegs of spikes when the hook slipped and fell, injuring the Trackmen.

On July 25, 1996 the Carrier instructed the Claimant to attend an Investigation on August 1, 1996. The notice charged him with gross negligence, carelessness, failure to perform his duties safely and properly, creating an unsafe condition, and failure to follow instructions. The Investigation was held, as scheduled. On August 16, 1996 the Carrier notified the Claimant that he had been found guilty of the charges and was suspended for 30 days and disqualified from operating machinery for one year.

The dispute turns on whether the Carrier proved the charges by substantial evidence. The mere fact of an accident does not establish an employee's culpability. The Carrier contends, "The violation was two-fold: 1) [Claimant] failed to properly secure the rail with rail tongs (dogs) instead of a hook, and 2) he allowed the Trackmen to work underneath the rail while it was suspended by the crane."

There is no dispute that the Claimant used the hook instead of the rail tongs to secure the rail. However, there was evidence that, because of the way in which the rail was situated, the rail tongs could not be used or could not be used safely. Although the Roadmaster testified that the Claimant should have used the rail tongs instead of the hook, he did not address the way in which the rail was situated, and the Carrier introduced no evidence to show that under the circumstances presented the rail tongs could have been used and could have been used safely. Accordingly, we are unable to find substantial evidence that the Claimant acted improperly in forgoing the rail tongs for the hook.

The Claimant testified that when operating the crane, he could not see if the Trackmen were working under the suspended rail. There is no evidence that the Claimant allowed the Trackmen to work underneath the suspended rail or had any responsibility for where the Trackmen positioned themselves. The Claimant testified

that he was instructed to use the crane to lift the rail. There is no evidence that in following such instruction, the Claimant was culpably responsible for the injuries sustained by the Trackmen. Accordingly, we find that the Carrier failed to prove the charges by substantial evidence.

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 25th day of January 1999.