

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25442
Docket Number MW-25401

M. David Vaughn, Referee

(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(The Chesapeake and Ohio Railway Company

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

(1) The discipline imposed upon Messrs. D. Russell (ten work days of suspension). J. Conley (thirty days of overhead suspension for a period of six months), D. Higgins (ten days of overhead suspension for a period of six months) and R. Holman (five days of overhead suspension for a period of six months) for alleged "fault for damages to Jackson Tamper PTF-717 and Ballast Regulator BRD 522" on July 11, 1982 was without just and sufficient cause (System File C-D-1406/MG-3596).

(2) The claimants' respective records shall be cleared of the charges leveled against them and they shall be compensated for all wage loss, if any, suffered.

OPINION OF BOARD: At the time of the claim, Claimant J. Conley was employed by the Carrier as a Track Foreman and Claimants R. Holman, D. Higgins and D. Russell were employed as Machine Operators. On July 11, 1982, Claimant Conley was in charge of the movement of three pieces of self-propelled maintenance equipment from one location to another, in convoy, as part of the work of a resurfacing force. The first piece of equipment in line, Tamper 707, was operated by Claimant Holman, the second, Tamper 717, by Claimant Higgins, and the third, a Ballast Regulator, by Claimant Russell. Claimant Conley was riding on Tamper 707. At Owens, Ohio, Tamper 707 stopped and Tamper 717, which was slowing but not stopped, was hit by the Ballast Regulator. Tamper 717 and the Ballast Regulator were damaged.

After notice to Claimants, the Carrier conducted an investigatory hearing concerning the incident and, based on the results of that hearing, suspended Claimants for the periods stated in the claim. The Carrier concluded that Claimant Conley failed properly to have instructed his employees before beginning the move and to have failed properly to have exercised his responsibility to control the speed, spacing, and signalling between the units during the movement. Claimants Holman, Higgins, and Russell were found by the Carrier to have failed to maintain proper speed and spacing and to have failed to have signalled their changes in speed.

By letters dated September 17, and September 30, 1982, the Organization appealed the suspensions of Claimants Conley, Holman, and Higgins to successive steps in the grievance process, and by letters dated September 23 and November 29, 1982, the Carrier denied the claims of those employees.

The Organization argues with **respect** to the claims of Conley, **Holman**, and Higgins that Claimants did comply **with** their respective obligations to instruct **and** follow instructions and with applicable rules regarding **signalling**, speed, and spacing. It asserts that the collision was the result of excess grease on the rails, an occurrence which it asserts could not reasonably have been anticipated. The Organization concludes that the accident was not the result of negligence on the part of Claimants and that the record does not, therefore, support the imposition of discipline.

The Board is not persuaded by the Organization's arguments. The record shows that Claimant Conley failed prior to undertaking the movement to brief the operators on **safety or** on his intentions for the conduct of the move. Circumstantial evidence suggests that Claimants were operating at excessive speed and with insufficient distance between them, conduct for which Claimant Conley was responsible as Foreman in charge of the move. The record also shows that **Conley gave** no or insufficient signals at **Owens** that he was stopping, nor did he ensure that the operators of the equipment who were under his supervision did so.

The record shows further that Claimant operators were all experienced, that they knew that grease on the running surface of the rails **makes** stopping extremely difficult, and that such **grease** is frequently found in the vicinity of turnouts.. Claimants were aware that maintenance of way equipment must be operated at low speeds, **particularly** through turnouts. The collision is itself proof that Claimant Russell was running at a speed and with separation from the other equipment insufficient for safe operation under the circumstances and/or that he was **inattentive** to his duty to keep a constant lookout for obstructions ahead.

The evidence against Claimants Conley, Higgins, and **Holman** demonstrates that they failed adequately to signal that they were stopping. As indicated, there is **circumstantial** evidence that claimants were **operating** at excessive speed. Testimony indicated that the damage to the equipment was produced by speed higher **than** that stated by all the Claimants. The Organization correctly ascribes to the Carrier in discipline claims the burden of proof with respect to each element of the offense and points out that mere speculation will not support discipline. However, support consisting in part of circumstantial evidence does not 'require that the discipline be overturned.

Where there is, as here, substantial evidence to support the Carrier's decision, the Board will not disturb the discipline imposed. See, **e.g.**, Third Division Award 16280. Although circumstantial evidence may in many circumstances be entitled to less weight than direct evidence, the test remains the weight of evidence and not simply its nature. The Board concludes that there is substantial **evidence in the record** against all Claimants and, accordingly, sustains **the imposition** of the discipline.

The **Organization argues** that, even if there was culpability on the part of some or all of the Claimants, the differences in the degree of discipline imposed against them by the Carrier make its actions arbitrary. The Organization is correct that where Claimants have relatively equal service and employment records, imposition on **employees** of different levels of discipline which is not accounted for by differences in the degree of culpability of each **employee** will not be sustained.

Here, however, the Carrier appears to have assessed the penalties in rough proportion to the Claimants' overall degrees of fault. The **Board** cannot conclude on the basis of the record that the penalties assessed **were** arbitrary and declines, therefore, to disturb the Carrier's determination and **imposition** of different levels of discipline.

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

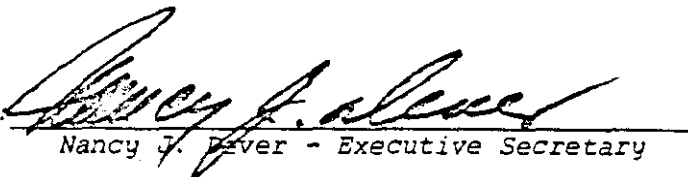
That the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois this 30th day of April 1985.