

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26730
Docket Number MW-27003

Elmer Thias, Referee

PARTIES TO DISPUTE: ((Brotherhood of Maintenance of Way Employees
(National Railroad Passenger Corporation (Amtrak)
(Northeast Corridor

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

1. The five (5) days of suspension imposed upon EWE 'C' Ballast Regular Operator J. W. McSorley for alleged violation of Rule 'H' on August 7, 1984, was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File NEC-BMWE-SD-1097D).

2. The claimant's record shall be cleared of the charge leveled against him and he shall be compensated for all wage loss suffered."

OPINION OF BOARD: The Claimant in this case had been employed by the Carrier for a period of seven years at the time of the incident giving rise to the dispute, namely August 7, 1984. On that date, and for some time prior thereto, the Claimant was assigned as an E.W.E. "C" Machine Operator. As matters would have it on that date, the Claimant was starting to "travel" Ballast Regulator #4249, which he regularly operated, from Thorn Interlocking to Downingtown Yard when he became involved in a collision with Tamper #0408 (Torsion Beam).

As a consequence of the collision, the Carrier's Track Supervisor conducted a somewhat formalized Investigation on August 9, 1984, at which testimony was taken and transcribed from the Claimant, the gang's Truck Driver, who was substituting for the regular operator of Tamper #0408, and from the Track Foreman. This testimony was taken individually and separately with no cross-examination had. Carrier's Equipment Engineer also interviewed the three above-mentioned employees plus another and submitted a written statement concerning the collision.

Under date of August 27, 1984, the Claimant was charged as follows:

"Violation of rule 'H' Amtrak Rules of Conduct, that part which reads, 'Employees must take every precaution to guard against loss and damage . . .'

Specification a) In that on August 7, 1984 at approximately 12:01 p.m. you failed to maintain sufficient distance between equipment while operating Ballast Regulator #4249 on #2 track at Thorn Interlocking, resulting in a collision with Tamper #0408 which caused \$8,000 damage to the Lining Buggy portion of that Tamper."

A Trial was held on September 5, 1984. The Claimant was present and represented.

Initially, the Organization objects that the Carrier failed to conduct a fair and impartial trial on the basis that two employees, whom it characterizes as "neutral eye-witnesses," and who were located at the tower in West Downingtown Yard, were not called as witnesses at the Trial. The record does not make clear that the two witnesses in question actually witnessed the collision but it is at least clear that they witnessed the scene after the collision had occurred. Likewise, there is testimony in the record that these two potential witnesses had heard the Truck Driver give a horn signal for the stop he made with Tamper #0408, which he was "traveling" at the time. Neither the Claimant nor the Organization has suggested any factual testimony which the so-called "neutral eye-witnesses" could have presented that was not otherwise developed during the Trial. This Board has recognized the Carrier's responsibility to conduct a full and fair Trial in which all of the pertinent facts are developed. On this record, we are confident that has been done.

The Organization offers a second objection in that the Equipment Engineer interviewed three of the employees directly involved with the collision and obtained written statements from those employees without notification they would be permitted representation by the Organization if they so desired. We summarily dismiss this objection on the basis that it has neither been sufficiently developed nor substantiated to permit the Board to reach a determination.

Turning to the merits of the discipline, we believe a number of factors are relevant and need be considered. The Carrier takes the position that the Claimant was negligent while operating the Ballast Regulator in that he did not keep that equipment at a safe distance behind the Tamper. Principal support for this position comes from the testimony of the Track Supervisor and Equipment Engineer who appeared as witnesses at the Trial on September 5, 1984.

The Track Supervisor testified that on the basis of his investigation, he felt there was insufficient distance between the two machines. The Equipment Engineer testified that on the basis of his investigation, he felt the cause of the collision was the Claimant following too close for conditions. It is noted that neither the Track Supervisor nor the Equipment Engineer witnessed the collision; their testimony was derived from information obtained from employees involved in the collision. Additionally, one observed the site on the following day and the other inspected the machines when they arrived at Downingtown.

During the Trial, testimony was developed indicating that the Ballast Regulator was not in good working order. Mention was made by several of the witnesses that this equipment had numerous leaks in the hydraulic system and that the brake system was not functioning properly. In this regard, testimony also indicated that a mechanic was called out to make repairs in the braking system after the collision. The mechanical deficiencies of the Ballast Regulator are suggested as having a causative effect to the collision because some of the hydraulic fluid may have been on the rails, which, in combination with the deficiencies in the brakes, caused the Regulator to skid over a distance sufficient to permit the Claimant to put the Regulator in reverse before the collision occurred.

From the inception of the collision the Claimant maintained that the principal cause of the collision was the lack of qualifications on the part of the employee who was "traveling" the Tamper at the time. It developed that the employee who was regularly assigned to operate the Tamper had a dental appointment and he was excused from duty to keep that appointment at approximately 11:30 A.M. Then, the Foreman instructed the gang's Truck Driver to "travel" the Tamper from the home signal at Thorn to Downingtown West Yard. As a result of the considerable testimony developed over the Truck Driver's qualifications on the Tamper, the parties are sharply divided on the point of his qualifications.

It is not our function to decide the qualifications of the Truck Driver to properly operate the Tamper; that question is not particularly in point. Instead, our consideration is given to whether the Claimant received a recognizable stop signal when the Truck Driver stopped the Tamper in front of the tower. The Truck Driver testified that he blew the horn on the Tamper two or three times prior to stopping the machine, but the Claimant insists that he did not hear the horn. The regular Tamper Operator was called as a witness during the Trial and was interrogated on the point. He testified that the procedure used when stopping was:

"To flash the (quartz) lights because they are visible, you cannot always hear the horn."

It may be added that both the regular Tamper Operator and the Truck Driver, who was substituting for the regular operator when the collision occurred, testified that the substitute operator had not previously "traveled" the involved Tamper. Also, the substitute operator testified that he had never had to signal for a stop prior to the date of the collision.

Carrier summarizes its position in support of the discipline imposed by pointing out that the Claimant was experienced, fully qualified and aware of the Rules governing the movement of track cars. The Claimant was only 60-75 feet behind the Tamper and that distance was inadequate to safely stop the Ballast Regulator as evidenced by the collision with the Tamper.

While the distance the Claimant maintained in following the Tamper is certainly a significant and valid consideration in this dispute, there are other factors present for which the Claimant was not responsible. The Ballast Regulator was not in good order; both the hydraulic system and the brake system were faulty to a degree and the Regulator was being taken to the Downingtown Yard for the specific purpose of having repairs made to it. Testimony is that some of the hydraulic fluid leaked on the rail. Finally, an inexperienced substitute operator "traveled" the Tamper but a short distance when he stopped and the Claimant did not receive the customary signal which he recognized as indicating a stop. While it may be offered that all of these other factors should have been taken into consideration by the Claimant in order to safely stop the Ballast Regulator, the proof should be clear that the distance maintained was not safe. Negligence on the part of the Claimant is not demonstrated simply because a collision occurred.

As in all cases of this nature, we are bound by the evidence presented by opposing factions at the Hearing. We find from a review thereof that there was insufficient substantial evidence to enable Carrier to conclude that Claimant was negligent, given the other factors mentioned hereinbefore.

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 violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: 

Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 11th day of December 1987.