

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISIONAward No. 31217  
Docket No. MW-31731  
95-3-94-3-5

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes  
(Union Pacific Railroad Company

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

- (1) The thirty (30) day suspension imposed upon Track Machine Operator H. Francis for alleged violation of General Rules A,B,I, 607(1)(2), 4000 and 4001, in connection with an accident that occurred on August 5, 1992, was arbitrary, capricious, without just and sufficient cause and in violation of the Agreement (System File D-176/930084).
- (2) As a consequence of the violation referred to in Part(1) above, the Claimant's 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 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 waived right of appearance at hearing thereon.

Claimant was operating a ballast regulator when he rear-ended a tamper causing about \$4500 worth of damage. It appears that the tamper was ahead of the regulator, it then backed up, stopped and while stopped was rammed. Fortunately no one suffered an injury.

A timely Investigation was scheduled and following same, Claimant was suspended for 30 days.

The challenge to the discipline is both procedural and on failing to substantiate the charges. The procedural is based upon the Carrier's furnishing the Board less than a complete transcript. As Yogi Berra said "Its Deja Vu all over again." See Third Division Award 31148.

In this instance, Page 69 is missing. Whether it was the copier, the collator or whatever, it is clear no one checked before copies were furnished the Board.

To determine if the administrative error was of such magnitude that it would nullify the disciplinary process will have to be determined on a case by case basis.

In the on-property handling, no one mentioned an incomplete transcript, thus both parties had a full transcript upon which to base its respective positions. The missing page contains the testimony of the Tamper Operator as this was a joint investigation. Claimant has not in anyway been deprived of a final review of the dispute nor has this Board detected any attempt at chicanery or fraud.

Regarding the imprecise notice of charges, a review hereof leads this Board to recognize the notice of charges as being adequate. Despite Claimant's representative plea of no knowledge of what Claimant did that was wrong, he did an excellent job of defending Claimant.

Regarding the facts as gleaned from the transcript and the on-property handling, Claimant was operating a ballast regulator that had no working headlights for months. In the process of pulling gravel from the right shoulder of track, Claimant, who was sitting sideways on the machine, did not see the tamper which had backed up, then stopped in front of the regulator. There is also testimony that the tamper operator did not see the regulator as he testified only to seeing dust. If the headlights of the regulator had been working and been on the regulator just perhaps would have been visible at least enough to alert the tamper operator of the regulator's position.

Claimant had an obligation to be constantly aware of where he was at as well as being aware of what he was doing. He has to accept some responsibility for what occurred. If he could not see because of the dust, perhaps he should have stopped all movement until he had good visibility. But then it was near the end of the work day, the track warrant was expiring and the Supervisor's method of conveying a sense of urgency by slamming his hard hat to the ground with enough force to break it and throwing a rock at the cab of the tamper to get the Operator's attention, plus the dust raised by the regulator and no working headlights may have contributed to the cause.

The 30 days out of service, under these conditions and when considering a clear record of almost 11 years of service is somewhat arbitrary. The discipline is reduced to 15 days. Claimant is to be compensated for all wages lost commencing with the 16th day until he was reinstated, as provided for in the Agreement.

AWARD

Claim sustained in accordance with the Findings.

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 1st day of November 1995.