Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31628
Docket No. MW-31946
96-3-94-3-299

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
(Burlington Northern Railroad Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The dismissal of Track Inspector D. G. Eckstrom for alleged violation of ". . . General Rules A and I and Rules 62 and 63 of the Maintenance of Way Rules . . ." was arbitrary, capricious and on the basis of unproven charges (System File C-93-D070-3/MWA 93-7-12A).

2. As a consequence of the violation referred to in Part (1) above, the Claimant shall be reinstated to service with seniority and all other rights unimpaired, his record shall be cleared of the charge 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 were given due notice of the hearing thereon.

On December 20, 1992, Claimant was involved in a crossing accident, when the hi-rail truck he was operating collided with a 1992 Chevrolet S-10 pickup truck. On December 22, 1992, Claimant was notified to attend an Investigation on December 29, 1992 concerning "... your alleged failure to pass over a public crossing ... in a safe manner while operating Hi-rail unit #11081...." The Investigation was postponed several times and held on January 21, 1993. On February 17, 1993, Claimant was advised that he had been found guilty of violating General Rules A and I and Maintenance of Way Rules 62 and 63, and had been dismissed from service.

Following the accident, Claimant was given a drug test. The drug test was positive for marijuana and cocaine. On December 6, 1992, Claimant was advised to attend an Investigation on January 4, 1993, concerning his alleged violation of Rule G. Neither Claimant nor his representative appeared at the Investigation on January 4, 1993. Subsequently, however, Claimant submitted a letter signed by himself on January 8, 1993, and by the Local Chairman on January 21, 1993, admitting a violation of Rule G and waiving right to Investigation. The letter also contained conditions concerning participation in an employee assistance program and providing that Claimant might be returned to service "solely as a matter of management leniency."

The Organization contends that Carrier failed to prove the charge by substantial evidence. The Organization observes that Claimant testified that he slowed down as he approached the grade-crossing, checked carefully for traffic and proceeded across the intersection only when he was sure that it was clear. The Organization contends that the pickup, being white in color, may have been lost against the snow that was present. The Organization also points to obstructions in the area directly to the east, which was the direction from which the pickup was traveling. In the Organization's view, Carrier is seeking improperly to infer Claimant's responsibility from the mere fact that an accident occurred.

The Organization further maintains that the penalty of dismissal violated the Agreement. The Organization contends that Claimant was the victim of disparate treatment. In support of its position, the Organization cites eight other crossing accidents in which no discipline was imposed. Furthermore, the Organization observes that Claimant had no disciplinary action for eight years prior to the accident, and contends that dismissal was arbitrary and excessive. In the Organization's view, Claimant successfully completed rehabilitation and, therefore, the accompanying Rule G violation should not be considered in evaluating the discipline.

Carrier contends that it proved Claimant's guilt by substantial evidence. Carrier

argues that the record established that Claimant was traveling at an excessive speed at the time of the accident and that Claimant's attention was diverted from the roadway by paperwork he was reviewing.

Carrier rejects the Organization's contention of disparate treatment, arguing that every crossing accident must be evaluated on its own facts. Carrier further contends that dismissal has been upheld in appropriate vehicle accident cases and that dismissal was warranted under the circumstances in the instant case, including Claimant's prior record and the accompanying Rule G violation.

The Board has examined the record carefully. We find that there is substantial evidence to support Carrier's determination of guilt. We agree with the Organization that the mere fact of an accident, standing alone, cannot support the imposition of discipline. The record in the instant case, however, contains considerably more evidence of Claimant's culpability.

On the accident report, Claimant estimated his speed at 25 miles per hour. The Roadmaster testified that this was not a prudent speed to be traveling at this crossing. The Roadmaster suggested that a safe speed would be approximately two or three miles per hour. Furthermore, Claimant testified that he momentarily glanced down from the road to pick up his line up.

We do not agree with the Organization that snow or obstructions accounted for the accident. The Claimant testified that there was no fresh snow. The road was dry. There was some snow remaining on the nearby plants, but there were no conditions that would have completely hidden a pickup truck, even if it was white in color. Furthermore, to the extent that there was concern over snow and obstructions, these concerns would not excuse the accident, but rather would question why Claimant did not exercise even more caution that unusual. Accordingly, we conclude that Carrier proved the charges by substantial evidence.

Turning to the penalty imposed, we find no evidence of disparate treatment. The mere fact that other crossing accidents were treated differently does not establish disparate treatment. Disparate treatment means that similarly situated employees have been treated differently. Without having any detailed facts and surrounding circumstances of the other incidents, we are unable to say that the employees involved were situated similarly to the Claimant.

Through 1985, Claimant was disciplined several times. However, between 1985 and the incident in question, Claimant's record was free of disciplinary action. Nevertheless, we find that there were several aggravating factors. Claimant was proceeding at a rate of speed far in excess of a prudent speed. The driver of the pickup truck was injured and both vehicles sustained damage. Moreover, at the time of the accident, both marijuana and cocaine were present in Claimant's system.

We do not agree with the Organization that Claimant's successful participation in an employee assistance program makes his admitted Rule G violation irrelevant. Rule G prohibits the use of controlled substances while subject to duty, regardless of the circumstances which might lead to testing in accordance with the Agreement. Even if conditions exist under which Carrier might exercise its exclusive right to grant leniency for the Rule G violation alone, this would not preclude consideration of the presence of controlled substances in the Claimant's system as a factor in assessing his level of culpability for the accident.

We observe that under appropriate circumstances, responsibility for a vehicular accident has been held to justify dismissal. See Second Division Award No. 9367. Our role is not to decide what discipline we would impose were we to decide the case de novo. We are limited to reviewing the discipline that Carrier imposed. Under the circumstances present herein, we are unable to say that dismissal was arbitrary, capricious or excessive.

AWARD

Claims denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 29th day of August 1996.