Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32140
Docket No. MW-32715
97-3-96-3-12

The Third Division consisted of the regular members and in addition Referee Hyman Cohen when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Southern Pacific Transportation Company
( (Eastern Lines)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The discipline (suspension pending hearing and subsequent dismissal) imposed upon Machine Operator A. R. Garza for alleged violation of Rules 1.1, 1.1.2 and 1.6 of the Safety and General Rules for all Employes and violation of Rule 72.13.32 of the Chief Engineer's Instructions for Maintenance of Way and Engineering, in connection with '... your responsibility in the collision of the tamper you were operating near Longfellow, Texas March 14, 1995 with two parked machines resulting in damage, loss of production, unnecessary expense to the company and personal injuries.', was without just and sufficient cause and on the basis of unproven charges (System File MW-95-136/MW D95-16 SPE).

(2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be reinstated to service with seniority, vacation and all other benefits unimpaired, his record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered beginning March 15, 1995 and continuing until he is returned to service."

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.

Prior to his dismissal, the Claimant was employed as a Machine Operator. On March 14, 1995, the Claimant was assigned to Surfacing Gang T-1 and the Machine Operator of a Jackson 6700 Tamper.

Following the completion of his assignments on March 14, he was proceeding, in an easterly direction to another work site. Ahead of the 6700 Tamper was a Mark 2 Tamper operated by T. Luna and a Ballast Regulator that was operated by Machine Operator B. G. Edrington. According to Edrington, he called his Supervisor T. E. Pledgor and told him that he "needed to warn the other machines that the rail was very oily and they needed to slow down because they were stopped around the curve." He said that "he had slid a couple of pole lengths." Edrington told Pledgor that he was unable to communicate with the Claimant on the 6700 Tamper.

After Edrington advised Pledgor that he had trouble stopping the Ballast Regulator, Pledgor called the Claimant and "informed him of what was ahead." According to Pledgor the Claimant said "O.K."

The Claimant was operating the 6700 in reverse on a downhill grade. He said that as soon as he received Pledgor's call, he applied the brakes. Upon doing so, the 6700 Tamper skid and collided with the Mark 2 Tamper which was then driven into the Ballast Regulator.

The collision caused damages to the three vehicles. Personal injuries were also sustained by both Luna and the Claimant.

Following the collision, the Carrier instructed the Claimant to submit to a urinalysis test. The test was negative for alcohol or illegal substance.

Tie Production Supervisor Abel Sosa investigated the incident and determined that the cause of the collision was the excessive speed of the 6700 Tamper that was operated by the Claimant. He drew this conclusion from the skid marks on the rail from the point of impact to the point where the three vehicles came to rest.

Based upon the Carrier's investigation, the Claimant was charged with several Rule violations. After formal Investigation, the Claimant was discharged for negligent operation of the 6700 Tamper.

The key issue to be addressed is whether the Claimant was operating the 6700 Tamper at an excessive speed when he applied the brakes. The Claimant testified that the speed of the Tamper was "about 12 miles per hour." Labor Driver R. Cruz who was riding in the 6700 Tamper with the Claimant estimated that "we were going 15 MPH when he applied the brakes * *."

It is undisputed that there was excessive grease and oil in the location where the events leading to the collision occurred. Despite the excessive grease and oil, the Carrier relies on circumstantial evidence to support its contention that the Claimant was operating the 6700 Tamper at an excessive speed. Subsequent to the collision, the Carrier inspected the area. The Carrier determined that skid marks from the point of impact or where the vehicles came to rest, extended 329 feet.

In light of the length of the skid marks, this Board has inferred that the Claimant was operating the 6700 Tamper at an excessive speed. Had the Claimant operated the 6700 Tamper at a reasonable speed, the vehicle would not have skid 329 feet from the point of impact. The excessive speed of the vehicle caused considerable damage to the three vehicles and personal injuries to both the Claimant, himself, and to Luna.

The Carrier also conducted a test on March 21, 1995, a week after the collision. Work Equipment Supervisor LeRose tested a Jackson Tamper, at various speeds on a

track which had light grease. One of the tests showed that the tamper stopped at 30 feet when the Operator pumped the brakes at 11 to 12 miles per hour. In a second test, the vehicle stopped at 216 feet when the tamper was traveling at a speed of 31 miles per hour. In yet another test, the vehicle stopped "627 feet by slamming on the brakes" when the Tamper was at a speed of 40 miles per hour.

The Board does not attribute any weight to the tests conducted by the Carrier. The tests were conducted with a "same type" of tamper but not with the 6700 Tamper. There is nothing in the record to establish that the Jackson Tamper has the same characteristics as the 6700 Tamper that was operated by the Claimant on March 14. The record also discloses that instead of the excessive grease that was on the track when the collision occurred, the Carrier's tests were conducted with light grease on the track. Moreover, the Carrier did not establish that the tests were conducted on the downgrade that existed on March 14, 1995. Since the conditions under which the tests were conducted by the Carrier on March 21, 1995 were different than the conditions that existed on March 14, the results of the tests are not entitled to any weight.

Having established that the Claimant was operating the 6700 Tamper at an excessive speed, the Board is of the view that there are other circumstances in the record which must be considered in determining the penalty to be imposed. In this connection, the Board concludes that the excessive grease and oil were factors which contributed to the collision. Pledgor acknowledged that in the years that he has worked for the Carrier, the grease and oil were "excessive." Edrington said that the grease and oil were "the worse I have ever seen and I have been on this railroad for 16 years."

It may very well be true that the Mark 2 Tamper was able to stop in a safe manner. The Ballast Regulator also stopped in a safe manner, but due to the excessive grease and oil on the rails, Edrington said his machine "slid about 2 poles." There is no question that the excessive grease and oil on the rails were contributing factors which led to the collision.

Moreover, there are several other circumstances which reinforce the conclusion that the Claimant should not be dismissed from service. When the Claimant received the call from Pledgor, he was already in the curve, where the excessive grease and oil were located. Pledgor acknowledged that he did not tell the Claimant where the excessive grease and oil were located. Edrington who initially contacted Pledgor did not

know where he had stopped "because [he] was not by a Mile Post marker." Since the Claimant did not know the specific location of the excessive grease and oil, he applied his brakes. Upon doing so, the 6700 picked up additional speed because it went into a skid.

In addition, the Claimant did not receive timely notice from Pledgor to stop before the location of the excessive grease and oil. Pledgor said that the time that elapsed between his call to the Claimant and hearing about the collision was "short." He testified that it "seem[ed] like immediately * * they were calling."

Edrington said that he estimated "about 20 to 30 seconds" went by between the time that Pledgor contacted the Claimant and the time when he first saw the 6700 come out of the blind spot of the curve. Upon seeing the 6700 Tamper, Edrington said that he "knew he [the Claimant] did not have enough time to stop."

The excessive grease and oil on the downgrade rails, and the Claimant's failure to receive timely notice of the existence and location of the excessive grease and oil, are factors which cannot be ignored in evaluating the events which precipitated the collision. It should be underscored that these circumstances do not excuse the Claimant's negligence; however, they constitute mitigating circumstances in assessing the penalty. Furthermore, the Claimant's unblemished service record of 16 years cannot be ignored in determining that the penalty of dismissal was excessive.

Accordingly, the Board concludes that the Claimant is to be reinstated to his former position with seniority and all other rights, benefits and privileges restored, but without backpay.

## 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 13th day of August 1997.