

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32758
Docket No. MW-33837
98-3-97-3-297**

The Third Division consisted of the regular members and in addition Referee James E. Conway when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(St. Louis Southwestern Railway Company**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The thirty (30) day suspension imposed upon Mr. W. R. Porter for alleged violation of Rules 1.1, 1.1.2, 1.6 and 27.9 of the Safety and General Rules For All Employees and Rule 72.13.32 of the Chief Engineer's Instructions for Maintenance of Way and Engineering in connection with his alleged responsibility in the collision of the ballast regulator on November 8, 1995 was unjust, extremely excessive and in violation of the Agreement (System File MW-96-16-CB/MW D96-15).**
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant shall ' . . . be paid in full for his time lost, per diem, overtime, all benefits, and the charge letter and investigation be removed from his personal records.' "**

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.

While driving a ballast regulator down an incline near Chamberlin, Texas, on November 8, 1995, Claimant collided with a loaded, occupied push car. Following Investigation, he was suspended for 30 days for violation of Rules 1.1, 1.1.2, 1.6 and 27.9 of the Safety and General Rules for All Employees, and Rule 72.13.22 of the Chief Engineer's Instructions for Maintenance of Way and Engineering. Those Rules read in pertinent part:

"Rule 1.1 Safety

It is the responsibility of every employee to exercise care to avoid injury to themselves or to others. Working safely is a condition of employment with the Company. The company will not permit any employee to take an unnecessary risk in the performance of duty."

"Rule 1.1.2 Alert and Attentive

Employees must be careful to prevent injuring themselves or to others. They must be alert and attentive when performing their duties and plan their work to avoid injury."

"Rule 1.6 Conduct

Employees must not be:

- 1) Careless of the Safety of themselves or to others**
- 2) Negligent"**

"Rule 27.9 FOLLOWING MOVEMENTS OF TRACK EQUIPMENT

When two or more track vehicles are being moved as a group, they must maintain sufficient distance between cars to provide a safe stopping distance to prevent collisions."

"Rule 72.13.32

Track machines must be operated at a safe speed at all times, subject to conditions, especially on grades, both while working and while running light.

While traveling, machines must be separated from other machines in such a way as to avoid any undesired contact between the machines."

The facts of record are these: Claimant, a qualified Ballast Regulator Operator admittedly familiar with Company Rules governing his work, ran his ballast regulator through a switch onto the house track, down an incline and into a loaded push car. No defects were found on the regulator, and Claimant does not assert that mechanical problems played any role in the accident. Claimant admits that it was his responsibility to operate equipment safely, and offers no explanation for the cause of the accident, although he rejects Carrier's contention that his machine on the day of the incident was "out of control."

For his role in this collision, Claimant was suspended from service for 30 days on November 9, 1995 by Production Supervisor R. W. McCartney. Investigation was conducted on January 9, 1996 by Signal Supervisor C. E. Baxter. Carrier's decision to uphold the suspension, however, was issued not by the investigating officer but by Regional Engineer B. L. Reinhardt. The Organization maintains that Carrier's failure to have the investigating officer render the initial decision is destructive of Claimant's rights to a fair Hearing. Additionally, the Organization asserts that Claimant was denied due process when Reinhardt functioned as both the officer rendering the initial decision and the appellate officer.

The issues for consideration by this Board as raised in case handling on the property are these: whether the Carrier's handling of the initial claim and appeal violated Claimant's rights to a fair and impartial Investigation; and whether, on the merits, sufficient evidence has been presented by the Carrier to establish Claimant's responsibility for the accident at issue.

A careful review of the Investigation proceedings suggests that Carrier was scrupulous in affording Claimant a full and fair opportunity to make his case, to examine and cross examine witnesses, and to present whatever evidence and argument he believed had a bearing on this matter. Accordingly, while the handling of this claim as it moved on the property may have fallen short of ideal, it is clear that it violated no express

contractual mandates specifying which Carrier officer must render decisions on discipline. The Agreement is likewise silent on the specifics of which officer must hear appeals. For those reasons, and because on this record we find no evidence of prejudice to Claimant's rights to a full and fair Investigation by Carrier's assignment of Reinhardt as Hearing Officer, the Board is not disposed to credit the Organization's procedural concerns.

With respect to the merits of the claim, this case appears to present a classic illustration of circumstances that are within the scope of the familiar doctrine of *res ipsa loquitur*. That well established principle in rough summary provides that where conduct causes an accident of a type that does not happen in the ordinary course of events if due care is exercised, and the instrument of harm is shown to have been under control of one party, a case of negligence is made out in the absence of any explanation tending to show that it was not due to his want of care. Here, Claimant admitted that it was his responsibility to operate the ballast regulator safely, but was unable to produce any explanation whatsoever for the accident for which he was disciplined.

The Board concludes that Carrier has shown by clear and convincing record evidence that the Claimant was derelict in his duties on November 8, 1995, and finds that the penalty imposed was neither arbitrary nor unreasonably harsh under the circumstances. Accordingly, the claim must be denied.

AWARD

Claim 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 23rd day of September 1998.