

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32888
Docket No. MW-33646
98-3-97-3-27**

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin 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 dismissal of Machine Operator A. E. Stoddard for his alleged '... failure to comply with rules and instructions. This is evidenced by the collision of the TKO you were operating and a parked TKO near MP 510.0 in the vicinity of Gilmer, Texas about 4:15 P.M., February 6, 1996, a fellow employee was subsequently struck by the parked TKO and pinned between it and a parked double broom sustaining severe personal injuries.' was without just and sufficient cause, based on unproven charges and in violation of the Agreement (System File MW-96-18-CB/MW D96-17).**
- (2) Machine Operator A. E. Stoddard shall be reinstated with seniority and all other rights unimpaired, compensated for all wage loss suffered plus per diem and expenses incurred and have his record cleared of the charge."**

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.

At the time the claim arose, Claimant had some 15 years of service. Up until the time of the accident in question, his Supervisors considered him to be a safe Machine Operator. While there was only minor equipment damage, one employee sustained rather serious personal injuries.

After Investigation, Claimant was dismissed for violations of several of Carrier's safety rules. The Organization challenged the discipline both procedurally and substantively. Our review of the record, however, does not reveal any procedural improprieties.

The sufficiency of the evidence of Claimant's culpability is also in dispute. After careful review of the investigative transcript as well as the record of the appeal process on the property, we must agree with the Organization's position. The evidence is insufficient to support Carrier's determination that Claimant violated safety rules.

As this Board has said many times, the mere fact of an accident does not establish that there was carelessness or other misconduct. To warrant the taking of discipline, the Carrier must satisfy the burden of proof to establish that Claimant acted in an unsafe manner. Satisfaction of the burden of proof requires more than supposition. In this regard, the evidentiary record is notably deficient. Neither of Carrier's two witnesses was in a position to see the accident. There was no admissible evidence that Claimant was operating at excessive speed. There was no Investigation to determine if the injured employee, whose machine was struck by Claimant's machine, properly signaled that he was slowing to stop, as Carrier Rules required, before halting his machine. The record suggests that one Carrier official grossly exaggerated the size of the rearview mirror Claimant had available to him as he had to drive backward in a non-swivelling seat to the tie up point. In addition to the foregoing, the record provides no adequate evidentiary foundation for the excessive speed conclusions drawn by the Carrier witnesses. Their conclusions were based solely on the presence of skid marks and the fact of the collision. No measurement of the skid marks was introduced into the record. Moreover, the on-property record suggests that other machines were operated over the track area before the skid marks were examined. Indeed, there is no probative evidence

to establish that the skid marks observed were actually made by Claimant's machine. Finally, there was no firsthand evidence to contradict Claimant's assertion that he was proceeding at a "... very, very slow speed. ..." because of misting on the tracks. Given these evidentiary deficiencies, we have no choice but to sustain the claim.

AWARD

Claim sustained.

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 21st day of October 1998.