

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

Award No. 32960  
Docket No. MW-33584  
98-3-96-3-1096

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:** (  
(Union Pacific Railroad

**STATEMENT OF CLAIM:**

“Claim of the System Committee of the Brotherhood that:

- (1) The Level 1 discipline assessed Foreman J. S. Becerra for his alleged failure to inspect a ballast regulator prior to moving the machine on April 27, 1995 was without just and sufficient cause and based on an unproven charge (System File D-236/960063).
- (2) Foreman J. S. Becerra shall now have his record cleared of the incident.”

**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.

Claimant received a letter of reprimand following Investigation of the charge that he did not perform a proper inspection of his ballast regulator on April 27, 1995. While moving to clear the main line about 4:30 P.M. that day, the right front stabilizer assembly fell from the machine in the vicinity of CPN 455 near Nampa, Idaho. Following Investigation held June 12, 1995, Claimant was found to be in violation of Carrier Rules 41.2, 1.1, and 1.1.3 and was assessed with the previously noted Level 1 discipline.

The Organization challenged the discipline on both procedural as well as the sufficiency of the evidence. Our review of the record shows that the Organization's procedural objections lack merit. Regarding the substantive aspect of the claim, however, we find the evidence of record to be insufficient to support the Carrier's disciplinary decision in two important respects.

First, the record does not properly establish how or in what manner Claimant failed to inspect his machine on the day in question. In this regard, Rule 41.2 reads, in pertinent part, as follows:

**"Operators of roadway machines and work equipment are responsible for the efficient operation and proper care of equipment. Operators must:**

- \* Operate, inspect, maintain and lubricate equipment according to manufacturer specifications." (Emphasis added)**

At no time during the Investigation were the inspection specifications of the manufacturer introduced into evidence. Moreover, the machine's daily log book, which supposedly also contained a check list of the requirements for inspection before, during, and after operation, was not introduced in evidence. No documentary evidence whatsoever was introduced to establish what the specific inspection requirements were. A violation of Rule 41.2, by its very terms, requires that the inspection requirements be established by resort to the manufacturer's specifications. On this record, those requirements were not so proven. At best, this record contains nothing but supposition on the part of several witnesses about what the requirements should have been.

Secondly, the evidence does not properly establish what the cause of the problem was. At most, the record contains only the speculation of certain witnesses about the failure mechanism. A finding of guilt must be based on more than mere supposition.

Even if one assumes, for the sake of discussion, that the locking pin came loose and allowed the stabilizer assembly to come in contact with the ground, a tie, a switch, or other roadway apparatus, there is no evidence to show that the pin was partially loose at the time Claimant began the seven to eight mile movement to clear the mainline. If the pin was properly seated at that time, as it was during Claimant's inspection between 2:00 and 3:00 P.M., an additional inspection would not have detected anything amiss. If the pin came loose during that movement, no inspection prior to the beginning of that movement would have prevented the accident.

Because the record is deficient as noted above, it is similarly insufficient to support the Carrier's determination that Claimant also violated Rules 1.1 and 1.1.3. The claim, therefore, must be sustained.

**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 23rd day of November 1998.**