

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

Award No. 33379  
Docket No. MW-33326  
99-3-96-3-830

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  
(CSX Transportation, Inc.)

**STATEMENT OF CLAIM:**

“Claim of the System Committee of the Brotherhood that:

(1) The thirty (30) working day suspension imposed upon Machine Operator H. L. White for his alleged failure to perform his duties properly while operating a ballast regulator on August 14, 1995 near Covington, Virginia was unwarranted, on the basis of unproven charges and in violation of the Agreement [System File SPG-D-9444/12 (95-1123) CSX].

(2) The Claimant's 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 hearing thereon.

The Claimant, with nearly 28 years of service, holds seniority as an Equipment Operator. On August 14, 1995, the Claimant was assigned to a Kershaw Ballast Regulator with the 6XT4 Team (a tie unit) near Covington, Virginia, when the events giving rise to the instant dispute occurred. The Stabilizer which is normally operated by the Claimant was not operating on the day in question and in need of repair.

Because D. Wheatley, the Ballast Regulator Operator was on vacation, Supervisor Hanshew instructed the Claimant to operate the Kershaw Ballast Regulator. The Claimant was plowing out ballast in advance of the tie unit, when he noticed a hot box detector "approximately thirty (30) feet" away. He was unable to stop the forward movement of the ballast regulator and struck the hot box detector. The collision with the hot box detector caused damages in the amount of \$6,500.

The key issue to be resolved is whether the Carrier proved by substantial evidence in the record that the Claimant was negligent in operating the Kershaw Ballast Regulator that caused damage to the hot detector box. Based upon the record, the Carrier failed to establish by the required quantum of evidence that the Claimant's negligence caused the property damage in question.

It is undisputed that when the transmission of the Kershaw Ballast Regulator is placed in neutral, it does not always disengage the gears. Supervisor D. E. Hanshew acknowledged "that's the nature of the transmission set up with a hydrostatic - I guess you call it work gears."

This special characteristic of the particular ballast regulator that the Claimant operated on August 14, in the Board's view, was the cause of the property damage. As the Claimant related, he attempted to stop the machine and pulled "... it down into neutral ... but [he] didn't know it wasn't in neutral." He "applied the brake - it went through ...." He estimated the speed of the Ballast Regulator at "maybe two miles, maybe three miles an hour." The Claimant added that "it should have stopped me when I was maybe two miles an hour." The inference to be drawn from the record is that the Claimant was unaware that the particular ballast regulator that he operated on August 14 was not totally disengaged when it is out of forward or reverse movement and in a neutral position.

Although the Claimant had operated "a regulator and double broom" previously, Supervisor Hanshew said that the Claimant had not operated "this particular regulator"

during 1994. It is undisputed that the operation of the Kershaw Ballast Regulator on August 14 was not a job duty within the Claimant's "normal position."

Supervisor Hanshew acknowledged that the Carrier had not sent the Claimant to school for training on the operation of ballast regulators. Nor was the Claimant provided any training or instructions with respect to the operation of the Kershaw Ballast Regulator before he was assigned to operate the machine.

As previously indicated, the ballast regulator that was operated by the Claimant on August 14 was Wheatley's regularly assigned machine. However, on the day in question, Wheatley was on vacation. Wheatley stated that had he known that the Claimant would be assigned to operate the machine on August 14, he would have warned him about the machine's capacity to move in either direction even though the gears are in a neutral position.

Wheatley had been given schooling by the Carrier in the operation of ballast regulators. The classes consisted of the details with respect to the operation of ballast regulators as well as their maintenance. By contrast, the Claimant had never been given such training.

The Carrier relies upon the testimony of Wheatley to prove that the Claimant was aware of the special characteristic of the Kershaw Ballast Regulator and failed to exercise due care in operating the machine before it struck the hot box detector.

In this connection, Wheatley was asked whether the equipment operated by the Claimant had "a problem" to which he replied as follows:

"I can't make a statement like that. I mean it is in the transmission. But, you know, like I said others have said that they would have the problem too. I mean I don't know if it's set up that way or what the deal is."

Wheatley acknowledged that he had operated other ballast regulators that had "similar stopping problems." When he was asked whether "stopping problems" were a characteristic of the ballast regulator, Wheatley replied: "I assume I don't know, I don't really know. I mean the ones I have is you know . . . ." In further questioning by the Investigating Officer, Wheatley said that "at first" it was "a problem in stopping

around switches and things he did not want to run over," but he "got used to it and it just comes natural."

Thus, Wheatley testified that he was unable to admit that the Kershaw Ballast Regulator had a "stopping problem." Moreover, he said that other ballast regulators that he had operated have "similar stopping problems," but he did not know whether it was a characteristic of ballast regulators. Moreover, at first, he found it a "problem" in operating ballast regulators, but he got "used to it and the stopping of the machine comes natural."

As opposed to the Claimant, Wheatley's views with respect to the Kershaw Ballast Regulator and, in general to ballast regulators, is akin to that of an expert who has been schooled in the fundamentals and maintenance of ballast regulators. That Wheatley admitted that other ballast regulators had "similar stopping problems" referred to machines that he had operated. There is nothing in the record to establish that the Claimant was aware of "similar stopping problems" in ballast regulators.

Moreover, Wheatley's testimony in having problems "at first" in stopping around switches, after which he "got used to it and it just comes natural" is applicable to operating the Kershaw Ballast Regulator. There is nothing in the record that indicates that the Claimant was familiar with the "stopping" characteristic of the Kershaw Ballast Regulator.

In addition, the Carrier's view of various aspects of Wheatley's testimony cannot be reconciled with his testimony as a whole. When asked by the Organization's representative whether there is a problem "with the other ballast regulators on this machine, or on this gang doing the same thing," Wheatley responded by stating: "I hear there is. I mean there's talk." Furthermore, Wheatley stated that he "assumed" there was a problem with the Kershaw Ballast Regulator, which he did not fully understand.

Thus, in viewing Wheatley's testimony as a whole, at best, it is ambiguous and confusing with respect to whether there is a "stopping problem" with the Kershaw Ballast Regulator and other ballast regulators. The Carrier's reliance on Wheatley's testimony to support its case against the Claimant is hardly adequate. Clearly, the Carrier failed to satisfy its burden of proving that the Claimant, with 28 years of satisfactory service, committed an act of misconduct or was negligent in causing property damage to the hot box detector on August 14, 1995.

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**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 13th day of July 1999.**