

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33851
Docket No. MW-33995
99-3-97-3-444**

The Third Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Southern Pacific Transportation Company**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [thirty (30) day suspension] imposed upon Machine Operator R. Chavez for alleged violation of Rule 17.9.16 in connection with the collision of the ballast regulator and motor vehicle on a road crossing near the west siding switch at Splendora, Texas on February 26, 1996 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File MW-96-65/MW D96-34 SPE).**
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant's record shall be cleared of the charges 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.

On February 26, 1996, Claimant was operating a Ballast Regulator. The machine was facing north and Claimant was backing up to the south when there was a collision at a road crossing between the machine and a Ford Bronco. Carrier removed Claimant from service and suspended him for 30 days for violating Rule 17.9.16. The Organization, acting on Claimant's behalf, requested an Investigation. The Investigation was held on March 18, 1996. On April 3, 1996, Carrier advised Claimant that his suspension would remain unchanged.

Carrier contends that it afforded Claimant a fair Hearing and that it proved the violation by substantial evidence. The Organization argues that Claimant was denied a fair Hearing, contending, among other things, that Carrier prejudged Claimant's guilt and that it failed to call material witnesses. The Organization also argues that Carrier failed to prove Claimant's guilt.

We need not address the Organization's procedural arguments because we find that Carrier failed to prove Claimant's guilt by substantial evidence. The only evidence in the record concerning how the accident occurred was Claimant's testimony. Claimant described his actions leading up to the collision as follows:

“... When you approached the crossing, did you stop at the crossing sir?”

“A: Yes sir.”

“... And after you stopped at the crossing, what procedure did you follow then sir?”

“A: I put the machine into second gear after stopping and went through the procedures of safety going across that crossing. By doing that I looked over to facing North, looked over to my right on the adjacent road and quickly scanned to the left on the highway side and continued to my left to see the signal maintainer and the other crossing, the other side of the crossing. When I saw that it was safe for me to go across and I proceeded at a safe speed, at 2 to 3 miles an hour.”

Carrier emphasizes that Rule 17.9.16 provides, "Highway traffic has the right of way," and urges that Claimant failed to yield the right of way to the Ford Bronco as evidenced by the collision. However, the mere fact of a collision does not establish an employee's culpability in connection with the collision. Carrier's argument is tantamount to holding Claimant strictly liable for the collision. The only evidence is that Claimant approached the crossing in a safe manner.

In Third Division Award 29195, the Claimant was suspended for failure to yield the right of way to a motor vehicle at a road crossing. The Claimant testified that as he approached the crossing, he came to a complete stop, looked both ways, saw no vehicular traffic, proceeded into the crossing and was struck by a vehicle. The Board held, "The mere fact that Claimant was involved in an accident does not mean that he is presumed to be at fault and subject to discipline."

We find the instant case indistinguishable from Award 29195. Carrier has proven only that an accident occurred. It has offered no evidence to contradict Claimant's testimony concerning the events of February 26, 1996. On this record, we are unable to say that Carrier proved Claimant's culpability by substantial evidence.

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 December 1999.