

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 35303  
Docket No. MW-33318  
01-3-96-3-808**

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 Employees  
(St. Louis Southwestern Railway Company)

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The discipline (withheld from service, dismissed and subsequently reinstated) imposed upon Foreman D. Bingham for alleged violation of Rules 1.1, 1.1.2 and 1.6 of the Safety and General Rules for All Employees and Rules 71.2.3.3, 72.13.3 and 72.13.32 of the Chief Engineer’s Instructions for Maintenance of Way and Engineering on August 17, 1995 was arbitrary, capricious, without just and sufficient cause and on the basis of unproven charge (System File MW-95-53-CB/MW D95-43 SSW).**
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be compensated for wage loss suffered and his record shall be cleared of the charges leveled against him.”**

**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.

Prior to his dismissal from service, the Claimant held seniority as a Track Foreman. On August 17, 1995, the Claimant was assigned as a System Gang Foreman to Tie Gang T2 and working under the supervision of Production Supervisor T. A. Plank. While riding on Tamper 311 that was proceeding to a new work site, the tamper collided with the rear end of a train near Chandler, Texas, at about 12:05 P.M. The train had stopped due to a red signal. The Claimant was the on-duty Foreman riding on the tamper and L. B. Murry was the Operator of the tamper.

Testimony at the formal Investigation established that prior to impact, the track was curved two degrees which is severe enough to restrict the range of vision of a Machine Operator. The track was descending in the direction of the movement of the tamper.

When the brakes of the tamper were applied by Murry, there was oil or grease which came from a rail lubricator which serves the purpose of reducing friction in the curved area of the rail. Evidence at the Investigation indicated that Machine Operators and Foremen know or should know that all curved rails in excess of two degrees are lubricated.

Equipment Supervisor C. LeRose testified that the brakes on the tamper were in working order. There was one flat spot on the right rear wheel which indicated that the wheels had been sliding on the rail. LeRose further testified that with the brakes applied in full, the wheels lock up and slide on the rails.

LeRose estimated the speed of the tamper to be at 25 miles per hour. Murry estimated the speed to be "... 18 or 19 mph, roughly guessed."

LeRose testified that the skid marks indicated that the tamper slid 704 feet before colliding with the train. The Claimant jumped from the tamper before the tamper struck the train. He not only sustained personal injuries, but also considerable property damage resulted from the collision. It is undisputed that the Claimant did not instruct Murry to slow the machine down.

Based upon the record, the Board concludes that Murry was not operating the machine at a safe speed given the conditions that existed at the time. As previously stated,

the track was curved two degrees, it was descending in the direction of the movement of the tamper, the curved rail was lubricated and LeRose's estimate that the skid marks measured a distance of 704 feet according to Murry was "not too far off." The reasonable inference to be drawn from the circumstances surrounding the accident establishes that the collision was caused by excessive speed of the tamper operated by Murry.

Under Rule 71.1.3.3 the Foreman is required to "see that employees under them properly and safely perform their duties. . . ." It was incumbent upon the Claimant to supervise Murry with respect to the speed at which he was operating the tamper. He was not merely a passenger along for the ride on the tamper; he was required to provide supervision and direction when Murry was operating the tamper under the circumstances which existed before it was too late for Murry to avoid the collision with the train. Because he was aware of or should have been aware of the excessive speed of the tamper operated by Murry under the existing circumstances, the Claimant failed to comply with the duty to provide supervision and direction of Murry's operation of the tamper. Accordingly, the Claimant failed in his obligation to "see that" Murry "properly and safely" performed his duties as required under Rule 71.1.3.3.

It is important to point out that the Claimant was dismissed from service and subsequently reinstated. The claim is 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 24th day of January, 2001.