

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35307
Docket No. MW-35229
01-3-99-3-81**

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Union Pacific Railroad Company (former Chicago and
(Eastern Illinois System)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Level 3 discipline [five (5) day suspension] assessed Machine Operator D. L. Arnold for his alleged violation of Rule 42.6 in that the machine he was operating struck an automobile at a crossing on November 7, 1997 was without just and sufficient cause and based on an unproven charge (Carrier’s File 1122690 CEM).**
- (2) As a consequence of the aforestated violation, Machine Operator D. L. Arnold shall now have his record cleared of the incident 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 November 7, 1997, the Claimant was operating a Tamper as part of a two-man crew assigned to perform track surfacing work in the vicinity of Sullivan, Illinois. The second employee in the accompanying Tamper was following approximately one-quarter mile behind. The Claimant was proceeding southbound. When he came to the McGill Street intersection at Mile Post 176.75, there was a collision at the un-gated crossing in which the nose of an automobile came into contact with the front attachments (the buggies) of the Tamper. Following a review of the incident and an on site visit by a Carrier Officer, the Claimant was notified to report for an Investigation and Hearing to develop the facts and determine whether the Claimant had violated Safety Rule 42.6, which reads as follows:

“Track cars and on-track equipment must approach all grade crossings prepared to stop and must yield the right-of-way to vehicular traffic. If necessary, flag the crossing to protect movement of track cars or on-track equipment.”

The Investigation was postponed by mutual agreement and then held on December 10, 1997. Following the Investigation, the Claimant was issued a five-day suspension. That is a Level 3 Discipline under the Carrier's UPGRADE discipline policy for all agreement employees.

The Organization challenged the discipline both procedurally and substantively. Our review of the record does not reveal any procedural improprieties. It is the sufficiency of the evidence of the Claimant's culpability that forms the crux of this dispute.

The Organization argued that the mere fact of an accident does not establish carelessness or other misconduct. With that fundamental premise, the Board is in complete agreement. However, the critical point in this case is that, even though the Claimant testified that he looked to the left and the right before entering the crossing, he admitted that he was aware that the Tamper had “blind spots” which impaired his ability to see the approaching car. Under these circumstances, the Claimant had an obligation to exercise a greater degree of caution than was demonstrated on this record.

What more should the Claimant have done? Rule 42.6 provides the answer. The Claimant acknowledged in his testimony that the presence of another employee would have allowed the crossing to be flagged. There was another Tamper following not far behind the Claimant, yet the Claimant failed to adhere to procedure outlined in Rule 42.6 which states that "if necessary, flag the crossing to protect the movement of the track car or on track equipment." Even though it might have caused a few minutes of delay, the Claimant should have awaited the arrival of the second Tamper so that they could have provided flagging for each other to insure the safe passage through the crossing.

Rule 42.6 also provides that equipment approaching a grade crossing must be prepared to stop and yield the right of way. The Claimant conceded in his testimony that the other vehicle "must've been where I just couldn't see him." Since the Claimant admittedly was unable to determine whether a vehicle was approaching the crossing, he should have stopped before entering the crossing to confirm that he could yield the right of way. Instead, after the Claimant looked to the left and the right, he proceeded directly through the crossing without stopping.

The Claimant in his defense testified that the police officer at the scene stated that some of the responsibility for the accident may have rested with the other driver. However, no documentation in the form of a ticket or police report was introduced in the record, and the Claimant admitted at the Hearing that he did not know whether the driver of the car was ticketed or not.

Under these circumstances, there was sufficient evidence, including the Claimant's own admissions, to support the Carrier's finding of culpability. As to the penalty, the 5-day suspension was administered in accordance with the Carrier's UPGRADE policy and we have not been provided with any reason to disturb the discipline. Accordingly, this claim must be denied.

AWARD

Claim denied.

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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.