

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35986
Docket No. MW-35911
02-3-99-3-938

The Third Division consisted of the regular members and in addition Referee Nancy F. Eischen when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(Union Pacific Railroad Company (former Missouri
(Pacific Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Level 2 Upgrade Discipline Assessment and disqualification of Machine Operator S.M. Payne for his alleged violation of Union Pacific Rule 41.2, wherein he allegedly failed to maintain and lubricate BR1745 resulting in damage to the transmission of said machine on August 15, 1998, was without just and sufficient cause, based on an unproven charge and in violation of the Agreement (System File MW-99-24/1166004 MPR).
- (2) As a consequence of the violation referred to in Part (1) above, Machine Operator S.M. Payne shall have the discipline removed from his record, compensated eight (8) hours for attending the investigation '... and any and all expenses he acquired to include meals and mileage reporting to Spring, Texas to attend the hearing. . . .', restoration of his machine operator's seniority and compensation for the difference in wages between trackman and machine operator from August 15, 1998 and continuing until this dispute is resolved."

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 June 1, 1998, S. M. Payne (Claimant) was awarded the position of Machine Operator on Ballast Regulator BR1745, and subsequently assigned to Gang No. 4127 under the direct supervision of Foreman H. Hayes and Manager Track Maintenance J. Flores, Jr.

On August 15, 1998 while the Gang was surfacing track between Sugarland and Rosenberg, Texas, the Carrier alleges that the Claimant "failed to maintain and lubricate Ballast Regulator BR1745, resulting in damage to the transmission," thereby violating Union Pacific Rule 41.2.

Following a September 14, 1998 Investigation, the Claimant was found guilty as charged, and assessed a Level 2 Discipline requiring the Claimant to attend a one day alternative assignment, with pay, to develop a Corrective Action Plan.

The Organization protested the discipline, maintaining that the Carrier had "unilaterally" postponed the Investigation that was originally scheduled for September 9, 1998. The General Chairman further maintained that the Claimant was not afforded sufficient time to train on the BR1745. In that connection, however, the General Chairman asserts that the Claimant did properly maintain the equipment, and noted doing so in his log book.

Finally, the Claimant contends that commencing June 1 to August 6, 1998, he "periodically" notified Foreman Hayes of leaks in the transmission of the BR1745, and also advised his Foreman that the transmission did not shift properly in all of the gears.

For its part, the Carrier contends that the Claimant was afforded a fair and impartial Hearing during which there was "more than sufficient evidence" to warrant sustaining the charges brought against him. The Carrier further contends that the assessed discipline is commensurate with the extensive damage caused by the Claimant's negligence.

A review of the record demonstrates that the Claimant received a fair and impartial Hearing, thereby rendering the procedural arguments advanced by the Organization without merit.

Turning then to the merits of the dispute, Rule 41.2 - OPERATORS - sets forth the following:

- "* 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.
- * Correct any improper condition found.

NOTE: IF THE PROBLEM CANNOT BE CORRECTED, THE OPERATOR MUST REPORT THE CONDITION BEFORE IT IS NECESSARY TO TIE UP THE MACHINE.

- * Complete the required production and repair order reports."

The Claimant asserts that he properly maintained Ballast Regulator BR1745 and that he reported "the leaks several times a day." However, MTM Flores reported that when he inspected the BR1745 on August 15, the Regulator had "run out of oil" and "burned up."

Further, and in that connection, it is not disputed that on August 7, approximately one week prior to the time this issue arose, the shifting fork in the gear box of the BR1745 had to be replaced due to "lack of proper lubrication."

Although the Claimant asserts that he properly logged the "problems" associated with the BR1745, Mechanic J. Morris reported that the Claimant's log entry(s) indicated that everything was "okay" and there were "no problems" with the equipment. Mechanic Morris went on to state that had the BR1745 been "properly maintained," the damage would not have occurred.

Finally, regarding the Claimant's training period, Mechanic Morris testified that he personally instructed the Claimant on August 6, 1998 with respect to his responsibility for checking and filling the oil levels on the machine he was operating and instructed him on how to do so. Of note, according to Morris' uncontested testimony, he installed six and one-half quarts of transmission fluid on August 7, 1998, the day after he had instructed the Claimant regarding same.

In discipline cases such as this, the Carrier bears the burden of proving that the misconduct for which the employee was disciplined occurred. In these circumstances the Carrier has proven, by substantial record evidence, that the Claimant was guilty of the charge of violating Rule 41.2 and the discipline assessed was reasonable and in accordance with the UPGRADE discipline policy.

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 19th day of March, 2002.