

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 36381
Docket No. MW-36767
03-3-01-3-331

The Third Division consisted of the regular members and in addition Referee Barbara Deinhardt when award was rendered.

**(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(Burlington Northern Santa Fe Railway**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (Level 1 Formal Reprimand and restriction from operating any and all machinery and vehicles and required to work with a fellow employee) imposed upon Mr. R. E. Rains on October 12, 1999 for an alleged violation of Rule 1.1.1 (Maintaining a Safe Course) in connection with alleged involvement in hitting a communication pole on August 3, 1999 and laying a mower over on August 4, 1999 at or near Seward, Nebraska was arbitrary, excessive, on the basis of unproven charges and in violation of the Agreement [System File C-00-D040-1/10-00-0052(MW) BNR].**
- (2) As a consequence of the violation referred to in Part (1) above, the discipline assessed upon Mr. R. E. Rains shall be overturned and removed from his personal record and he shall be made whole for any losses incurred continuing until the discipline is removed and he is allowed to operate machinery and vehicles in accordance with his seniority.”**

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 has been employed by the Carrier for 24 years and at the time of the incidents here held seniority in the Roadway Equipment Subdepartment as a Group 3 Machine Operator. Beginning on July 1, 1999, the Claimant was assigned to operate a John Deere weed mower. He was operating the weed mower on August 3, 1999, when the mower struck a communication pole in his path. The Claimant claims that he was mowing weeds approximately two feet deep and his attention was momentarily diverted when he felt the mower strike something. He turned back to see what had happened and when he turned forward he saw the pole directly in front of him, but did not have sufficient time to avoid it. He promptly reported the accident.

Then, the next day, the Claimant was operating the same mower when it rolled on its side. He reported that accident as well.

By letter dated August 6, 1999, the Claimant was notified "Arrange to attend investigation in Burlington Northern Santa Fe Railway Depot, Seward, NE at 1000 hours Tuesday Aug. 17, 1999, for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged involvement in a Leased John Deere Mower incident (Hitting communication Pole) on Aug. 3, 1999 at or near Ruby, Nebraska and (Laying Mower Over) Aug. 4, 1999 at or near MP 25.6 at approx. 1035 hours while assigned as Weed Mower Operator Seward NE."

An Investigation was held on September 22, 1999, and the Claimant was found guilty of violation of Rule 1.1.1 (Maintaining a Safe Course) in a decision dated October 12, 1999. He was issued a Level 1 Formal Reprimand and was restricted from operating any and all machinery and/or vehicles and was required to work with a fellow employee.

The Organization appealed the decision by letter dated November 24, 1999. The appeal was denied on January 25, 2000.

The Organization's primary argument is that the Claimant was found guilty of a Rule violation with which he was never charged and that was not contemplated during the Investigation, Rule 1.1.1 (Maintaining a Safe Course). Consequently, the

Claimant had no opportunity to defend himself against the charge for which discipline was imposed and thus he was denied due process. The Organization cites Rule 40 of the Agreement that requires that a Notice of Investigation "must specify the charges for which investigation is being held." The Organization also alleges that the Carrier failed to prove the Claimant's responsibility in connection with the incidents.

The Carrier argues that the Notice of Investigation clearly stated the matter to be investigated and no one was unaware of the two specific incidents involved. Thus the Claimant was on notice of the subject of the Investigation and was able to prepare his defense. Precedent has established that specific Rules do not need to be cited in a Notice of Investigation. The Carrier notes that while the Organization argued that the Claimant is being improperly denied the exercise of seniority in the Machine Operator classification, it is also a fact that the Claimant has a long record of being unable to handle machines and has been previously disqualified. The Claimant has again been negligent in the handling of machinery and is a hazard to himself and others. There is no rationale in the record to allow the Claimant to operate machinery.

We recognize that the Organization cited cases similar to that before us in which a claim has been sustained because it has been determined that the Notice of Investigation did not specify the charges with sufficient exactitude or precision to allow the employee an opportunity to defend himself. In the instant case, the Claimant knew that the purpose of the Investigation was to ascertain exactly what had happened on August 3 and 4, 1999 while he was operating the mower and what his responsibility was in connection with hitting the communication pole and the laying over of the mower. He was available to testify as to exactly what happened. The accidents were unwitnessed, so no witness was called, nor would one have been called had the charges been more precise. The Claimant makes no showing as to what he would have done differently at the Hearing had he been advised that it was specifically Rule 1.1.1 that was being alleged as violated.

We are persuaded by the cases cited by the Carrier, including cases involving these two parties, that establish it is not necessary for the exact Rule(s) being charged be cited, as it may be that the purpose of the Investigation is to ascertain which, if any, Rules were violated. Rather, the purpose of Rule 40 is to ensure that the employee has sufficient notice of the wrongdoing being alleged that she or he can prepare a defense. We find in this case that the Claimant did have such notice.

We also find that the Carrier had sufficient evidence to conclude that the Claimant failed to maintain a safe course when he struck the communication pole. As any operator of moving equipment knows, it is dangerous to take one's eyes off the road ahead, particularly where, as here, there are upcoming obstructions, such as poles. It must be that the Claimant failed to maintain a safe course because he was operating the mower when it ran into the pole after he turned to look behind him. The Claimant explained what had happened, thus ruling out any alternative explanations for why the mower could have struck the pole, such as a faulty brake or a stuck accelerator. He knew he was driving close to the pole line and he was not looking.

On the other hand, there is no such evidence to explain the laying over of the mower. All we know is that the mower laid over. We do not know if the mower hit a hidden object in the weeds or if the way was particularly steep. (There is some reference in the Organization's representative's closing statement about why the mower laid over, but that is not testimony.) An accident per se does not establish a Rule violation and the Claimant's professed discomfort with the operation of the mower is not sufficient to support the finding of failure to maintain a safe course. The Carrier has not established that the Claimant failed to exercise due care or failed to maintain a safe course in driving the mower.

The Agreement was violated. The Claimant's failure to maintain a safe course in hitting the communication pole, given that he had only been driving the mower for a short time and had not been given specific training, is not sufficient to justify the permanent disqualification from operating all machinery. In light of the Claimant's history of disqualification and discipline, including a 30-day suspension for failure to comply with instructions, arising from an incident involving the unsafe use of a tamper, we find that the Carrier was justified in issuing the Formal Reprimand and restricting him from operating any machinery and requiring him to work with a fellow employee for a substantial period of time. We find, however, that a permanent disqualification is not warranted and that the Claimant should now be given a final opportunity, following a fitness for duty examination and requisite training, to bid for Machine and Vehicle Operator jobs again.

AWARD

Claim sustained in accordance with the Findings.

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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 18th day of February 2003.