

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 36610
Docket No. MW-36583
03-3-01-3-90

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Norfolk Southern Railway Company (former Norfolk
(and Western Railway Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline imposed upon Mr. M. S. Melson [thirty-eight (38) calendar days suspension beginning with removal from service on October 8, 1999 and continuing through November 15, 1999] for alleged failure to follow NORAC Operating Rules and Conrail Safety Rules in connection with the operation of a track car and a collision involving a tamper he was operating and a dump truck on October 8, 1999 at Wyoming, Delaware was arbitrary, capricious, unwarranted, excessive and in violation of the Agreement. (Carrier's File MW-HARR-99-23-NWR).
- (2) As a consequence of the violation referred to in Part (1) above, the charges against Mr. M. S. Melson shall now be stricken from his record and he shall be compensated on a make whole basis for any and all time lost.”

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 was a Class I Machine Operator with 23 years of unblemished service as of the date of the incident. On October 8, 1999, he was instructed to operate a torsion beam tamper from Mile Post 43 at Harrington, Delaware, to a road crossing. He was operating the machine in reverse.

He approached a road crossing Mile Post 51. There is no dispute that he flashed the machine's lights and sounded its air horn. While traffic flow was stopped at the crossing, a dump truck traveled from a side road and, due to faulty brakes, collided with the track machine. The truck was put into a 270 degree spin and thrown 120 feet. The tamper continued to move another 71 feet after impact. The truck driver was issued a traffic citation.

On October 12, 1999, the Carrier sent the Claimant a notice to appear for an Investigation on Thursday, October 27. Then, on October 25, after it was discovered that Thursday was actually October 28, an amended letter was sent setting the investigation for Thursday, October 28.

The charges set forth in the letter were as follows:

- "1) Alleged violation of Rule 811 of Conrail (NORAC Operating Rules) Six Edition, effective January 1, 1997, which reads: "Track cars must approach highway crossings prepared to stop. They must give highway traffic the right-of-way."
- 2) Alleged violation of Rule 815 of Conrail (NORAC Operating Rules) Sixth Edition, effective January 1, 1997, which reads in part: "Track cars must not exceed the maximum freight train speed. In addition, the following maximum speeds apply to the movement of track cars:

All types: when backing up - 10 MPH."

- 3) Alleged violation of Rule 63.8 of the Conrail Safety Rules and Procedures - Engineering-S7C, effective May 1, 1995, which reads in part: "Maintaining Proper Speed - when operating equipment or track

cars on track, do not exceed the maximum speeds indicated in the following table:

- 3. Operating any other track car**
 - b. Backward – 10**
- 8. Running over highway crossing, railroad grade crossing, switch turnout, derail, or through open side of frog – 5.”**
- 4) Alleged violation of Rule 63.9 of the Conrail Safety Rules and Procedures - Engineering-S7C, effective May 1, 1995, which reads: “Passing a Highway Grade Crossing - Follow these precautions when passing a highway grade crossing;**
 - 1. As you approach the highway grade crossing, prepare to stop and sound warning.**
 - 2. Before you proceed over the crossing, make sure there is time to do so safely.**
 - 3. If a vehicle is approaching, stop your equipment and allow the vehicle to pass over the track. Signal the driver to proceed, if necessary.**
 - 4. If your view of the highway traffic is restricted in any way, stop your equipment clear of the crossing and provide flagging protection.”**

Following the Investigation, on November 15, 1999, the Claimant was issued a 38 day suspension for violations of NORAC Operating Rules and the Conrail Safety Rules. The 38 days corresponded to the time between the date the Claimant was removed from service and the date of the letter.

The Organization filed a claim appealing the discipline on January 10, 2000. The Carrier denied the claim on February 1, 2000.

The Organization argues that the Notice of Investigation was defective, because it did not give the Claimant ten days notice of the Investigation. The Notice was issued October 25 for an October 28 Hearing. Further, the Organization argues that Conrail

Rules were not in effect on the date in question, but rather were superseded by Norfolk Southern Rules. The Organization also disputes that the Claimant committed any unsafe acts. He was going slowly and stopped to look before crossing the road. The accident was the fault of the truck driver as asserted by the Carrier during litigation related to the accident. Finally, the fact that the Hearing Officer returned the Claimant to work the day of his decision indicates that the Claimant was disciplined not because of any credible showing of guilt but so as to limit the Carrier's liability to the Claimant.

The Carrier asserts that the typographical error in the Notice neither impeded the Claimant's ability to prepare a defense nor prejudiced his right to a fair and impartial Investigation. Further, the Organization is incorrect in its contention that Conrail Rules did not apply. A determination had been made, about which the Claimant was well aware, that following the acquisition by Norfolk Southern of certain Conrail territory, Norfolk Southern Rules would not go into effect until after a six-month transition and training period. In the interim Conrail Rules would continue. Even if Conrail Rules did not apply, there is no dispute that NORAC Rules, as charged were also in effect. The Carrier's Investigation showed that the Claimant was operating the tamper at an excessive speed of 15 to 20 miles per hour. Further, the Investigation showed that the Claimant did not ensure that his tamper was stopped before proceeding into the intersection.

We find that the original Notice was sufficient to put the Claimant on notice of the nature of the charges and the evidence that would be presented at the Investigation. The amended Notice either confirmed that the Investigation would take place on Thursday of that week or arguably gave the Claimant an extra day, until October 28. The Organization made no showing of any prejudice or surprise suffered by the Claimant because of the change in the Notice.

We agree with the Carrier that Conrail Rules were in effect on the day in question. The Claimant was aware of this as he had seen the memo stating that Norfolk Southern Rules did not begin to apply immediately. However, we also agree with the Carrier that it is not critical to determine if Conrail Rules applied, because Conrail and NORAC Rules are largely consistent, particularly as to the procedure and speed limit for operating machinery in reverse as well as the need to be prepared to stop at a crossing. There also is apparently no dispute that NORAC Rules applied.

The Organization is correct that an accident alone is insufficient to establish negligence or violation of Safety Rules. In the instant claim evidence supports the conclusion that the Claimant did not follow applicable Rules. According to NORAC Operating Rules, track cars cannot exceed ten miles per hour when backing up. Conrail Safety Rules further require that a track car not exceed five miles per hour when running over a grade crossing. While it is true that there was no speedometer on the tamper operated by the Claimant, he testified that he thought he had been going "maybe 15" miles per hour. He also acknowledged to a Carrier Officer that he felt that he was doing 15-20 miles an hour when he approached the crossing. As a Machine Operator with 23 years experience, he should have been able to estimate his speed accurately.

NORAC Rules also require that a track car approach highway crossings prepared to stop and give highway traffic the right-of-way. According to the Claimant, as he approached the crossing from the south, he looked to the west and saw the dump truck, which he "felt was stopped," looked to the east and saw that the traffic was stopped, and proceeded through the crossing. Ostensibly, while he was looking to the east at the traffic, the dump truck traveled 120 feet to collide with the tamper in the crossing. Thus, after the Claimant looked in its direction, he alleges that enough time elapsed for the dump truck, which according to the Claimant had been at a stop when he saw it and which was pulling a trailer filled with concrete block, to start up, turn left and drive 120 feet. We conclude from this scenario that the Claimant was negligent in proceeding through the crossing without first affirming that the truck was stopped prior to operating the tamper into the crossing.

Thus, the Claimant violated NORAC Rules both by traveling at an excessive rate of speed and by not ensuring that the traffic was stopped before proceeding through the crossing. The fact that the truck driver was also at fault because of his faulty brakes does not excuse the Claimant from disregarding his obligations under the Safety and Operating Rules.

The Board disagrees with the Organization that the mere fact that the Hearing Officer set the duration of the suspension to coincide with the time the Claimant had been out of work was improper. Safety is a critical element of the Carrier's operations and any compromise of safety must be dealt with seriously. The Organization presented no evidence that the time assessed was inappropriate given the gravity of the violation committed. The Claimant's inattention arguably contributed to his own personal injuries and almost \$4,000.00 in damages to the Carrier's equipment.

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 29th day of July 2003.