

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37282
Docket No. MW-37001
04-3-01-3-634**

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Montana Rail Link, Inc.

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [five (5) working day suspension without pay] imposed upon Mr. J. G. Winslow for alleged violation of General Safety Rules G-1-a, E/M-13-c and General Code of Operating Rule 1.1.2 in connection with his personal injuries and damage sustained by the speedswing ditcher when it tipped over on July 19, 2000 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File MRL-169).
- (2) As a consequence of the violation referred to in Part (1) above, Mr. J. G. Winslow's record shall ‘. . . be immediately cleared, without impairment. Restoration of loss is to include, but not limited to, wages loss, overtime opportunities lost, promotional opportunity and all fringe benefits lost such as insurance, railroad retirement contributions, ect (sic).”

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.

As a result of charges dated July 25, an Investigation held on September 20 and a letter dated October 18, the Claimant was suspended for five days for violation of various general Safety Rules in connection with personal injuries he suffered and damage sustained to a speedswing ditcher that tipped over on July 19, 2000 while the Claimant was operating the equipment. As a result of the accident, the Claimant suffered a concussion and bruises. Damage to the equipment was estimated at \$20,000.

The Claimant testified that he had no recollection of the incident. According to the Claimant, "I recall regaining consciousness and the machine was tipped over." Based upon observations of the equipment and the scene of the incident, the Carrier pieced together a theory that the Claimant did not safely operate the equipment in that he was in a stopped position; his track authority was about to expire; and, in order to get the ditcher off of the rail in a timely fashion, he engaged in a risky maneuver of having the bucket lower and the front end of the machine raised on a curve with a three inch elevation that resulted in a three point contact which caused the machine to tip. The Organization argues that any theory offered by the Carrier is conjecture and insufficient to meet the Carrier's burden of proof to show by substantial evidence that the Claimant violated the Carrier's Safety Rules.

For the sake of discussion, we will give the Claimant and the Organization the benefit of the doubt. There were no eyewitnesses other than the Claimant and he does not remember what occurred.

However, notwithstanding our not considering the Carrier's theory concerning how the equipment tipped over, we find that substantial evidence exists

in the record to demonstrate that the Claimant did not operate the equipment in a safe manner as required by the Carrier's Rules. Assistant Chief Engineer C. Anderson inspected the cab of the equipment and testified "I did not identify, by looking in the cab, any seat belt." Work Equipment Supervisor F. Owens also inspected the cab and testified that "[t]he seat belt was . . . the left-hand side of it was tucked in between the seat cushions." When asked if it appeared whether the seat belt had been used, Owens responded "I would say no from its position." The Claimant testified "I don't recall" when asked if he was wearing the seat belt.

Rule E/M-13-c specifies that the "[o]perator must . . . [w]ear seat belts, if equipped." The evidence sufficiently shows that the seat belt was tucked into the seat cushion. Substantial evidence therefore shows that the Claimant engaged in misconduct in that the seat belt was not used as required by that Rule.

Given the demonstrated misconduct, we find that a five day suspension was not arbitrary. The Claimant suffered a concussion and other bruises when the equipment tipped over to the extent that he could not even recall what happened. It is fair to conclude that had the Claimant been wearing the seta belt, his injuries may not have been as extensive.

Based on the above, we will deny the claim.

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 17th day of November 2004.