

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37421
Docket No. MW-37171
05-3-02-3-147

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Soo Line Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (withheld from service and subsequently advised that effective August 31, 2000 he would no longer be allowed to operate ‘track cars’ as described by the FRA O.T.S. rule) imposed upon Mr. B. Erickson for his alleged violation of O.T.S. Rule 23.2.4 in connection with his involvement in a highway crossing accident on July 26, 2000 was arbitrary, capricious, without just and sufficient cause and in violation of the Agreement (System File D-1488-00.09/8-00410).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant B. Erickson shall receive the remedy prescribed by the parties in Rule 20(g).”

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 July 26, 2000, the Claimant, while operating a speed swing, was involved in a grade crossing accident at Mile Post 15.8 (the Portland Street crossing at White Bear, Minnesota) on the Withrow Subdivision. At approximately 8:45 A.M., the Claimant approached the crossing from the west. He looked to the north and south before proceeding. He proceeded into the crossing and struck a northbound 1997 Toyota Camry driven by S. LaBore. Although LaBore suffered only minor injuries, her vehicle sustained substantial damage. The speed swing was not damaged. The Claimant reported the accident to Track Program Manager Balmer who, in turn, reported the incident to local police. The Claimant was removed from service and subjected to a urinalysis, the results of which were negative. Thereafter, the Claimant was returned to service on August 1, 2000.

By letter dated August 3, 2000, the Claimant was directed to attend an Investigation to be held on August 18, 2000, "... for the purpose of developing all facts and circumstances and placing responsibility if any, in the highway crossing accident that you were involved in on Wednesday, July 26 when the speed swing you were operating collided with a 1997 Toyota Camry at Portland Street in the city of White Bear, MN in violation of OTS rule 23.2.4, GCOR rules 1.1, 1.1.1, 1.6 item #1, and safety handbook rules A, I and O."

In a letter dated August 31, the Carrier notified the Claimant that as a result of the August 18, 2000 Investigation, he was suspended for a period of five days for violating O.T.S. Rule 23.2.4. Further, the Claimant was precluded from operating track cars as described in O.T.S. rules for C.P. Rail, and "... therefore, your seniority in Groups 1, 2, 3, and 4 of the Maintenance of Way Seniority Roster will be forfeited. . . ." The discipline was subsequently modified by a letter dated September 1, 2000 in which the Carrier defined the term "track car."

By letter dated October 24, 2000, the Organization filed an appeal on behalf of the Claimant alleging that the discipline was unwarranted. It asserts that the burden of proof in a discipline matter such as this is on the Carrier and that burden

has not been met. The Organization contends that the Carrier imposed harsh and excessive discipline against the Claimant. According to the Organization, the Carrier's decision to discipline the Claimant was based solely on the fact that an accident occurred and not that fault lay with the Claimant. The Organization claims that even if the Claimant was at fault, the discipline imposed was too severe.

Conversely, the Carrier takes the position that the Claimant was afforded a fair and impartial Investigation and was guilty as charged. According to the Carrier, the record contains substantial evidence to support the Claimant's culpability. It asserts that it met its burden of proof and that the discipline was appropriate in light of the two accidents in which the Claimant was previously involved.

In discipline cases, the Board sits as an appellate forum. We do not weigh the evidence de novo. As such, our function is not to substitute our judgment for the Carrier's, nor to decide the matter in accord with what we might or might not have done had it been ours to determine, but to pass upon the question of whether there is substantial evidence to sustain a finding of guilty. If the question is decided in the affirmative, we are not warranted in disturbing the penalty unless we can say it appears from the record that the Carrier's actions were unjust, unreasonable or arbitrary, so as to constitute an abuse of its discretion. See Second Division Award 7325, Third Division Award 16166.

The Board finds substantial evidence to uphold the Carrier's decision. The Carrier proved that the Claimant's negligence violated the relevant safety Rules and caused the accident involving LaBore. In addition, because the discipline imposed was reasonable, the Board will not change that result. See Case 7, Public Law Board No. 5842.

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 22nd day of March, 2005.