

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37547
Docket No. MW-38628
05-3-04-3-604

The Third Division consisted of the regular members and in addition Referee James E. Conway when award was rendered.

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

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (Level 3 with five (5) day actual suspension) imposed under date of November 6, 2003 upon Mr. J. Rivera for alleged violation of UPRR Rules 136.7.5, 42.9, 70.4, 42.8, and 1.1.2 on October 29, 2003 while operating TRIP 176179 and struck PP44 was arbitrary, capricious, on the basis of unproven charges, excessive and in violation of the Agreement. (System File UPKB-6847D/1382255D).
- (2) As a consequence of the violation referred to in Part (1) above, Mr. J. Rivera shall now “. . . be compensated all lost time, be made whole all losses and have any reference to the investigation removed from his personnel record as outlined in Rule 48 (h) of the effective Agreement.”

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 Organization here challenges a five-day suspension imposed on the Claimant for alleged negligence in operating his Company vehicle in a manner that the Carrier contends caused a collision with another Company vehicle.

The circumstances surrounding the accident at issue are not in dispute. On October 8, 2003 the Claimant - a 30-year System Machine Operator - reported for work on System Tie Gang 9061, received a safety/job briefing on the activities planned for that day, and was then asked to assist with moving a number of vehicles from MP 162 near Wood River, Nebraska, approximately two miles eastward toward their next assignment.

With a public crossing in the area, it is undisputed that all Company vehicles were moving slowly and were tightly bunched during the move as prescribed by Rule 136.7.5 to minimize the time that they would block the public crossing. Immediately ahead of the vehicle the Claimant was driving, TRIP 176179, was a Company Personnel Carrier on which several employees were riding. All vehicles in the procession maintained the requisite 50-foot intervals up to the point where they passed the crossing, where they began to spread out. As they did so, at approximately 2:15 P.M. in broad daylight the TKO machine immediately in front of the Claimant stopped abruptly. The Claimant was unable to halt his machine and it rear-ended the TKO, derailing it. Thereafter the Claimant was directed to attend an Investigation on October 29, 2003. On November 6, 2003 he was assessed a Level 3 five-day actual suspension for violation of the Rules stated above pertaining to safe traveling distances and related issues. The Organization challenges that discipline as not supported by record evidence

The Hearing transcript indicates that a tamper was in position directly in front of the TKO machine the Claimant struck. It is undisputed that its driver had brought his machine to a sudden stop with no advance warning east of the road crossing in order to hand off a portable radio to another employee. In response, the TKO Operator quickly applied his brakes and stopped approximately three feet from the tamper. As the TKO was braking, Assistant Foreman D. P. Daum, who was riding on the TKO, signaled the Claimant to stop. The Claimant acknowledged

the signal and immediately applied his brakes, but his vehicle slid into the personnel carrier at a low rate of speed, derailing it. A subsequent inspection of the rail revealed oil and grease on the track at the point where the Claimant had tried to bring his machine to a halt.

The most specific of the Rules for which the Claimant was disciplined involve "tailgating" in violation of Rule 136.7.5, Safe Traveling Distance Between Machines and Rule 42.8, Following Cars or Trains. Those Rules read:

"RULE 136.7.5 Safe Traveling Distance Between Machines

Keep at least 300 feet behind other on-track equipment, trains or engines while traveling. See Rule 42.8 (Following Cars or Trains).

EXCEPTION: When roadway machines need to 'bunch up' to move over highway or rail crossings, keep at least 50 feet between the machines.

When slowing down or stopping, comply with Rule 42.9 (Signal to Stop).

RULE 42.8, Following Cars or Trains

On-track equipment must remain at least 300 feet behind other on-track equipment, trains or engines while traveling.

Maintain greater intervals between large machines such as ballast regulators, tampers, cranes and yard cleaners."

We have been unable to discern any evidence in the record before us suggesting that following too closely played any causative role in the collision. No witness to the accident states that the Claimant's machine was maintaining an inappropriate distance behind the TKO. Assistant Foreman Daum, who had the Claimant in his view at all relevant times, testified that the string of maintenance-of-way vehicles had just passed the road crossing and was "a couple of rail lengths . . . 3, 4 rail lengths" east of it at the time of impact and beginning to spread out, as appropriate. According to Daum, the Claimant was "at least 150 feet or something . . . it was quite a ways" back and traveling at about one or one and one-

half miles per hour at the time he waved at him to stop. He saw the Claimant acknowledge the signal and observed him begin braking immediately. He further testified that the personnel carrier, on which he was a passenger, was "150, 200 feet" behind the tamper that suddenly applied its brakes and that despite braking promptly it had stopped within three feet of the tamper. In Daum's opinion, he thought the Claimant could also stop on time, and "he was almost stopped when it did hit." When he got down to examine the area and determine what had happened, he saw "oil and stuff on the rail." With the Claimant and his Foreman equally spaced, the charge of following too closely is misplaced.

The Carrier additionally cites the Claimant for inattention. Its applicable Rule reads:

"RULE 1.1.2, Alert and Attentive

Employees must be careful to prevent injuring themselves or others. They must be alert and attentive when performing their duties and plan their work to avoid injury."

As with tailgating, the record in our judgment does not support a charge of "inattention." Despite the findings of the Hearing Officer, there is no credible evidence here establishing any indifference or lack of concentration on the Claimant's part prior to the collision. The record provides no basis for any conclusion but that the Claimant was moving very slowly and at exactly the same speed as the other machines, at all times maintaining the appropriate distance from the unit ahead of his, when the accident happened.

The Claimant was further charged with violation of Rule 42.9, Signal to Stop and Rule 70.4, Safe Working Space. Those Rules provides as follows:

"Rule 42.9 Signal to Stop. When two or more track cars are moving on the same track, the operators of all cars must agree upon and use a predetermined signal to stop that is easily seen and understood.

The operator of a track car that follows must watch for signals and must acknowledge a signal with the same signal.

Rule 70.4 Safe Working Space. When working in groups be aware of the work and movement of other group members and equipment."

It is plain from the record that during the critical timeframe, the Claimant's vehicle was moving at a snail's pace out of concern for the crossing in the area. TKO Operator I. R. Castillo testified that when he saw the tamper slide to a stop, he applied his brakes and also started sliding, eventually stopping about three feet short of the tamper. According to Castillo, "... some of the machines were leaking oil and there was oil on the tracks. We didn't know about it until that time." Claimant in turn testified without contradiction that he was moving at about 1.5 miles per hour when he saw Daum signal him to stop. He immediately applied his brakes and slid "over 150 feet." Inattention might reasonably be inferred from a significant time lapse between Daum's signal and the Claimant's response, but the record is clear that the Claimant reacted immediately to the stop signal given by Daum. The Carrier failed to bear its burden of proving the Claimant violated either of the foregoing Rules.

Anyone unfortunate enough to have spent a day in traffic court recognizes that drivers who "rear-end" other vehicles are often found responsible for such accidents. In the case at hand, we find that the evidence strongly points to intervening causes other than negligence.

AWARD

Claim sustained.

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 20th day of July 2005.