

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20365  
Docket Number MW-20396

Joseph A. Sickles, Referee

PARTIES TO DISPUTE: {  
(Brotherhood of Maintenance of Way Employees  
(Louisville & Nashville Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Carrier acted improperly, arbitrarily, capriciously, without just and sufficient cause and on the basis of unproven charges when it demoted Machine Operator O. A. Cotton, Sr. and took away his seniority as a Rank 3 Machine Operator (System File 1-12/D-104663 E-306-18).

(2) Mr. O. A. Cotton's seniority as a Rank 3 Machine Operator be restored and unimpaired and that he be allowed the difference between what he would have received at the ballast regulator's rate and what he was paid in a lower rank position from January 15, 1973 until he is returned to work as a Rank 3 Machine Operator with seniority as such unimpaired.

OPINION OF BOARD: On December 13, 1972, the Foreman instructed Claimant to travel to a designated area in a ballast regulator to perform certain work. Claimant was advised to return to the main work site by 10:00 a.m.

Claimant performed all of the work he could, and started back to the main work site at about 9:30 a.m.

At the same time, the Foreman determined that he needed the ballast regulator at the main work site. The Foreman had no way of contacting Claimant, so, he sent another employee in the electronic tamper to Claimant's work site to inform him that he was needed with the main body of the gang.

Consequently, the two machines were operating in opposite directions on the same track, approaching a compound curve. Neither operator had any reason to believe that the other was operating his machine in the manner described above. The two machines collided on the curve.

Carrier conducted an investigation concerning Claimant's responsibility in connection with the accident. Carrier found responsibility and advised Claimant that as a result,

"...your Rank 3 seniority is being taken from you."

Carrier insists that Claimant was "...negligent in the operation of the ballast regulator in that he was not maintaining a proper lookout nor did he have the machine under control so that he could stop when he saw the tamper."

Without immediate regard for the quantum of punishment imposed, the Board is of the view that the evidence produced at the investigation, including Claimant's own statements, constituted substantive proof of negligence in operation of the machine.

The operator of the tamper saw Claimant's machine approaching him 6 to 10 rail lengths prior to the collision and was able to stop his machine; yet Claimant did not see the tamper until he was 3 rail lengths or less from the point of impact. Claimant was operating his machine in reverse, in a dangerous curve, with heavy underbrush to obscure vision. Claimant was aware of a regulation which requires operation, at all times, "...prepared to stop in less than one-half range of vision." Moreover, Claimant appeared to admit a degree of laxity when he testified:

"If I had know that he was sending a tamper down there, I would have been on a closer lookout than I was..."

While the proof supports a finding of responsibility, a consideration of the entire record shows that the amount of discipline imposed is excessive, and under those circumstances, this Board may reduce same. See Awards 20364, 18603, 10582 and 11914. See also, Award 20134 concerning these parties.

The record does not support a conclusion that Claimant exhibited a deliberate disregard for safety or that his conduct constituted gross negligence. The Foreman was aware that Claimant was due to report back by 10:00 a.m. and could reasonably have expected him to depart his work site earlier than anticipated, yet the record does not indicate that the Foreman gave any special warning in this regard to the tamper operator, even though he was aware that the machines had to pass through the dangerous compound curve. In short, we feel that there were mitigating circumstances present. We also note that Carrier has not disputed Claimant's assertion that this was the first accident he has been involved in even though he has been operating machines for some time.

Claimant's seniority in Rank 3 shall be restored. We are not prepared, however, to sustain the claim for loss of earnings, inasmuch as we have determined that the record supports a conclusion of a degree of responsibility. Accordingly, we will sustain the claim to the extent of restoration of Claimant's seniority in Rank 3, but we shall deny the claim for compensation of wage loss.

**FINDINGS:** The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

A W A R D

Claim sustained to the extent stated in Opinion of Board.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST:

A. W. Paulsen  
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of August 1974.