

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26532  
Docket Number MW-26927

Edwin H. Benn, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees  
(  
(The Denver and Rio Grande Western Railroad Company

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

(1) The dismissal of Work Equipment Operator D. R. Lawyer and the discipline (sixty demerits) imposed upon Track Liner Operator E. G. Chavez for alleged responsibility in connection with '...collision between Ballast Equalizer BE-3, Track Liner TL-6 and Motor Car 3039 ... personal injury to E. G. Chavez on October 30, 1984....' was arbitrary, capricious, without just and sufficient cause and in violation of the Agreement (System Files D-64-84/MW-4-85 and D-65-84/MW-5-85).

(2) Claimant D. R. Lawyer shall be reinstated with all seniority and rights unimpaired and he shall be compensated for all wage loss suffered in accordance with Rule 28.

(3) Claimant E. G. Chavez' record shall be cleared of the charge leveled against him and the sixty (60) demerits imposed upon him shall be removed from his record in accordance with Rule 28."

OPINION OF BOARD: At the time of the incident, Claimant Lawyer was an Equipment Operator and was in the Carrier's service since May 5, 1981. Claimant Chavez was a Track Liner Operator/Extra Gang Laborer and was in the Carrier's service since May 19, 1981. Both were assigned to section forces headquarters at Pinecliff, Colorado. As a result of a collision on October 30, 1984, charges dated November 1, 1984, Investigation held November 6, 1984, and letters dated November 12, 1984, Claimant Lawyer was dismissed from service and Claimant Chavez was assessed 60 demerits for their responsibility in connection with that collision.

The record discloses that on October 30, 1984, Claimant Lawyer, while operating a ballast equalizer, followed Claimant Chavez into a 1000 foot tunnel (Tunnel 16). At the time, Claimant Chavez was operating a track liner towing buggies. While in the tunnel, the ballast equalizer collided with the moving track liner. A motor car operated by Track Patrolman S. P. Schoening then collided with the ballast equalizer. The collision destroyed the buggies, damaged the track liner and motor car and caused injury to Claimant Chavez.

With respect to Claimant Lawyer, we are satisfied that substantial evidence exists in the record to support the Carrier's determination to impose

discipline. Under the circumstances, and considering the conditions that existed, we cannot find fault with the Carrier's determination that Claimant Lawyer should have operated the ballast equalizer at a reduced speed in the tunnel so as to permit adequate distance for stopping. Claimant Lawyer knew that Claimant Chavez was ahead of him with the track liner. The tunnel was on an approximate 12 degree curve and, according to Claimant Lawyer, was "real steep." Claimant Lawyer testified that he followed Claimant Chavez into the tunnel but could not see Claimant Chavez ahead of him. Further, by Claimant Lawyer's own estimate, he was going approximately 15 miles per hour and it would have taken a distance of five to seven rail lengths to stop his equipment while he could only see at a distance of two rail lengths ahead. Thus, Claimant Lawyer was traveling faster than his ability to see and stop.

The fact that Claimant Chavez was operating the track liner without headlights does not change the result. The record reflects that Claimant Chavez thought he informed Claimant Lawyer that the headlights were not working on the track liner. In any event, there are no taillights on the track liner and the record satisfies us that the operation of the headlights on the track liner had no effect on avoidance of the collision which occurred as a result of Claimant Lawyer's excess speed for the condition of the terrain. Nor would the fact that the Track Patrolman was not disciplined even though his motor car collided with the ballast equalizer after it collided with the track liner require a different result. The record reflects that the motor car was proceeding slowly at five miles per hour or less and had more than adequate stopping distance between it and the ballast equalizer (three to four rail lengths). The motor car slid and lost friction and was unable to stop after passing over hydraulic fluid that spilled onto the tracks as a result of the collision caused by Claimant Lawyer on the ballast equalizer. Therefore, we can find no disparate treatment in the failure to discipline the Track Patrolman.

Rule M requires employees to expect the movement of equipment and to take every precaution to prevent injury. Rule 405 requires employees to expect to find the track in use and further requires care be exercised to avoid striking other track cars. Similarly, Rule 415 requires special care be exercised in adverse conditions and that track cars must be operated at safe speeds for existing conditions. The record thus supports the Carrier's determination that these rules were not followed by Claimant Lawyer. In light of the above, we do not believe under the circumstances that the Carrier's action of assessing dismissal was either arbitrary or capricious.

However, we do not find substantial evidence in the record to support the decision to impose discipline upon Claimant Chavez. He was operating in the tunnel at a cautious speed when he was struck by Claimant Lawyer. The Carrier asserts that some fault should be placed upon Claimant Chavez because he was operating without lights. However, the record shows that he reported the problem with the lights to his Supervisor prior to the collision and the record further reflects that he was denied permission to get a part to repair the lights. In any event, as we have found above, the record satisfies us that the lack of lights on the track liner was not the cause of the collision, but the collision was attributable to the speed of the ballast equalizer under the given conditions. There is no evidence that Claimant Chavez was in any fashion culpable for the collision. Therefore, we shall require that Claimant Chavez' record be cleared of the demerits assessed.

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 not violated with respect to Claimant Lawyer but was violated with respect to Claimant Chavez.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

  
Nancy J. Beyer - Executive Secretary

Dated at Chicago, Illinois this 30th day of September 1987.