

The Third Division consisted of the regular members and in addition Referee Thomas J. DiLauro when award was rendered.

(Brotherhood of Maintenance of Way Employees  
PARTIES TO DISPUTE: (  
(Soo Line Railroad Company (former Chicago, Milwaukee,  
St. Paul and Pacific Railroad Company)

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

(1) The discipline assessed Crane Operator R. A. Michael, twenty (20) working days' suspension from service, for alleged violation of General Code of Operating Rule E-1029, involving a grade crossing accident on January 17, 1990 was arbitrary, capricious, on the basis of unproven charges and disparate (System File C #15-90/8-00002 CMP).

(2) As a consequence of the violation referred to in Part (1) hereof, Mr. R. A. Michael shall be paid twenty (20) days' pay and his record shall be cleared of this incident."

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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 waived right of appearance at hearing thereon.

The Claimant worked as a crane operator, and he was regularly assigned to operate Burro Crane No. 137.

In St. Paul, Minnesota, on January 17, 1990, at approximately 8:30 A.M., Burro Crane No. 137 traveled in consist with a lead flat car, the burro crane, another flat car, and a caboose. The conductor/pilot remained in the caboose. As the consist approached the Otto Avenue crossing, the Claimant slowed the consist to one to two miles per hour. The Claimant noted a vehicle approaching from the north. When the vehicle failed to stop, the vehicle collided with the flatcar. The St. Paul Police investigated the accident and issued a citation to the driver of the vehicle for failure to grant the right of way to the train. Drug tests were administered to the Claimant and the driver of the vehicle, and both tests produced negative results.

As a result of the accident, the Carrier notified the Claimant that he was assessed a 20 working day suspension from service as discipline for his alleged violation of General Code of Operating Rule E-1029. General Code of Operating Rule E-1029, (hereinafter referred to as "Rule E-1029"), provides:

"Road Crossings - When passing over public crossings, track cars are to be handled in the following manner.

- (a) Approach crossing under complete control.
- (b) Stop if necessary.
- (c) Flag crossing if necessary.
- (d) Highway traffic must be given preference. The responsibility of striking a vehicle or being struck by a vehicle at a crossing rests with the employes in charge of the track car."

After a Hearing, the Carrier found the Claimant guilty of violating Rule E-1029.

The Organization maintains the Carrier failed to meet its burden of proof to provide credible evidence in support of the charges against the Claimant. The Organization characterizes the discipline as arbitrary, capricious, and unsubstantiated.

The Organization asserts the Carrier's decision to discipline the Claimant was based merely on the fact that the accident occurred, because the Carrier speculated that the incident would not have occurred had the Claimant insisted the conductor/pilot flag the crossing.

The Carrier asserts it fulfilled its burden to prove the charges assessed against the Claimant. The Carrier admits Rule E-1029 places all the blame on the Claimant, but the Carrier notes it considers extenuating circumstances in assessing discipline. The Carrier argues the Claimant is responsible, because he admitted in his testimony that he failed to stop prior to entering the crossing as required by Rule E-1029. The Carrier also cites the Claimant's admission that he elected to proceed across the crossing, because he assumed the vehicle would stop.

The Organization argued the Carrier's decision to hold the Claimant totally responsible for the collision constituted disparate discipline, because the conductor/pilot and the driver of the vehicle must share responsibility with the Claimant. In response, the Carrier notes the general rules contained in the General Code of Operating Rules require all employes to ensure "safety is of the first importance in the discharge of duties." Accordingly, Claimant failed to comply with the General Operating Rules by failing to ensure the conductor/pilot provided protection.

With respect to the substantive charge, the Board finds there is sufficient probative evidence in the record to establish the Claimant is guilty of the charge against him.

The Board initially notes its deference to a carrier to determine whether a claimant exercised reasonable care under the circumstances.

"...He was required to exercise care in the performance of his duties and it was within the province of the Carrier to determine whether he did so under all the circumstances. We cannot substitute our judgment for that of the Carrier and if there is any evidence which would justify Carrier in concluding that Claimant was not using the best judgment in conducting himself safely, it is not for us to disturb it." Third Division Award 11775.

In this case, the record demonstrates the Carrier produced sufficient evidence to prove the Claimant acted negligently. For example, by his own admission, the Claimant failed to stop the consist after sighting the vehicle.

Therefore, the Board rejects the Organization's argument that the Carrier failed to meet its burden of proof that the Claimant was responsible for the crane accident (Third Division Awards 21285, 23254, 26874) at a grade crossing (Third Division Awards 21318, 27002) with evidence of speculative hindsight or an accident per se. (First Division Award 22576; PLB No. 4402, Award 22; SBA No. 947, Award 88). The Board also rejects the Organization's argument that the discipline is unwarranted in this case.

Although the Board notes the Organization's argument raising the potential culpability of the conductor/pilot, the Board is unable to assess the disparity argument because the record lacks sufficient evidence concerning the ramifications of the accident for the conductor/pilot. Further

"Negligence of others which contributed to the derailment does not absolve Claimant of his responsibility for the negligence on his own part."  
Third Division Award 17163.

This Board finds the Claimant responsible for his own negligence in this case.

With respect to the disciplinary action, the Board will not set aside discipline imposed by a Carrier unless it is unreasonable, arbitrary, or capricious. Third Division Award 26160. The Board finds the discipline assessed in this case to be reasonable under the circumstances. The Board held a suspension is not unreasonable for a violation of a Safety Rule.

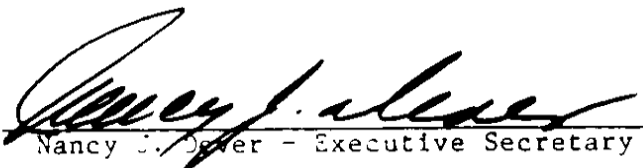
"Safety Rules, by their very nature, place a high degree of care on carrier's employees, and ... the 15 day suspension was not arbitrary, unwarranted, or unreasonable." Third Division Award 14770.

Therefore, the Board finds a twenty day suspension in this case is reasonable.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:   
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 21st day of October 1992.