

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32013
Docket No. MW-31704
97-3-93-3-735**

The Third Division consisted of the regular members and in addition Referee Nancy F. Murphy when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Southern Pacific Transportation Company
((Eastern Lines)**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The thirty (30) days of suspension imposed upon Machine Operator M. H. Martinez for alleged violation of Rule 2.11.8 on September 15, 1992 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File MW-93-1/MWD 93-2 SPE).**
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant's record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered and properly credited for all benefits in connection therewith."**

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.

M. H. Martinez (Claimant) has been employed by Carrier for approximately 18 years, and has established and holds seniority as a machine operator. He was assigned as such on a ballast regulator, under the supervision of Roadmaster W. Zunker and was working in the vicinity of Hebronville, Texas at the time of the incident giving rise to this dispute.

On September 15, 1992, Claimant was operating a ballast regulator in the vicinity of Mile Post (MP) 704. The ballast regulator, which normally works directly behind a tamper, is used for filling in the track and "dressing" it for final inspection. Claimant had been instructed, by his supervisor, to perform work at MP 701 while the tamper raised and lined track near MP 704.6. After Claimant had finished the assigned work at MP 701, he traveled to the west switch at Collado, Texas, where he was to meet the tamper being operated by Machine Operator Lopez. As Claimant approached the west switch, he applied his brakes; however, the ballast regulator slid, some 574 feet, colliding with the tamper. The collision resulted in damage to the front attachments (buggies) of the tamper.

Claimant maintained that the collision occurred a result of "an excess amount of grease on the rail", caused by a rail oiler located at MP. 705.30. However, Carrier asserted that the accident occurred as a result of Claimant traveling at "an excessive speed."

On the following day, September 16, 1992, the "incident" was reenacted. According to Roadmaster Zunker, on the date of the accident, Claimant slid approximately 574 feet, and on the day of the reenactment, he traveled only 450 feet prior to the point of impact. However, Work Equipment supervisor Quesada stated that Mr. Martinez actually slid 585 feet on the day the incident was reenacted, some 11 feet further than on the date Carrier charged him with the improper the rule violation.

Regardless of the inconclusive reenactment "results", on September 30, 1992, Carrier assessed Claimant with a 30 day suspension for his "involvement in" the collision of his machine and the buggies of the tamper. Carrier premised the discipline on Claimant's alleged violation of Rule 2.11.8, which states:

"Operators must have track cars under control at all times and be able to stop short of one-half of the sight distance or before striking an obstruction on, or foul of, the track."

In accordance with Article 14 of the Agreement - DISCIPLINE AND INVESTIGATION, Claimant requested an Investigation, which was originally scheduled for October 20, 1992, but was postponed, and held on October 29, 1992. In Carrier's Notice regarding said postponement, it stated that Claimant had instead, allegedly violated Rule 2.13.32, which provides:

"Track machines must be operated at a safe speed at all times, subject to conditions, especially on grades, both while working and while running light.

While traveling, machines must be separated from other machines in such a way as to avoid any undesired contact between any two machines."

At the outset of the Hearing, Carrier qualified the alleged dual Rule violation by stating that:

"Let the record show at this time it is noted that Mr. Martinez was suspended from service for Rule 2.11.8 which he was charged with in the original charge letter and then changed to Rule 2.13.32 in the corrected letter. In reviewing both rules, I find that both rules applied for this alleged violation. Being that Mr. Martinez was suspended for Rule 2.11.8 and that Mr. Martinez requested this investigation per Rule 2.11.8, it is my determination that we will investigate Rule 2.11.8 only in this hearing. Let the record show that after the opening of this investigation I'll entertain a request for recess from Mr. Sanchez or Mr. Martinez if additional time is needed to prepare because of the change in the charge letter."

The Organization did not ask for additional time to prepare, but, Mr. Sanchez did request that the Investigation be terminated because: "Mr. Martinez was operating a track machine, not a track car. It is our position that a roadway machine is a machine that can be operated on the highway and on the track, and Mr. Martinez is and was not

operating a roadway machine or motor car on this date as charged.” Carrier denied the Organization’s motion to terminate the Investigation, reiterating that Claimant “could have been charged with either Rule 2.11.8 or 2.13.32.” Subsequent to the Investigation, Carrier upheld the discipline of a 30 day suspension.

The Organization submitted a claim premised upon the following:

- (1) Excessive grease on the rail led to Claimant’s inability to stop prior to colliding with Mr. Lopez’ tamper.
- (2) There was “absolutely no evidence” that Claimant was negligent in the operation of his assigned machine, and in light of an 18 year unblemished record, the discipline is harsh and excessive.
- (3) Claimant cannot be charged for the cited Rule, Rule 2.11.8, as Claimant was not operating a motor car, push car, hi-rail vehicle or any on-track roadway machine.

Carrier denied the claim, maintaining that:

“Review of the transcript of the investigation clearly indicates that Mr. Martinez was in violation of the rules for which he was cited, and the evidence educed (sic) supports the discipline assessed.”

The Organization’s threshold argument, regarding the change in the Agreement Rules cited, and the appropriateness, or lack thereof, is not persuasive. Carrier’s assertion that either, or both Rule 2.11.8 or 2.13.32, could apply, in these particular circumstances, is well grounded. There is no showing of actual prejudice, unfairness or lack of understanding of the charges, by Claimant or the Organization. Moreover, the Organization waived the right to have additional time to prepare. Therefore, the Organization’s contention, that that procedural “flaw” is fatal to Carrier’s case is without merit.

Turning to the merits of this dispute, a close review of the transcript fails to support Carrier’s contention that the accident would not have occurred, but for Claimant traveling at “an excessive rate of speed.” In that connection, we need look no

further than the testimony of Carrier witnesses' Zunker and Quesada. Under questioning by Organization Representative Sanchez, Roadmaster Zunker testified:

"Q. Can you tell me what, in your interpretation of your investigation, did you determine what cause this regulator to run into the tamper?"

A. My opinion of what happened is that Max Martinez failed to operate his machine at a safe speed because of grease on top of the rail and he was, and ran into the buggies on the tamper.

Q. You say he failed to go at a safe speed, what would you consider a safe speed when you say there's grease on top of the rail?

A. That, you know, it would be a speed that would allow him to stop short of the tamper.

Q. And what were your findings in your reenactment?

A. On the first day, Max Martinez marked a spot on the rail approximately 574 feet east of where the buggy was sitting and this is where he told me he began...where he began to stop or he set the brakes on the machine. And the following morning we took the regulator back to Collado and he started going westward at about 20 mph., and then he set the brakes for about the same place, and the next morning he slid for about 450 feet, some 124 feet less than the day before."

Regarding the Organization's assertion that excessive grease on the rail, rather than excessive speed, was, in fact, the primary cause of the accident, we have Mr. Sanchez' interrogation of Roadmaster Zunker and Work Equipment Supervisor Quesada:

"Q. You also said that there was a grease lubricator at mile post 705.30 and another one at mile post 702.30. During the past have you had any problems with these two greasers as far as not functioning properly?"

A. Oh yes sir, uh huh. We have a rail lubricator mechanic that works on those things, they constantly need work on them.

Q. Mr. Zunker, the amount of grease that was on the rail, is that the normal amount of grease that would be on the rail depending on various greasers located on the main line? Or was it in excess of the normal amount?

A. I would say it was in excess of the normal amount.

Q. Mr. Quesada, as an A&WE Work Equipment Supervisor and being in an operator's seat on a ballast regulator, do you think an operator could see the grease on the rail?

A. No."

Finally, in addition to that testimony, Claimant stated:

"Q. Are you familiar with an oiler being located at this mile post location?

A. Yes sir, I was an oiler myself.

Q. You stopped at other locations on that day. did you have any problem stopping at any of these other locations as far as did you notice anything problem with the brakes on your machine?

A. No sir. I had to make a real sudden stop early that morning, for a bridge crew, and everything stopped normally, everything worked correctly, as it should. But there was no grease on that rail either.

Q. Do you feel you were under compliance with the Rule?

A. I had my machine under control at all times, not noticing that there was grease on the rail. If it would have been foggy, snowing or raining, that accident never would have happened 'cause I would have taken proper steps to slow down way before I ever got there. But I couldn't see the grease, all the time I was traveling that direction. I didn't have any idea that grease was there, and I thought I had full control of my machine, as I normally do."

Aside from speculation, there is no persuasive proof, in this record, that Claimant was traveling at a speed which could be considered "excessive" for the conditions. On

the other hand, the undisputed record establishes that there was an extraordinary amount of grease on the rail, a condition which Claimant could not have observed or anticipated. Based on the evidence presented, we conclude that Carrier erred in holding Claimant responsible for the collision. Therefore, the imposition of any discipline in this case was arbitrary and unreasonable. The claim is sustained.

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 6th day of May 1997.