

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 32488  
Docket No. MW-32975  
98-3-96-3-360**

The Third Division consisted of the regular members and in addition Referee Robert Perkovich when award was rendered.

**PARTIES TO DISPUTE:** (Brotherhood of Maintenance of Way Employees  
(Burlington Northern Railroad Company)

**STATEMENT OF CLAIM:**

**"Claim of the System Committee of the Brotherhood that:**

- (1) The dismissal of Machine Operator J. A. Diemert for alleged violation of '... rules 1.1, 1.1.1, 1.1.2, 1.2.7, 1.6, 6.5 and 6.51 of the Maintenance of Way Operating Rules, and Item 3 of the Burlington Northern Safety Policy, in connection with your failure to be alert and attentive, your failure to stop short of men and equipment, your disregard for the safety of yourself and your co-workers, your failure to give all the acts surrounding this incident and your dishonesty while you were performing service as a machine operator assigned to TKO BNX-63-00105 on Gang TP-03 on Friday April 7, 1995, near Sterling, North Dakota. . . .' was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File T-D-943-H/MWB 95-08-17AJ).**
- (2) As a consequence of this violation referred to in Part (1) above, the Claimant shall '... be made whole for any and all losses incurred beginning April 7, 1995 through and including his restoration to service. Such losses are to include, but are not limited to, wage loss, lost overtime opportunity, loss of accreditation for any lump sum payments, insurance coverage payments, loss of promotional opportunity and loss of vacation qualification accreditation. We are also requesting that any mention of this investigation and subsequent discipline be stricken from Claimant's record.'"**

**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.

On April 7, 1995 the Claimant, who had established over 18 years of service, was operating a TKO Machine as a part of Gang TP-03 near Sterling, North Dakota. The TKO Machine in question had a turntable that would drift downward while in motion. Thus, the Claimant was monitoring that downward drift and raising the turntable as it moved. In addition, the Claimant was pulling a cart with a load on it and he was required to monitor that load as well. Finally, the Claimant had placed his tool box at his feet and as the TKO moved he had to monitor the tool box as it shifted and on some occasions reach over to the tool box and move it to a more secure place. The Claimant operated the TKO Machine while traveling westbound in reverse mode following a Tamper and a Tie Plater. As the three vehicles continued their journey, the Claimant was using his mirrors to monitor the distance between the TKO Machine and the other vehicles and glanced the other way to monitor the load on the cart. In addition, he operated the turntable to correct the downward drift and sometimes leaned over to stabilize his tool box. Eventually, the Claimant did not see that the Tamper and Tie Plater had come to a halt and the TKO Machine collided with the two vehicles. As a result there was approximately \$6,100 damage to the machinery and two employees were injured. One of the two employees sustained serious injury. The Claimant was withheld from service and, after Investigation, was discharged.

The Organization asserts that the discharge must be overturned on both procedural grounds as well as the merits of the charges made against the Claimant. In the alternative, it asserts that although this Board might reject those challenges the discharge must be set aside because it is excessive.

The Organization's procedural arguments relate to the conduct at the Investigation Hearing and the fact that the Claimant was removed from service prior to the Investigation. More specifically, the Organization contends that the Investigation was biased because only the Claimant was removed from service and required to submit to a drug test, because witness statements and other documents were not provided by the Carrier, and because the Conducting Officer rewound and replayed the tape recording used at the Investigation while witness examination was underway. We reject each of these contentions. Although it is true that other employees were present at the time of the accident, the only reasonable preliminary conclusion when one vehicle collides into the rear end of another is that the Operator of the former may be the party responsible, if anyone. This is particularly true when, as here, the conduct of any other individual cannot be regarded as a cause of the accident. Thus, to remove the Claimant, and only the Claimant, under these circumstances was not a procedural defect. Similarly, with regard to the actions of the Conducting Officer, the record clearly shows that on those occasions when the tape recording was rewound and replayed, it was in an effort to refresh the recollection of witnesses and not in an effort to diminish or negate the Claimant's procedural rights. Finally, there is ample precedent that the failure of the Carrier to provide documents requested by the Organization prior to the Investigation is not a fatal error as there is no contractual or legal obligation on the Carrier to do so.

On the merits the Organization argues that the Carrier has failed to prove the charges made against the Claimant because the TKO Machine in question was defective and/or because the Claimant was distracted through no fault of his own. Thus, the Carrier has disciplined the Claimant merely because there was an accident and the mere fact that there was an accident does not mean that the Claimant was guilty of any misconduct. We disagree. The only alleged defect to the TKO Machine was the fact that the turntable drifted downward while the TKO Machine was in motion. However, the record clearly establishes that the downward movement of the TKO turntable did not affect the rate of speed or the braking ability of the TKO Machine. Thus, to the extent that it was a defect or deviation from ordinary circumstances it did not cause the Claimant to fail to brake in time to avoid colliding with the Tamper and the Tie Plater. There is however, some relation between the condition of the turntable and the Organization's "distraction" defense. That is, the Organization contends that the condition of the turntable, monitoring the load on the cart that the Claimant was pulling, and the necessity for the Claimant to observe and reposition his tool box all lead to the conclusion that the Claimant was not negligent and indeed was exercising the requisite amount of care under the circumstances.

It is no stretch of the imagination to conclude that the Claimant was occupied with multiple legitimate considerations while required to monitor the distance between the TKO Machine and the other vehicles. However, not all of the demands that he faced were caused by circumstances outside of his control. For example, the record contains no evidence that might lead us to conclude that he could not secure his toolbox so that it would not impact on his ability to monitor the distance in question. That therefore leaves for examination the demands placed on his attention by the drifting turntable and the load on the cart that the Claimant was pulling. We believe that neither of these conditions excuses the Claimant from liability for the accident. First, the record shows that the drifting movement of the turntable was not so sudden or constant that it would excuse the Claimant's failure to monitor the distance between the TKO Machine and the others. Second, monitoring the load on the cart would require nothing more than an occasional glance and again does not constitute a distraction that would prevent the Claimant from avoiding the accident in question. (See e.g. Public Law Board No. 4161, Award 15, between these same parties, holding that even work related distractions do not absolve an employee from guilt for rule violations governing the safe operation of machinery.) Moreover, despite these competing demands on his attention, the record clearly shows that all operating rules, of which the Claimant was aware, required that he maintain a distance of 300 feet from the other vehicles. This he certainly failed to do and we can only conclude that had he done so the accident might not have taken place. Finally, the evidence establishes that before the collision other gang members motioned and called to the Claimant to stop the TKO Machine, but that he failed to do so.

In the final analysis the Organization asks this Board to overturn the discharge because the penalty is excessive. We do not agree. First, this Board does not have the authority to grant leniency for it is a decision that rests with the Carrier alone. Only when that discretion is exercised in an arbitrary, capricious, or discriminatory manner may we act differently than the Carrier. The record shows that the property damage and personal injury as a result of the Claimant's rule violations was substantial. Under those circumstances we do not find the Carrier's exercise of the discretion to impose discharge unwarranted.

### **AWARD**

**Claim denied.**

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**ORDER**

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD**  
**By Order of Third Division**

**Dated at Chicago, Illinois, this 23rd day of February 1998.**