

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 32929  
Docket No. MW-33844  
98-3-97-3-337**

The Third Division consisted of the regular members and in addition Referee James E. Conway when award was rendered.

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

**STATEMENT OF CLAIM:**

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

- (1) The discipline (30 day suspension) imposed upon Machine Operator W. G. Foehr for alleged violation of Rules 1.1, 1.1.2, 1.6, 27.9 and 72.13.32 on February 28, 1996 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File MW-96-66/MW D96-25 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 one hundred sixty-eight (168) hours' pay at his straight time rate."**

**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.

Machine Operator Foehr, at the time a 21 year employee with Carrier, was involved in an collision with a spiker on February 26, 1996 while operating a ballast regulator at a grade crossing near Splendora, Texas. Claimant maintains that although qualified on that equipment, his normal assignment was to drive a fuel truck, and he had driven a ballast regulator only "once or twice" over the prior six month period. For his role in the incident, which resulted in minor property damage but no injuries, Claimant received a 30 day suspension.

The accident occurred at about 10:00 A.M. while Claimant was plowing ballast after having driven his assigned fuel truck and performed other duties earlier in the morning. According to the Carrier, Claimant's machine ran into the back of a spiker working on the mainline just ahead of him, doing minor damage to the spiker but none to Claimant's machine.

Carrier's position is that Claimant was solely responsible for this accident, which it maintains was a direct result of his failing to maintain proper separation between his machine and the spiker, which he knew was working ahead of him in the same area. By his own admission, Carrier argues, Claimant first saw the spiker when he was only ten to 12 feet from it, and by then he was unable to avoid the collision.

The Organization puts up a blizzard of procedural objections to the manner in which this discipline was imposed and progressed in claim handling on the property. It contends that Carrier's disregard of contractually guaranteed protections had the effect of denying Claimant the right to a fair Hearing.

The Organization asserts that Carrier's failure to make available at the Investigation Assistant Division Engineer C. A. Maida, who had determined that Claimant was responsible for the collision, deprived him of the right to confront and question his accuser. Of a similar texture is its contention that Carrier refused to provide three witnesses it requested at Claimant's Hearing. It further challenges the failure of Carrier's Hearing Officer, Roadmaster Sponsel, to render the decision in this case, which was issued by Division Engineer Johnson.

We carefully reviewed the Organization's arguments, and while it is apparent from an examination of numerous Third Division Awards that such irregularities are

frequently not deemed fatal to a fair Hearing, the Board has concern that in this particular instance, in the aggregate these lapses may have had prejudicial effect.

The record of Claimant's Hearing reflects uncertainty concerning whether the machine he struck had safety stop lights in the rear. There is unrebutted testimony by Claimant's Supervisor that Claimant was operating at a safe speed when he saw him, and that Mr. Maida informed him that Claimant "would probably receive a five day suspension." The state of Claimant's current experience on the ballast regulator is not fully resolved. Under the circumstances, and particularly in view of the fact that this accident involved a very long service employee with an unblemished safety record, a relatively minor accident and an extremely serious penalty, a reasonably objective Hearing would have been assured by giving Claimant the opportunity to confront his accuser and to have credibility and severity issues determined by the trier of facts.

A reduction in the penalty assessed appears appropriate. The 30 day suspension imposed on Claimant shall be reduced to 15 days, Claimant's records shall be revised accordingly, and Claimant shall be made whole for the difference.

#### AWARD

Claim sustained in accordance with the Findings.

#### 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 23rd day of November 1998.