

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 32947
Docket No. MW-33137
98-3-96-3-557

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
(CSX Transportation, Inc.

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of Machine Operator H. Harris for alleged ‘ . . . running the ballast regulator through the turnout side of the McMillan Bloedel switch without first slowing down to 5 mph or less and that you were not able to stop before impacting the machines ahead of you ***’ was without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement [System File 21(56) (95) /12 (95-998) CSX].
- (2) As a consequence of the aforesaid violation, the Claimant shall be reinstated to service with seniority and all other rights unimpaired, his record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered.”

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 the day in question the Claimant, with 22 years of seniority, was operating a ballast regulator on a gang working in the vicinity of Mile Post 10 on the Chattanooga Subdivision. Claimant traveled southbound with other Machine Operators following behind him, passing the McMillan Bloedel switch and Siding at Mile Post 8.1 and proceeded to the worksite. Once at the worksite and after working for some time, the gang was instructed to clear the track for a passing freight train. After the Claimant completed additional ballast regulating work so that the track would be stable for the passing train, he proceeded to clear the track, electing to move into the Siding at the McMillan Bloedel switch. As he did so, he traveled approximately 15-20 miles per hour into the Siding when he discovered, apparently for the first time, that the other Operators had moved into the Siding as well. Once he realized that this had occurred, he attempted to stop the ballast regulator, but was unable to do so. A collision ensued with extensive property damage, but no personal injuries.

An Investigation was conducted after which the Claimant was dismissed from service pursuant to the charges set forth above.

The Organization contests the Carrier's dismissal of the Claimant arguing that the Claimant did not receive a fair and impartial Hearing, that the Carrier failed to prove the charges made against the Claimant, and that the penalty of discharge was excessive. We find against the Organization on each of these arguments.

With regard to the Hearing conducted before the Claimant's dismissal, the Organization contends that the Hearing Officer impeded the Organization in defending the Claimant against the charges. More specifically, the Organization asserts that the Hearing Officer interrupted the Claimant's Representative's examination of witnesses, "repeatedly badgered" the Claimant, and refused to permit the Organization to make a closing statement. We closely examined the Hearing record and conclude that the Hearing Officer did not "repeatedly" badger the Claimant. In fact, the Organization cites to only one such alleged incident which hardly, in our view, deprived the Claimant of a fair and impartial Hearing. With regard to the other arguments, a review of the transcript does indeed establish that the Hearing Officer interrupted the Organization

Representative's examination of witnesses and that the Organization was deprived of the opportunity to make a closing statement. However, we do not believe that these deficiencies rise to the level of an unfair Hearing. First, it is clear in all instances cited by the Organization as those where the Hearing Officer interrupted the examination of a witness, it was in the context of the Hearing Officer expressing displeasure with the tendency of the Organization Representative to make a statement, rather than asking a question. Clearly, a more prudent course of action would have been to permit the Representative to complete his comment to see if indeed a question would have been asked. Indeed, such a course of action might be advisable in light of the fact that often the representatives of either or both parties at an investigatory Hearing are not well-versed in the rules of procedure and/or evidence. However, the fact of the matter is that if the Representative altered his comments so that his question would have been apparent, the Hearing Officer's action would then have been misplaced or hopefully, might not have occurred.

The Hearing Officer's denial of the Organization Representative's request to make a closing statement, however, is not saved by any such consideration. Rather, it was a clear refusal for which the Representative had no alternative. Nevertheless, the standard is whether the refusal compels the conclusion that the Hearing was not fair and impartial. We do not countenance the Hearing Officer's conduct in this regard and we are troubled by it. But the fact of the matter is that the evidence necessary to present considerations to the Hearing Officer mitigating against dismissal were put forward during the course of the Hearing. Therefore, although the Hearing Officer did not have the argument cogently set forth, the facts that would form the basis of the argument were presented. Accordingly, we conclude that the Hearing was fair and impartial.

On the merits of the charge, the Organization raised a number of arguments including the fact that the Claimant did not know that the other machinery had moved into the siding in question and that the switch in question was not manned or otherwise in a condition that would have enabled the Claimant to avoid the collision. But the Organization failed to explain away the Claimant's admission that he was traveling at 15-20 miles per hour, or in his words "flat out," which was in excess of the five mile per hour limit. Thus, had the Claimant been traveling at the proper rate of speed, he would have been within all governing Rules and might have been able to avoid the collision. Thus, we conclude that on this fact alone the Carrier met its burden of proof.

The final argument raised by the Organization was that the penalty of dismissal is excessive. We do not adopt this point of view. Rather, we believe that dismissal is not inappropriate in light of the Claimant's admission that he was traveling three to four times in excess of the required speed limit, as opposed for example to a slight deviation, the Claimant's prior service record that includes other instances of negligence or misconduct with respect to operating machinery, and the fact that the collision caused significant property damage.

AWARD

Claim denied.

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 November 1998.