

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33160
Docket No. MW-33457
99-3-96-3-982**

The Second 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: (
(Denver and Rio Grande Western Railroad Company**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [thirty (30) day suspension] imposed upon Track Patrolman B. C. Espinoza for alleged failure to comply with Rules 1.1, 1.6 and 1.13 of the Southern Pacific Lines Safety and General Rules for all employees and Rules 71.1.3 and 71.1.6 of the Chief Engineer’s Instructions for Maintenance of Way and Engineering in connection with his allegedly applying excessive lubrication to the surface of the ball of the rail in the vicinity of the Royal Gorge, on Thursday, July 28, 1994, was arbitrary, capricious and on the basis of unproven charges (System File D-94-72/MW M95-1).**
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant shall receive the benefits of the remedy prescribed by the parties in Rule 29(d).”**

FINDINGS:

The Second 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.

B. C. Espinosa, Claimant, established seniority as a Track Patrolman. When this dispute arose, he was headquartered at Pueblo, Colorado, under the supervision of Roadmaster L. J. Martellaro.

In addition to the required inspection of track twice a week, Claimant is also required to make minor repairs such as replacing missing track bolts, raising low spots in the rail and driving down high spikes. Pertinent to this dispute, Mr. Espinosa is also responsible for maintaining and filling approximately 45 stationary rail lubricators located on his territory.

Claimant was on vacation July 18, 1994 through July 24, 1994. During that time, the track from Pueblo to Salida was patrolled by Roadmaster Martellaro who noticed "several" lubricators were not functioning. Claimant returned to work on July 25, 1994, and on the following day, July 26, the Roadmaster instructed him to fill the empty lubricators and oilers. Claimant told the Roadmaster that he would "try to get them all working."

Subsequent to Roadmaster Martellaro's directive to Claimant, on July 28, 1994, Engineer Versteeg was operating a train with 105 empty coal cars and three locomotives in a westbound direction from Canon City toward Minturn. According to the Engineer, he noticed "excessive" grease on top of the rail between Canon City and Salida, which caused his train to lose speed and the wheels to slip. The Engineer contacted the Dispatcher and reported that due to the condition of the track his train would be delayed. Mr. Versteeg then communicated with the westbound train behind him, and also with an eastbound train, and was informed that both Engineers had encountered similar difficulties and wheel slippage.

Roadmaster Martellaro testified that he overheard the radio communications regarding track in his territory and was advised that the track was reported to be "very slick." Roadmaster Martellaro hi-railed to the area, and he found both sides of the rail to be "so covered with grease that the rail could barely be seen."

As a result of the above facts, Claimant was charged with various the Rules violations and a formal Investigation was held. Following the Investigation, Claimant was suspended for 30 days.

The Organization protested the discipline maintaining that although there was excessive grease on the top of the rail, the evidence did not "conclusively prove" that Claimant was responsible or that he had applied an excessive amount of grease to the rail. For his part, Claimant alleges that he was "instructed by Roadmaster Martellaro to grease all the curves and all the tangent track where the oilers were not working" from Canon City to Salida. Claimant further alleges that he stopped application near functioning lubricators and resumed it when necessary, maintaining "proper" adjustment on the spray nozzles. In that connection, Claimant noted that the train which immediately proceeded Engineer Versteeg's did not encounter any excess grease, and must therefore, have activated the lubricators which he had filled and repaired as he was instructed on July 27, 1994. Finally, Claimant testified that he was "following the Roadmaster's instructions," although he recalled protesting that the amount of grease applied was excessive.

Carrier denied the claim asserting that the Claimant "put" the grease on the top of the rails "deliberately and with knowledge" of the potential harm. Regarding Claimant's allegation that the Roadmaster instructed him to apply the grease, Carrier notes that two witnesses to the conversation did not hear that instruction. Finally, Carrier contends that Claimant violated the Rules and established a "very dangerous condition" by doing so. Carrier maintains that Claimant was treated "very leniently" in light of the circumstances.

Agreement Rules pertinent to this dispute state:

"RULE 1.1 - SAFETY

Safety is the most important element in performing duties. Obeying the rules is essential to job safety and continued employment."

"RULE 1.6 - CONDUCT

Employees must not be:

1. Careless of themselves or others.
2. Negligent
3. Insubordinate

6. Quarrelsome
7. Discourteous"

"RULE 1.13 - REPORTING AND COMPLYING WITH INSTRUCTIONS

Employees will report to and comply with instructions from supervision who have proper jurisdiction. Employees will comply with instructions issued by managers of various departments when instructions apply issued by managers of various departments when instructions apply to their duties."

"RULE 71.1.3

All work must be performed in a manner that complies with Company rules, departmental instructions, guidelines, and standards. If in doubt as to the proper procedures to follow or precautions to take, employees must consult with their supervisors."

"RULE 71.1.6

It will be the responsibility of each employee noting or causing any hazardous condition to correct or report it promptly. Steps must be taken to prevent possibility of injury to employees until the hazardous condition is corrected."

There is no dispute that on or about July 27, 1994, Roadmaster Martellaro directed Claimant to fill dry lubricators on the territory for which he was responsible. The record indicates that with the exception of one of the oilers, located at MP 66, Claimant did as he was instructed. The record evidence also indicates, however, that in addition to filling the lubricators, Claimant, while operating his hi-rail vehicle, applied an "excessive amount" of lubrication to the ball of the rail in the vicinity of Royal Gorge on Thursday, July 28, 1994.

Claimant's defense was premised upon the assumption that: 1) He was merely following the Roadmaster's instructions; and, 2) The excessive lubrication on the rail resulted from newly filled lubricators which were "tripped" prior to the arrival of Engineer Versteeg's train.

With regard to excess lubrication occasionally caused by full oilers, Engineer Versteeg stated that there are "certain" lubricators which regularly apply more grease to the rail than necessary. However, the Engineer also stated that any slippage resulting from excessive lubrication would be "limited to a certain point" past which traction was restored. Further, and in that connection, when asked if he had heard an interchange between the Dispatcher and Claimant regarding the excess lubrication on the rail, Engineer Versteeg testified that had heard Claimant acknowledge that he was applying lubrication via his hi-rail vehicle.

Claimant asserted that Roadmaster Martellaro had instructed him to grease the top of the rail, however, the Roadmaster vehemently denied ever issuing the instruction. According to the Roadmaster, he told Claimant only to "get the oilers going." Although Claimant asserted that at least two individuals had overheard the Roadmaster giving the instruction, record testimony indicates that the only instruction that was overheard was the Roadmaster telling Claimant to: "Make sure to grease the shiny curves because the oilers were not putting enough grease on them."

The credibility issues presented at the Investigation were resolved against Claimant by Carrier. It is well settled that this Board, functioning as an appellate arbitration tribunal working off of a cold transcript, is unable to second guess such credibility determinations. So long as Carrier produces a preponderance of evidence which, if believed, establishes Claimant's culpability, it has met its burden of proof.

Indeed, we have only to look at Claimant's own testimony in which he stated the following:

"Q. Have you ever applied grease in this manner before?

A. No, I have not.

Q. And this grease came from the lubricators or from your truck?

A. It came from the truck.

Q. Do you feel the grease that you applied on Thursday with the lubricator on the truck was applied excessively?

A. I thought it was too much.

- Q. May I ask you this, are you telling me that when you left Mr. Martellaro's office you knew in your mind that you were going to create a hazardous condition and yet you went and did it?
- A. Well, I didn't know for sure if it would create a problem, I figured it probably would."

We must conclude that Claimant did, on July 28, 1994, apply excess lubrication to a portion of track thereby causing hazardous conditions for at least three trains on July 28, 1994.

In light of Claimant's many years of experience on the railroad and his admission that he "figured" his actions would "create a problem," we do not find Carrier's imposition of a 30 day suspension to be unreasonably harsh in all of the circumstances.

Based on the foregoing, this claim is denied.

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 Second Division

Dated at Chicago, Illinois, this 25th day of March 1999.