

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33841
Docket No. MW-33470
99-3-96-3-998**

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Southern Pacific Transportation Company (former
(Denver & Rio Grande Western Railroad Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- 1. The disqualification of Track Patrolman B.C. Espinoza for failure to comply with Rules 1.1, 1.1.2, 1.6 and 17.9.14(M) of the Southern Pacific Lines Safety and General Rules for all Employees in connection with his alleged responsibility for Hi-Rail Inspection Unit 5027-U being derailed and damaged at Mile Post 168.6 near Canon City, Colorado on May 19, 1995 was arbitrary, capricious and on the basis of unproven charges (System File D-95-75/MWD 95-30).**
- 2. As a consequence of the violation refereed to in part (1) above, the Claimant shall ‘*** be returned to service with all seniority and other rights unimpaired and 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.

At the time of the incident on Friday, May 19, 1995, Claimant had over 20 years of service with the Carrier. Of those 20 years, 16 had been as a Track Patrolman. Prior to the instant incident, Claimant had been suspended for a period of 30 days for Rules violations when he placed excessive lubrication on a track in the Royal Gorge area on July 28, 1994. An arbitration panel upheld this suspension on March 25, 1999 (Third Division Award 33160).

On May 19, 1995, Claimant was assigned as a Track Inspector in Pueblo, Colorado, and patrolled track between Cannon City and Salida, Colorado. On that day, Claimant began his duties at the regular time and place. He obtained authority to inspect a nine and one-half (9 ½) mile section of track between East Canon City and Parkdale, Colorado. Claimant was to complete this assignment using a Ford F150 pickup truck affixed with hi-rail attachments that allow the truck to traverse the track as a piece of track equipment.

At approximately 9:30 A.M. on May 19, 1995, a Dispatcher notified Roadmaster Martellaro that Claimant's truck had derailed at approximately Mile Post 168.6 in the Royal Gorge area. The Roadmaster then went to the scene of the derailment to observe the scene and investigate the matter. He measured the distance where the truck went off the track until the truck finally stopped. He found that after derailling, the truck went 81 feet, hit a rock wall, went over a culvert, and then blew out the right front tire on the rock wall. The truck then traveled an additional 56 feet and stopped. The total distance from where the truck derailed and where it stopped was 135 feet.

At the point of the accident, the track is on an upgrade with a sharp curve, with a rock wall on the right and the Arkansas River on the left. At this juncture, the speed limit for a hi-rail vehicle is 20 mph. The Roadmaster inspected the track and found no adverse track conditions that may have caused the derailment. Based on the evidence, the Roadmaster concluded that the Claimant was traveling too fast for the curvature of the track at the point of derailment.

Work Equipment Supervisor Maestas inspected the vehicle and found no defect that would have caused the accident. In addition, Maestas found that the first marks on the ties after the vehicle derailed were approximately 12 inches from the rail. Normally, when a vehicle derails the wheel drops immediately and there is a

mark very close to the rail or the plates. These also indicate that the vehicle was moving at an excessive rate of speed. Further, the vehicle had been serviced the week before the accident. Relying on his past experience, it was his belief that the vehicle was traveling at an excessive rate of speed at the time of the derailment. Maestas indicated that the total cost of the repairs to the hi-rail vehicle was \$17,373.77.

By letter, Claimant was instructed to attend an Investigation on June 2, 1995 charged with failure to follow various Safety Rules in connection with his involvement of a Hi-Rail Inspection Unit 5027-U being derailed and damaged. While there is some confusion as to the actual date of the Investigation, the Investigation proceeded on Thursday, June 1, 1995. As a result of the Investigation, on June 9, 1995, Claimant was disqualified as a Track Patrolman on the Southern Pacific Lines (which includes the Denver and Rio Grande Western Railway Company) for failure to comply with various Safety Rules. Pursuant to this decision, Claimant was allowed to exercise his rights as a Laborer.

The Organization claims that the discipline was unwarranted because the charges were unproven. The Organization claims that the burden of proof in a discipline matter such as this is on the Carrier and that burden of proof has not been met. While the Claimant was disciplined for allegedly speeding in the Royal Gorge area, the Organization claims that Claimant was disciplined simply for being involved in an accident. According to the Organization, there is no direct evidence that Claimant was speeding. It was only supposition on the part of the Carrier. According to the Organization, the Claimant was performing his tasks properly in accordance with applicable Safety Rules. Claimant testified to that he was acting appropriately and there is no conflicting testimony. Thus, according to the Organization, Claimant was fulfilling his duties in a customary manner on the date in question. Further, the Organization claims that even if Claimant did engage in the violations alleged, the penalty imposed was too severe.

Conversely, the Carrier claims that this is a very simple case. It is uncontested that Claimant was involved in an accident. Experienced individuals from the Carrier completed a thorough investigation of the accident scene. They determined that neither the condition of the track nor the vehicle could have led to the accident. Based on this fact as well as the distance that the vehicle traveled from where it derailed, the only reasonable explanation that can be reached is that the vehicle was traveling well in excess of the 20 mph speed limit for the area. This is

confirmed by the marks made by the vehicle immediately after it left the track. Further, there was testimony that the vehicle had been serviced just days before the accident. Finally, based on the seriousness of the accident, the fact that bodily harm to the Claimant could have resulted, and that this was not the first safety violation for Claimant, the Carrier contends that disqualification was the only proper result.

In discipline cases, the Board sits as an appellate forum. We do not weigh the evidence de novo. As such, our function is not to substitute our judgment for the Carrier's, nor to decide the matter in accord to what we might or might not have done had it been ours to determine, but to pass upon the question whether there is substantial evidence to sustain a finding of guilty. If the question is decided in the affirmative, we are not warranted in disturbing the penalty unless we can say it appears from the record that the Carrier's actions were unjust, unreasonable or arbitrary, so as to constitute an abuse of the Carrier's discretion. (See Second Division Award 7325; Third Division Award 16166).

After a review of the evidence, the Board finds that there was substantial evidence in the record to sustain the Carrier's position. While the Claimant indicated that he was properly fulfilling his duties on the hi-rail vehicle and not traveling at an excessive rate of speed, the inspection evidence contradicts this testimony. The evidence shows that the hi-rail vehicle traveled a significant distance after the derailment. Experienced individuals testified that such a distance is consistent with an excessive rate of speed. In addition, it is significant that the first marks on the ties after the derailment were approximately a full foot away from the rail. This is also consistent with traveling at an excessive rate of speed, as a derailment at a low rate of speed would show marks much closer to the rail.

The Organization is correct that simply being in an accident is not per se evidence of responsibility for that accident (Third Division Awards 29195 and 29319). However, the evidence in the instant matter is sufficient to show that the Claimant's excessive rate of speed was the cause of the accident. It cannot be said that the Hearing Officer was arbitrary and capricious when he found that Claimant had violated various Safety Rules when the accident occurred. Circumstantial evidence is certainly acceptable to prove the Carrier's case (Third Division Awards 26435 and 26135). Thus, we find that there was substantial evidence that Claimant was negligent and failed to properly perform his duties.

As to the severity of the penalty, as indicated above, we will not overturn a penalty unless we can say it appears from the record that the Carrier's actions were unjust, unreasonable or arbitrary, so as to constitute an abuse of discretion. Here, we cannot say that the discipline imposed constituted an abuse of discretion. This is true for two reasons. First, this is not the first time that the Claimant has been disciplined for violating Safety Rules. He was disciplined for applying excessive lubrication to the track in the same area that the accident occurred in July 1994. This caused hazardous conditions for at least three trains. Second, the instant violation is a significant safety violation that could have resulted in a serious injury to the Claimant as well as the property damage that was actually incurred. Based on these factors, the disqualification of Claimant as a Track Patrolman was not unjust, unreasonable or arbitrary.

Thus, the penalty of disqualifying Claimant from his position as Track Patrolman is upheld.

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 21st day of December 1999.