Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 38369
Docket No. MW-38948
08-3-NRAB-00003-050414
(05-3-414)

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

(Brotherhood of Maintenance of Way Employes Division –
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Soo Line Railroad Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The discipline (restriction of seniority rights in BMWE seniority Groups 1-A, 1-B, 1-C and 3-A, effective July 14, 2003) imposed upon Mr. B. Erickson for his alleged violation of Safety Handbook Rule 559E, 564, 571A, 572, 585, GCOR #1.1 and other Canadian Pacific Rules and Policies in connection with his alleged reckless driving on June 17, 2003 while operating the 4063 Material Truck near Mile Post 33 at Dickinson, Minnesota was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File D-03-440-003/8-00451).

(2) As a consequence of the violation referred to in Part (1) above, Claimant B. Erickson shall receive the remedy prescribed by the parties in Rule 20 (g)."

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 June 17, 2003, the Claimant was a member of a crew of seven employees consisting of the Foreman, a Truck Driver, a Back-Hoe Operator, a Front End Loader Operator, and three Laborers. The Claimant was the Truck Driver. He operated a 1995 GMC 40 foot super truck equipped with a crane. He was returning with the truck from Buffalo, Minnesota, where he had delivered some materials. He made a right turn from State Highway 55 onto Southeast 10th Street, where his crew was working. When he turned to the right he missed the road and put the truck into the ditch. A wrecker had to be called, who tied a winch to the top of the crane tower to keep the truck from tipping as he slid the truck sideways out of the ditch. The truck sustained the following damage: fan blades chewed off on the ends; tower of crane pushed forward on right side about one and a half inches; cracked posts on deck of truck box; and frame of truck bent where bed of truck and truck frame meet on right side. The cracked posts and bent frame could have resulted from the towing.

The Claimant's Superintendent testified that there were barricades on each side of the road indicating the presence of a ditch, but that there was plenty of room to drive between the barricades. According to the Superintendent, the truck was in danger of rolling over, and, if that had happened, the Claimant could have been injured. The wrecker operator told the Superintendent that probably the only thing that kept the truck from rolling over was the fact that it was empty.

Most of the other crew members, the Superintendent stated, expressed concern about their safety in working around the truck, about whether the Claimant was completely in control of the truck at all times. Other trucks, according to the Superintendent, were able to negotiate the turn in question without incident, including the tow truck that pulled the Claimant's truck out of the ditch. The tow truck was a little bigger than the Claimant's truck. There were numerous

other prior incidents involving the Claimant, the Superintendent testified. Had the June 17, 2003, incident been the only one that the Claimant had been involved in, the Superintendent stated, the present Investigation would never have taken place. He acknowledged that other employees who had had only a single incident while operating a company truck had not been the subject of an Investigation.

In his testimony the Claimant explained that he went into the ditch because the back tires of his truck tracked a little bit further in than he thought they would. "I didn't negotiate the turn wide enough," he stated. The Claimant was asked whether he could have stopped the truck, gone out and moved the barricades, and then completed his turn. He stated that he could have. According to the Claimant's testimony, he also could have gone to his left onto Southeast 10th Street for about a half mile, turned the truck around, and then gone straight through the space between the barricades. He was not operating under time restraints, the Claimant testified.

Following the Investigation and by letter dated July 14, 2003, the Carrier notified the Claimant:

> "Testimony developed during the investigation clearly established your responsibility in connection with the charges. Review of your past personal work history and as a result of your actions, your seniority rights will be restricted in the following BMWE seniority groups: 1-A, 1-B, 1-C, and 3-A."

The Organization contends that the Claimant was denied a fair and impartial Hearing because the same management representative was the Charging Officer, the Hearing Officer, and the officer responsible for executing and enforcing the discipline. On the merits, the Organization argues that the Supervisor, who was the sole witness for the Carrier, did not witness the incident and gave confusing and conflicting testimony regarding the incident. As a result, the Organization maintains, the Carrier failed to meet its burden of proof that the Claimant was negligent, careless, or in violation of any Carrier Rules or procedures.

The Organization also questions the appropriateness of the discipline for the violations found. It asserts that "at the time the incident occurred on June 17, 2003, the Claimant was assigned and working as a Truck Operator within Group 2, Rank

C in the Track Subdepartment and yet the Carrier did not restrict the Claimant's seniority in that position." The Organization notes that the discipline notice issued to the Claimant did not identify a subdepartment and that, despite the Organization pointing out the ambiguity in the notice of discipline, the Carrier failed to clarify its intent with regard to the Claimant's seniority restrictions. The Organization understands that the reference in the discipline notice to group 3-A is to Production Tampers, in which the Claimant has a seniority date, but argues that Production Tampers have no bearing in this case because the Claimant was not operating that kind of equipment when the incident occurred. Further, the Organization contends that the Carrier's decision to restrict the Claimant's seniority in positions not reasonably related to the position he was assigned to on June 17, 2003, "can only be viewed as excessive, capricious, improper and unwarranted." The Organization requests that the Claimant "be made whole for all lost wages, and seniority . . . and that his record be expunged of all charges."

On the procedural issue of a fair and impartial Hearing the Carrier contends that numerous Awards have addressed the issue of the same officer wearing more than one hat with regard to the Investigation and discipline without finding that the Carrier's action was improper. With regard to the merits, the Carrier argues that the misconduct was amply proved by the testimony of both the Carrier's witness and the Claimant's own testimony. As for the appropriateness of the discipline, the Carrier contends that the discipline imposed is consistent with arbitral precedent. In addition, the Carrier asserts that the Organization's references to Rule 3 and associated argument before the Board were not raised during the on-property handling and are therefore waived and outside the Board's jurisdiction.

The Board does not agree that the Claimant did not have a fair or impartial Hearing because the same management official was the Charging Officer, conducted the Hearing, executed the discipline, and was responsible for its enforcement. To the extent that the letter notifying the Claimant of the Investigation refers to the "alleged reckless driving incident that occurred on Tuesday, June 17, 2003 while [the Claimant was] operating the 4063 Material Truck near Mile Post 33 at Dickinson, Minnesota, on the Paynesville Subdivision," it is fair to consider the letter as a notice of charges against the Claimant.

Nevertheless the fact that the term "alleged" precedes the words "reckless driving incident" indicates a withholding of judgment until an actual Investigation

is conducted and the Claimant is given a full opportunity to give his side of the story and the Organization, to make argument in defense of the Claimant. Under these circumstances the Board sees no denial of industrial due process in the same Manager making the decision to conduct an Investigation and serving as the Hearing Officer in the Investigation.

The Organization also objects to the Hearing Officer being the one to make the decision whether or not to assess discipline. The Board notes that the Organization took the opposite position in another case heard before the Board on the same day as the present case. In Third Division Award 38370 the Organization argued that the Hearing Officer should have been the one to make the decision regarding discipline. The Board finds that the Carrier did not commit error by permitting the Hearing Officer to make the decision regarding the guilt of the Claimant and the discipline to be assessed. The Hearing Officer would be in the best position to make credibility determinations, having personally observed the demeanor of each witness and heard their testimony. In addition, the fact that the Hearing Officer may have been the individual who decided that an Investigation should be held does not mean that he prejudged the case or that he would not have been willing or able to rule that no violation occurred if the evidence justified such a conclusion.

Further the Board finds it important that the Carrier official who ruled on the appeal was not the same Manager who served as Hearing Officer or made the decision regarding guilt or innocence. The Manager who ruled on the appeal was not even from the Operations Department but from Human Resources. The Board finds that the Claimant received a fair hearing consistent with the concept of industrial due process.

The deciding Manager in this case ruled that "the investigation clearly established [the Claimant's] responsibility in connection with the charges." Because the charge was "reckless driving," the ruling is tantamount to finding the Claimant guilty of reckless driving. Both in law and in ordinary speech the term "reckless" denotes a much greater degree of culpability than ordinary negligence. In law the term "reckless" means to proceed with knowledge that the harm is substantially certain to occur as opposed to "ordinary negligence," where there is the "mere unreasonable risk of harm." See Prosser and Keeton on Torts, Fifth Edition (1984) §34. Similarly in ordinary American speech the term "reckless" means "without

thinking or caring about the consequences of an action" as opposed to "negligent," which is defined as "failure to take proper care in doing something."

There is no substantial evidence that the Claimant drove in a reckless manner. There is no evidence, for example, that he was speeding, that he was under the influence of alcohol or drugs, or that he fell asleep at the wheel. There was evidence, however, of negligence on the Claimant's part. The Claimant testified, for example, that he did not negotiate the turn wide enough. He acknowledged that he was not under any time constraint and that there were other ways that he could have entered Southeast 10th Street without hitting the barricades or going into the ditch. Under these circumstances it must be found that the Claimant's negligence caused the truck to go into the ditch on the day in question and sustain some damage.

In the Board's opinion the Organization is correct that the letter dated July 14, 2003, notifying the Claimant of the results of the Investigation does not make clear in which seniority groups the Claimant was being restricted. For example, Rule 3 lists five separate sub-departments in which an employee may have seniority rights, but the letter does not state or indicate in which sub-department(s) the Claimant's seniority rights are being restricted. Most puzzling of all is the fact that as a Truck Operator in the Track sub-department, the Claimant would have been in Group 2, Rank (c) in that sub-department, but there is no reference to Group 2 anywhere in the letter.

It is not as if the Organization did not call this ambiguity to the Carrier's attention. Contrary to the position of the Carrier that the Organization's references to Rule 3 and its associated argument were not made during the on-property handling, in the Organization's letter to the Carrier dated November 9, 2004, it stated, "In CP Manager Track Programs/Work Equipment Don McCall's letter of July 14, 2003 assessing discipline by restricting Claimants [sic] seniority is there any mention of the 4063 Material Truck a Group 2 Rank C in the Track Sup-department [sic]." The Organization's letter goes on to state that no sub-department is identified for any of the seniority groups referenced in the letter.

In addition, in the original appeal letter dated September 15, 2003, the Organization specifically cited Rule 3 and took exception to the Carrier's failure to specify any sub-department for the groups listed and to the fact that none of the

ranks listed for Group 1 or Group 3 in the discipline letter applied to the equipment that the Claimant was operating at the time of the incident in question. The subsequent November 9, 2004 letter also argued that the equipment was not covered by the groups and ranks listed in the July 14, 2003 discipline letter.

The Carrier's only direct response to the Organization's arguments regarding the seniority restrictions is found in its letter to the Organization dated January 19, 2005, where it states:

> "Claimant was restricted from operation [of] equipment due to the fact he is reckless and Carrier would be remiss in its duties should we continue to allow Claimant to operate machinery when he has demonstrated the possibility of injuring himself or others. Is BMWE willing to accept responsibility for Claimant injuring another person? Please advise.
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> The assessment of discipline was clear and BMWE has provided no evidence of any violation. In fact, Carrier is not sure what BMWE is alleging the violation is. Claimant was restricted from operation of machinery."

The Board finds that the assessment of discipline in this case was not clear. The seniority groups in which the Claimant was restricted were not identified in a clear manner. For example, as the July 14, 2003 letter of discipline is written, the Claimant is not restricted from operating a truck in the Track sub-department. This is so because the Truck Operator position is in Group 2, Rank (c) and Group 2 is not mentioned in the July 14 letter as one of the seniority groups in which the Claimant is restricted. The July 14, 2003 letter provided no authority for any Supervisor to restrict the Claimant from operating a truck in the Track sub-department. The post-Investigation correspondence, however, shows that the Claimant was, in actuality, restricted from operating a truck after July 14, 2003.

The Carrier has the burden of proof both as to the guilt of a charged employee and the appropriateness of the discipline issued. No evidence was presented at the Investigation or in post-Investigation correspondence between the

parties that the Claimant has ever been negligent in the operation of machinery other than while operating a company truck. For example, Carrier Exhibit B of its Submission to the Board in this proceeding lists three additional incidents, all involving a truck, that the Claimant was involved in besides the June 17, 2003 incident. No example is given of any incident that the Claimant was involved in with regard to a Production Tamper or any other equipment that the Claimant has operated as a Machine Operator.

In addition, three arbitral precedents were presented to the Board in support of the discipline imposed in this case. One of the Awards (Third Division Award 37421) upheld the permanent disqualification of an employee from operating track cars as the result of a track car-automobile accident that he was involved in at a crossing while operating a speed swing. In the second award (Public Law Board No. 5842), the permanent disqualification of an employee from operating a boom truck was upheld where the employee had three vehicular accidents within eight months. In the third Award (Third Division Award 35713), the disqualification of an employee from operating a +6 ton highway truck was upheld. No prior Award was offered as a precedent where an employee involved in a highway truck accident was disqualified from operating track machinery such as a Production Tamper or other track equipment in addition to highway trucks, or vice versa. Under these circumstances and in the absence of evidence that the Claimant has ever been disqualified or disciplined with regard to the operation of Production Tampers or other track equipment the Board finds that the Carrier has not met its burden with regard to the specific discipline imposed. It is the Board's conclusion that the Claimant's seniority rights should be restricted with regard to the operation of trucks effective as of the date of the letter of discipline but that, on the evidence presented in this proceeding and the precedents cited, no case has been made out for the restriction of the Claimant with regard to the operation of Production Tampers or other track machinery. The Claimant shall be made whole for lost time, if any, as the result of any restriction of his seniority rights related to the operation of machinery other than trucks on or after the date of the disciplinary letter in this case based on said discipline.

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 20th day of November 2007.