

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 38958
Docket No. MW-39168
08-3-NRAB-00003-050612
(05-3-612)

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

(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(CSX Transportation, Inc.

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [withheld from service beginning on November 11, 2004 and continuing and subsequent notification dated December 13, 2004 of being assessed an actual suspension for thirty (30) days that began on November 11 and ended on December 10, 2004] imposed upon Mr. G. Sanders, in connection with an incident that occurred on 5XC1 System Curve Patch Team on November 10, 2004 on the Tallahassee Subdivision at Mile Post SP799.1 in which the spike driver he was operating struck another spike driver, was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement [System File D21135504/12(04-1384) CSX].
- (2) As a consequence of the violation referred to in Part (1) above, Mr. G. Sanders shall now have all references to this discipline removed from his personal record and he shall be compensated for all losses suffered as a result of being improperly withheld from service and the aforesaid discipline.”

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 Claimant was a Trackman on System Curve Patch Team 5XC1 with 23 years of service. He had been temporarily upgraded the day before for a one-week period to Second Spike Driver Operator because of the absence of the regular operator. November 10, 2004, was the second day that he was assigned to fill in as operator on a spike driver. The Claimant has Machine Operator seniority and has operated spike drivers on and off in the past.

On November 10, 2004, the Claimant was moving his Spike Driver behind another Spike Driver that was towing a spike tender. The two Spike Drivers were followed by a Quality Cart. The three pieces of equipment were traveling to clear the main line. On the way there they had to pass through five highway grade crossings, relatively close to each other, in Tallahassee, Florida. On such occasions machines are required to travel in bunching mode, with a minimum distance of 40 feet between machines, to avoid repetitive activation of the crossing gates. Carrier's On-Track Worker Rules, and Qualifications, reads, in relevant part, as follows:

"727. Spacing of Equipment

* * *

2. Minimum Distances between Equipment

Maintain the following minimum distance between the machine you are operating and the machine to the front when performing the described activity:

- a. Working: 40 feet, unless a different distance is specified.
- b. Traveling: 200 feet.

- c. Bunching: 40 feet, unless speed is 5 MPH or less, then maintain the sufficient distance to prevent an accident.”

The machines had gone through four highway grade crossings without incident. On the way to the fifth crossing, the operator of the lead Spike Driver approached a switch that was aligned for the machine to go straight through, and when he reached the frog of the switch, his Assistant Foreman began to holler for him to stop. The operator released the travel pedal, and the machine stopped there. The Assistant Foreman, who was riding on the first Spike Driver to the left of the operator, then told the operator of the lead Spike Driver to look out. The operator looked back, and the second Spike Driver ran into the spike tender being towed by the first Spike Driver.

The operator of the first Spike Driver described the damage as follows: “Bad – it broke the tow bar. We ended up with everything together. And one step bent up. There’s a few hoses . . . say just nine that was busted. They worked on it two days to get the machine back in operation. Wasn’t nobody hurt.”

According to the operator of the lead Spike Driver, an employee on the quality cart (the third machine in line) had told the Assistant Foreman by radio that the lead machine was on the wrong track. It was then that the Assistant Foreman yelled at the operator, “Stop! Stop!” The Spike Drivers are equipped with brake lights. The operator of the lead Spike Driver testified that his brake lights were working.

The Claimant testified that the Assistant Foreman did not conduct a job briefing with him. The Assistant Foreman, according to the Claimant, did not say anything to him about going onto another track or that they were going to stop where they did. He just said, the Claimant testified, to follow the machine, to stick together, every time you get to a crossing. He was 50 or 60 feet behind the other Spike Driver, the Claimant stated, because they were getting ready to approach the fifth crossing. The Claimant estimated that he was going five or six miles per hour while following the machine in front of him.

Whenever they stop, the Claimant testified, they always take their hat off and wave it up and down as a signal that they are going to stop. “That’s the way we do

every time we stop," the Claimant stated. According to the Claimant, he did not observe the operator of the Spike Driver do so when the latter stopped suddenly immediately before the collision.

The Claimant testified that the Spike Driver he was operating on the day of the incident was leaking hydraulic fluid from a cylinder on its right side. The fluid, he stated, dripped onto the ground in the rear. Asked whether any of the drips went on the braking system or the brake shoes, the Claimant testified, "Not as I know." It is possible, he stated, that while the machine was moving, some of the hydraulic fluid could have been on the rail and been picked up on the wheels because "it leaks all the time." The Claimant informed the mechanics of the leak, and they told him they were instructed not to spend more money on the machine because the Carrier was getting rid of that machine. He had no difficulty stopping earlier that day, the Claimant testified, but he did not make any quick or abrupt stop.

He was standing up, the Claimant testified, when taking the Spike Driver into the hole. According to the testimony, the spike drivers are constructed in such a way that the operator must stand up to see ahead when the machine is traveling forward. For the operator to be able to see ahead while sitting down, he has to lean out to the side. Unlike the lead Spike Driver, which could be stopped simply by releasing the travel pedal, in order to stop his machine, the Claimant stated, he had to take his foot off the gas and put it on the brakes. You have to have a quick reaction, he testified, "when something like that just pops up in front of you." "I probably panicked before I hit the brake," the Claimant stated. According to the Claimant, once the brakes are applied, it takes a while for the machine to stop.

The Manager of SPT Curve Patch Teams, who investigated the incident testified that there was hydraulic fluid over the rails where the collision occurred. He did not look at the area behind the two machines to see if there was any hydraulic fluid on the rails there. None of the employees involved in the incident said anything to him about there being hydraulic fluid there. The only problem that he was aware of with the Spike Driver that the Claimant was operating, the Manager testified, was that it had a rail clamp that was not working properly when the machine was in work mode. No one had reported any problem with it when in travel mode.

The Claimant was removed from service on November 10, following the incident and, by letter dated November 19, 2004, from the Manager, SPT Curve Patch Teams, was notified to attend a formal Investigation on November 29 "to ascertain the facts and determine your responsibility, if any, in connection with an incident that occurred on the 5XC1 System Curve Patch Team on November 10, 2004, on the Tallahassee Subdivision at Milepost SP799.1." The letter continued, "On this date, the Spike Driver that you were operating struck another Spike Driver operating ahead of you." It stated that the "referenced incident indicates possible violation of CSXT Rules and/or possible violations of CSXT Safety Rules" and that the "purpose of this formal investigation will be to discover whether or not any rules were violated."

By letter dated December 13, 2004, from the Assistant Chief Engineer - SPT, sent by certified mail, the Claimant was notified that "[u]pon review of the transcript, . . . the facts support and confirm the charges against you, as you struck another machine while operating the spike driver. Account of this failure, you are hereby assessed the discipline actual suspension for 30 days that began November 11, 2004, and end on November [sic] 10, 2004." The Claimant was asked "to take time to reflect on the very serious nature of this incident to ensure your future safety and avoidance of collisions with other objects while operating machinery."

The Organization, by letter dated December 28, 2004, appealed the assessment of discipline. The appeal stated that "the charge letter of November 19, 2004 is defective in that it fails to meet the requirements provided in Rule 25." It asserted that "the dates specified . . . for discipline are confusing." The appeal letter argued that contrary to the Assistant Chief Engineer's assertions, the incident was not one of a very serious nature and that it was "only one of frequent occurrences on SPGs where machines are being bunched up for shut down on the day's work." The collision occurrences, the appeal stated, "are due to vision impairment associated with the location of the control valving on these machines" and such "impairment would be easily eliminated by moving these valves."

The appeal also claimed that there were numerous cases where machines collided and no one was charged. It "further noted that Claimant was not the assigned operator for this machine, but was instructed by the Carrier to operate" it. The appeal argued that the discipline assessed served only to recoup the Carrier's relevant budget, that no training was provided relative to the incident, and that

“[t]here was no justification for withholding Claimant from service or for the discipline assessed.” The appeal requested “that the letter of November 19, 2004, and all matter relative thereto, be removed from Claimant’s personal file and he be made whole for all losses suffered.”

In a letter dated February 14, 2005, to the Director Labor Relations the Organization asserted that although the Carrier had stated in correspondence that the Claimant was found guilty of violating CSXT Operating/Safety Rules, it cited no Rules that were allegedly violated. The Organization stated the reason for this was that the Claimant did not violate any Rule; that he operated as instructed; that while on the tracks working he maintained the proper distances between his machine and the others; and that when it came time to park the machines, he followed instructions given him in the bunching process. The Organization argued that the “only thing the investigation revealed was that the incident did occur and that Mr. Sanders operated as instructed and violated no Rules.” The Organization further argued that the factors mitigating the Claimant’s responsibility were abundant and that there was no showing that the collision was the result of a purposeful or deliberate act by the Claimant.

In response to the Organization’s letter of February 14, 2005, the Director Labor Relations, in a letter dated July 6, 2005, stated, “As a result of the investigation Mr. Sanders was found guilty of violating CSXT Operating Rule 727, spacing of equipment. It was determined that he did not maintain the proper distance between the machine he was operating and the machine ahead of him that he struck.”

It is the position of the Carrier that it conducted a fair and impartial Investigation that established that the Claimant, in violation of Operating Rule 727 2c, was guilty of not maintaining the minimum distance of 40 feet between operating machines required to prevent an accident when bunching. Had the Claimant maintained the 40 foot minimum distance, the Carrier argues, the accident would not have occurred. The Carrier cites Third Division Award 31299 as precedent that the Carrier need not specify a particular Rule violation in advance of the Hearing, but may introduce the Rule at the Hearing and discipline the employee accordingly.

“Rule 727,” the Carrier asserts, “does not consider mitigating factors, conjecture or hyperbole.” Consequently, in the Carrier’s view, the Organization’s

arguments that the brakes were applied unexpectedly on the machine the Claimant was following; that hydraulic fluid may have leaked on the track causing the Claimant's machine to slide into the machine ahead of him; that the equipment design created the hazard upon which the accident occurred; and that no one was charged for other accidents that occurred are all unavailing. Employees like the Claimant, who disregard Operating Rules, the Carrier contends, are routinely subject to discipline. The discipline assessed in this case, it insists, was just and warranted and commensurate with similarly handled disciplinary matters in the past.

The Board finds no merit to the Organization's procedural arguments. The Organization contends that it was improper to remove the Claimant from service because he did not commit a "major offense." However, Third Division Award 8027, cited by the Organization, defines the term "major offense" as including, among other acts, "employee's conduct [that] presents a hazard to his own safety or to the safety of others. . . ." The conduct of which the Claimant was accused was that he operated a machine without maintaining a safe distance between his machine and the machine he was following. Such conduct, if proved, would present a hazard both to the Claimant's safety and the safety of other employees. The Carrier therefore properly considered the Claimant's alleged conduct to constitute a major offense.

The Organization's due process argument based on the failure of the Carrier to cite a specific Rule allegedly violated in the letter notifying the Claimant of the Investigation to be conducted regarding the November 10, 2004, collision is similarly without substance. A like argument was rejected by the Board in Third Division Award 31299, which held that a carrier need not cite a specific Rule violation relied on in advance of the Hearing, but may wait to do so at the Hearing and base discipline on that Rule violation. The Organization cited no precedent in support of its position.

With regard to the merits of the case, the Carrier's contention that Operating Rule 727 does not consider mitigating factors is contrary to the Carrier's own authority cited in its Submission to the Board in support of its disciplinary action against the Claimant. In Third Division Award 31299, involving these same parties, for example, the Board stated, "The fact that Claimant did not receive Safety Rules training prior to the alleged accident [a collision between a Scarifier and a Tie

Handler] could provide grounds for mitigation of penalty.” The Board declined, however, to consider that fact in mitigation because of “evidence that Claimant was involved in a nearly identical accident two weeks prior to the instant accident [which] gave him, in the Board’s judgment, adequate notice of the Safety Rules at issue.”

A second case between these same parties involving a collision where a mitigating element was considered is Third Division Award 33379. In sustaining the claim the Board relied on the fact that the Claimant, who held seniority as an Equipment Operator, had never previously operated the particular ballast regulator that caused the damage to the hot box detector with which it collided or been trained regarding a peculiar stopping feature of the machine.

Another case involving the same Organization but a different carrier where mitigating elements were considered in sustaining a claim was Third Division Award 26730. In that case the claimant, a Machine Operator assigned to a Ballast Regulator, collided with a Tamper. He was charged with failing to maintain sufficient distance between equipment while operating his machine, resulting in a collision with a Tamper and \$8,000.00 damage to the Tamper. After a Hearing, the claimant was assessed a suspension of five days. In sustaining the claim the Board relied on the following considerations: the Ballast Regulator had a faulty hydraulic system and faulty brakes; some of the hydraulic fluid leaked on the rail; an inexperienced substitute Tamper Operator stopped the machine after moving it only a short distance and did not give the customary signal when stopping the machine. The Board indicated that there was inadequate proof that the distance maintained by the operator of the Ballast Regulator was not safe.

The Board is of the opinion that strong mitigating elements in this case require a substantial reduction of the penalty assessed.¹ It is not disputed that the customary signal given when stopping the Spike Driver, where the operator takes off his hat and waves it up and down to signal that he is about to stop, was not given in this case. Here the lead Spike Driver stopped suddenly without warning. Second, the Claimant was a substitute operator who had been temporarily upgraded from

¹In the Board’s opinion, if mitigating elements may be the basis for reversing a disciplinary penalty in its entirety and fully sustaining a claim, they may also serve to reduce the degree of discipline in an appropriate case.

his regular Trackman position, and this was only his second day operating the Spike Driver. Third, the Claimant was not given a job briefing concerning the move involved, and the stop was made necessary only because some other employee, who was not disciplined, had moved the lead Spike Driver onto the wrong track. Fourth, the Claimant's Spike Driver was continuously leaking hydraulic fluid from a cylinder on the right side of the machine, as reported by the Claimant to the mechanics, and it cannot be ruled out that some of the fluid spilled on the rails, making it more difficult to stop the machine. It is not disputed that the Manager who conducted the Investigation at the scene did not check the condition of the rails at the rear of the Claimant's machine.

The parties cited as precedents five Awards involving these same parties in which a suspension was assessed against a claimant because of a collision involving the machine that the Claimant was operating. The three Carrier cases involved a 30 working days suspension (Award 31299), a 15 day suspension (Award 36324), and a five day suspension (Award 36325). The two collision cases cited by the Organization (Awards 33141 and 33379) involved respectively a ten day and a 30 day suspension, both of which were reversed and the claims fully sustained. After careful consideration of all facts and circumstances of this case, it is the decision of the Board that, in view of the mitigating circumstances present, the appropriate discipline in this case should have been a five day suspension.

The Board is persuaded that the Claimant is culpable to some degree for the collision that occurred and that, for this reason, it would not be appropriate to sustain his claim in its entirety. The Board notes, for example, the Claimant's testimony that he probably panicked before he hit the brakes. After careful scrutiny of the transcript the Board has determined that there are clear indications in the record from the testimony of all of the witnesses that, if we take into account the distance that yet had to be traversed from the point of the collision until the fifth crossing, the Claimant did not maintain a sufficient distance between his machine and the machine that he was following.

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 29th day of February 2008.