

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

Award No. 39340  
Docket No. MW-40276  
08-3-NRAB-00003-080062

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

**PARTIES TO DISPUTE:** (Brotherhood of Maintenance of Way Employees Division -  
( IBT Rail Conference  
(  
(Soo Line Railroad Company (former Chicago, Milwaukee,  
( St. Paul and Pacific Railroad Company)

**STATEMENT OF CLAIM:**

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [ten (10) day suspension and restriction of seniority rights to section laborer/extra gang laborer] of Machine Operator Fernando M. Manriquez for his alleged responsibility in connection with the machine he was operating collided with another machine on August 30, 2006 was without just and sufficient cause, based on unproven charges, excessive and undue punishment and in violation of the Agreement (System File D-27-06-511-10/8-00499 CMP).
- (2) As a consequence of the violation referred to in Part (1) above, Machine Operator Fernando M. Manriquez shall be allowed the following remedy: “\*\*\* 1) all lost wages, including but not limited to straight time, overtime, paid and non-paid allowances and safety incentives, expenses, per diems, vacation, sick time, health & welfare and dental insurance, seniority and any and all other benefits to which entitled, but lost as a result of Carrier’s arbitrary, capricious, and excessive discipline in suspending claimant for ten (10) days; and 2) removal of restrictions of claimant’s seniority as imposed in Carrier’s hearing determination dated October 12, 2006.””

**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 August 30, 2006, the Claimant was operating an anchortite machine as part of the loading process for transporting it and the other machines of the tie gang from the Withrow Subdivision in Minnesota, to a new location in Tomah, Wisconsin. Local supervision wanted the machines to be loaded in a certain order so they would be ready to proceed upon arrival at the new work location. The transport cars and loading ramp were located on Siding Track No. 3. After the ballast regulator was loaded, two other machines had to be switched onto Track No. 2 to permit the loading of the quality control car next. The stabilizer machine had already been stopped some 224 feet into Track No. 2 when the Claimant was directed to make a reverse move with his machine. Only hand signals were available for communication. The Foreman stopped the Claimant ahead of the switch to line him into Track No. 2. Then the Claimant was signaled to back up. He did so and then stopped near the heel of the frog, but it was not far enough over the switch to permit the quality control car to be switched into Track No. 3 to become the next piece of equipment in the order. The Foreman signaled the Claimant to back up further. When the Foreman gave another stop signal, the Claimant was not looking at him. His attention was on his rear-view mirror and he thought he had been given the go ahead to back up the ramp onto the transport cars. The Claimant did not realize he had been switched into Track No. 2 and thought he was on Track No. 3. Although the operator of the stabilizer machine on Track No. 2 blew his machine horn to warn the Claimant of the impending collision, the Claimant did not respond and continued his reverse movement until the machines collided. The Claimant injured his back as a result.

It is undisputed that the Claimant had some 29 years of unblemished service with the Carrier and had been a Machine Operator for ten years. He had more than a

year of experience operating the anchortite machine. He was also of Hispanic descent and had limited fluency in English.

The Organization raised several procedural objections during the Investigation and/or during handling on the property. We carefully reviewed the record and do not find them to have substantial merit. It was not prejudgment for the Conducting Officer to attempt to introduce applicable Rules into the record during the Investigation. Although the Claimant had failed to pass his most recent Rules examination, the record does not establish that the grace period for re-taking the test had expired. Thus, the Claimant remained qualified on the Rules and was subject to them.

It also does not constitute pre-judgment of an employee to have the text of potentially applicable Rules read into the record during the Investigation. Indeed, it is necessary for the text to be available to the Board. If the text is not available, then we cannot properly perform our review function.

Although the Conducting Officer's involvement in the Investigation was more than customary, the record is clear that it was because of the Claimant's limited understanding of the English language. Our review of the transcript does not show that the Conducting Officer's involvement was unreasonable or otherwise degrading to the fairness of the proceeding. He merely re-stated his understanding of the Claimant's testimony and asked for agreement or disagreement while providing the Claimant with opportunities to clarify.

Turning to the merits, we are confronted with an unusual situation. The Carrier official who determined the discipline in this matter found the Claimant to have violated all of the Rules that were cited in the notice of charges. This official was also the Conducting Officer. During the Investigation, the Conducting Officer failed to introduce all of the Rules into the record. Moreover, he actually stated that two of them did not apply to the Claimant's situation. Thus, we have no proper basis for determining whether the Claimant's actions violated half of the Rules cited. The record contains only sufficient text for three of the Rules: Rule 23.2, 23.2.2, and 23.4. As to the remainder of the Rules, we must find that the Carrier has not sustained its burden of proof.

The record also portrays two significant mitigating factors. There is no evidence that the Claimant was ever informed that his machine would be switched into Track No. 2 to alter the loading order. The evidence does not establish that such details were discussed during the job briefing when they should have been. In addition, the

Claimant's machine did not have a radio for direct communication. Hand signals provide minimal communications capability when an operator's attention is primarily drawn to a rear view mirror.

Given all relevant circumstances, however, we do find the record to contain substantial evidence in support of the Carrier's determination that the Claimant's inattention to his overall surroundings did violate the Rules noted previously. It was reasonable, therefore, for the Carrier to impose discipline. We do not find the ten-day suspension without pay to be unreasonable and, for that reason, we do not disturb it. The permanent restriction of his seniority bidding rights to Machine Operator positions is another matter. Except for egregious misconduct warranting termination for a first offense, it is well settled that the objective of disciplinary programs for lesser misconduct is to correct the behavior by imposing relatively lesser forms of discipline and then progressing to more severe sanctions for recurrences. Because of the Claimant's otherwise unblemished service record as a Machine Operator for approximately ten years, the record does not support the conclusion that he should be forever disqualified from further Machine Operator service. Accordingly, the restriction on his seniority should last only until he passes the applicable Rules examination.

**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 September 2008.