

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39341
Docket No. MW-40278
08-3-NRAB-00003-080072

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 to section laborer and extra gang laborer] of Machine Operator Phil W. Cave for his alleged connection with the collision between the Chase Tamper and Mark IV Tamper near Mile Post 17.4 on the Withrow Subdivision on August 28, 2006 was without just and sufficient cause, capricious, disparate treatment and in violation of the Agreement (System File D-28-06-511-11/8-00500 CMP).
- (2) As a consequence of the violation referred to in Part (1) above, Machine Operator Phil W. Cave shall now be allowed “*** 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 11, 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.

The operative facts are undisputed. At the end of the workday, the Claimant was operating a chase tamper in travel mode following another tamper on the Withrow Subdivision. The gang Foreman was in a hi-rail vehicle ahead of the lead tamper. A tie gang was parking its equipment for the day in front of the Foreman. As the Foreman came up on the stopped tie gang machines, he radioed to the two tampers that he was stopping. The Claimant had his radio turned down to minimize static and he had his earplugs in. He did not hear the Foreman's warning. When the lead tamper stopped behind the Foreman, the Claimant was unable to stop in time to avoid a collision with it. Both tampers sustained some damage. There were no injuries.

The Claimant had some 25 years of unblemished service with the Carrier and had been a Machine Operator for 18 years. He had at least three months of experience operating the chase tamper in question.

The Organization raised a procedural objection about the validity of the transcript of the Investigation due to the number of portions shown to be inaudible as well as others that read like nonsensical gibberish. While our review confirms the existence of such defects, their presence does not infect the key portions of the testimony. The transcript is sufficiently clear and complete for the Board to fulfill its review function without concern. Indeed, the Claimant admitted he made a mistake. He acknowledged that he did not think he was maintaining the 300 foot separation behind the other tamper as required by Rule 23.4 while the machine was in traveling mode. His testimony also suggested he may have been "... in a daze ..." at the time.

In addition to the facts of the accident, the transcript makes it abundantly clear that the incident has registered with him the importance of maintaining proper machine spacing, as well as the need to be vigilant to ensure that he can stop his machine in one-half the distance to an obstacle or another machine.

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 situation did violate the Rules contained in the notice of charges. It was reasonable, therefore, for the Carrier to impose discipline. Collisions constitute "Cardinal Rule Violations." 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 on the Claimant's 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 18 years, the record does not support the Carrier's determination that he should be forever disqualified from further Machine Operator service. Accordingly, the restriction on his seniority shall be removed after he passes an appropriate 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.