

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41696
Docket No. MW-41918
13-3-NRAB-00003-120231

The Third Division consisted of the regular members and in addition Referee George Edward Larney when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes 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) calendar day – ultimately required to serve on May 27, 2011 through June 5, 2011] imposed upon Mr. R. DeSmith by letter dated December 29, 2010, “for alleged violation of On-Track Safety Rule 23.2.1 for On-Track Equipment Safety Procedures in connection with a collision of Tamper 7206-19 and the out-riggers of Material Truck E07021 near Mile Post 85.0 of the C&M Sub at approximately 12:15 P.M. on November 15, 2010 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File D-33a-10-390-08/8-00533 CMP).
- (2) As a consequence of the violation referred to in Part (1) above, all reference to the aforesaid discipline shall be removed from Mr. R. DeSmith’s record and he shall receive ‘. . . pay for all time and benefits lost as a result of being assessed a ten (10) calendar day suspension, including those straight time hours lost, the loss of holiday pay for Memorial Day, as well as the substantial overtime worked by his crew between May 27 and June 5, 2011.”

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.

Claimant R. DeSmith established and holds seniority as a Foreman in the Track Sub-department and has accumulated more than 30 years of railroad service.

On the incident date in question, Monday, November 15, 2010, the Claimant was assigned to be the Employee-In-Charge (EIC) and was scheduled to perform surfacing work on Main Track One (M1) in the vicinity of Mile Post 85.0 on the C&M Sub-division. As the EIC, the Claimant was responsible for supervising the surfacing work being performed and also responsible for the on-track protection that was in effect on the track(s) subject to the surfacing work. With regard to this latter responsibility, any trains needing to pass through the working limits of the on-track protection established on both M1 and M2, were required to contact the Claimant and obtain his permission to travel through the working limits. T. Brown, who was working under the supervision of the Claimant, was assigned to operate a tamper to perform the required track surfacing work needed to be completed on M1. Prior to granting a train permission to pass through the established working limits on M1 and M2, the Claimant would contact and verify with Operator Brown that he and the tamper he was operating were clear of the track the train was requesting permission to traverse.

Sometime prior to 12:15 P.M., S. Whedon, who was operating a material truck, drove to the location where the Claimant and Brown were performing track surfacing work on M1. Whedon informed the Claimant that he needed to set his truck on M2 to unload materials near the tracks within the working limits, specifically, dumping buckets of rock on M1 at the east end of the Menominee Bridge. The Claimant then held a job briefing with Whedon informing him of the type of on-track protection that was in effect on M1 and M2 and the surfacing work being performed by Brown. The Claimant further informed Whedon that at some point in time, Brown would need to move past the material truck with his tamper and when that time came, he would need to have his truck in the clear. Shortly, thereafter, while Whedon was in the process of unloading rock alongside the tracks, Brown contacted the Claimant and informed him that he was ready to move his tamper past Whedon's truck. In turn, the Claimant contacted Whedon and

informed him that Brown was ready to move his tamper past his truck and Whedon responded that he was in the clear and told the Claimant to go ahead and instruct Brown to traverse his tamper past his truck. The Claimant next contacted Brown to move his tamper past Whedon's truck and while in the process of doing just that, the arm extension component on the tamper collided with an outrigger that was extended out on the truck resulting in minor damage to the tamper.

Immediately following the accident, the Claimant proceeded to the scene to investigate what had happened and he inquired of Whedon as to why he had not taken in the truck's outrigger prior to informing him that he was in the clear, to which according to the Claimant's account, Whedon had no explanation as to why he had not done so. However, Whedon did tell him that he did not see the extended arm on the tamper. The Claimant then instructed Whedon to pull his truck up to a road crossing in order to get the truck off of the main track.

Section Foreman D. Roth who was assisting with the surfacing work and was in the area where the collision of the tamper and the truck occurred, called J. Gilmore, Assistant Track Maintenance Supervisor, Milwaukee (ATMS) to apprise him of the accident. Gilmore responded to Roth's call by traveling to the scene of the incident and upon his arrival, he proceeded to ascertain what had happened by speaking to Whedon, Brown, Roth, and the Claimant, after which he requested these employees to provide him with written statements. Next, based on the information that he obtained from the employees at the scene, Gilmore determined that under Carrier policy, it was necessary for Brown and the Claimant to submit to drug and alcohol screening. To that end, Gilmore escorted Brown and the Claimant to a nearby occupational medical clinic for testing.

By letter dated November 24, Division Engineer D. Wong, who presided as the Hearing Officer, notified the Claimant that he was to attend a formal Investigation on December 6, which was subsequently postponed by mutual agreement to December 14, 2010, for the purpose of developing all facts and circumstances and placing responsibility, if any, in connection with :

- The collision of tamper 7206-19 with the outriggers of Material Truck E07021
- Your alleged failure to comply with OTS Rules 23.2.1, 2nd & 3rd paragraph and 29.3B items 2 & 5
- The incident allegedly took place at the east end of Menominee Bridge M85.0 C&M Subdivision
- The time of the alleged incident was approximately 12:15 P.M. on Monday November 15, 2010.

On Track Safety (OTS) Rule 23.2.1 reads, in pertinent part, as follows:

“Every precaution must be taken by the Employee in Charge to see that equipment is operated in a safe manner at all times. Where views are obscured due to track, weather conditions or at night, the Employee in Charge must see that the necessary precautions are taken to prevent an accident.”

By letter dated December 29, 2010, the Claimant was apprised by General Manager Engineering S. Paradise that, in his opinion, the testimony presented during the Investigation established the Claimant’s responsibility in connection with the charge he violated OTS Rule 23.2.1; that the transcript of the Investigation clearly shows that the Claimant was the EIC of the work groups at the location noted and that he failed to take every precaution necessary to prevent an accident in light of site conditions and obscured views, which resulted in the tamper being operated in an unsafe manner; and that as the EIC, the Claimant did not take every precaution to verify that the tamper could be moved in a safe manner, as evidenced by the fact that a collision between Tamper 7206-19 and an out-rigger of Material Truck E07021 did occur.

Paradise informed the Claimant that as a result of his actions, and in accordance with Canadian Pacific Railway (CPR’s) “Positive Behavior and Performance Policy”, he was assessing the Claimant a ten calendar day suspension effective on the date of return from furlough status. In response, the Organization filed the subject claim by letter dated March 28, 2011.

The Carrier submits that notwithstanding the fact that the Claimant was Rules qualified, his own testimony rendered at the Investigation supports its position that he failed to comply with OTS Rule 23.2.1 by not taking every precaution to see that the tamper was being operated in a safe manner by Brown and making sure that the material truck was in the clear rather than relying solely on Whedon’s hand signal and verbal communication that, in fact, his truck was in the clear. Contrary to the Claimant’s assertion that he could not physically verify either the tamper’s arm extension or the transverse extension arm of the truck’s outrigger, the Carrier argues that he could have put himself in a position to have prevented the accident by standing next to R. Powell on M1 and watching the tamper movement. The Carrier asserts that had the Claimant positioned himself physically at that location he would have been close enough to the scene where the accident occurred to have seen that the transverse extension arm of the truck’s outrigger was fouling the track that the tamper was moving on and, upon this observation, he could have stopped the movement of the tamper.

The Carrier submits that the Claimant's own testimony makes clear that he did not, as required by OTS Rule 23.2.1 take every precaution to prevent this otherwise preventable accident from occurring and, therefore, by simply relying on Whedon's word that his truck was in the clear and it was alright for Brown to move the tamper, the Claimant proved himself to be negligent in fulfilling his duty as the designated EIC. The Carrier argues that whether someone else did not perform their duties (here employee Whedon who should have known that his truck was not in the clear at the time he confirmed to the Claimant that it was) the Claimant, as the EIC is not relieved from his responsibility to perform his duties as required by OTS Rule 23.2.1.

The Carrier submits that the record evidence adduced at the Investigation established by substantial evidence that (1) the Claimant failed to exercise good judgment (2) he failed to comply with OTS Rule 23.2.1, and (3) in failing to fulfill his responsibility pursuant to the requirements set forth in OTS Rule 23.2.1, he was guilty of being negligent. Accordingly, the Carrier asserts that the Claimant's ten calendar day suspension given such negligence was warranted and certainly commensurate with the offense committed by the Claimant, if not somewhat lenient.

Aside from the several procedural arguments asserted by the Organization, it presented purported evidence of fatal flaws in the Carrier's position under the broader charge that the Carrier failed to provide the Claimant with a fair and impartial Investigation; specifically:

- A failure to provide it with a full, accurate and complete transcript of the Claimant's Hearing;
- Hearing Officer D. Wong did not conduct the Claimant's Hearing in a fair and impartial manner;
- The decision to impose discipline was not made by Hearing Officer D. Wong;

The Organization argues that the Carrier failed to prove by substantial evidence that the Claimant acted negligently by failing to fulfill his responsibilities as the EIC pursuant to the requirements set forth in OTS Rule 23.2.1. The Organization asserts that nowhere within the testimony or exhibits presented at the Hearing was there proof that the Claimant did not take every precaution as required by OTS Rule 23.2.1 to ensure that the tamper was operated in a safe manner. On the contrary, the Organization submits that the testimony clearly established the following:

- The Claimant held a job briefing with all employees involved, but most importantly with Whedon regarding his need to be in the clear so as to allow the

tamper to move without incident at the time Brown indicated that he was ready to move the tamper;

- The Claimant was observing the surfacing work in question from where he was physically positioned at a place that ensured his own personal safety due to the locations and types of work being performed by the equipment in question at the time Brown informed him that he was ready to move the tamper;
- The Claimant confirmed with at least three employees (including Whedon) who were located at different vantage points that everyone was in the clear before he instructed Brown that it was alright to move the tamper.

The Organization argues that the evidence adduced by the forgoing testimony clearly shows that, contrary to the Carrier's position, the Claimant complied with his responsibilities as the EIC as set forth in OTS Rule 23.2.1. The Organization avers that because an EIC, here the Claimant, cannot be physically present everywhere at all times throughout the work day, an EIC must at times depend upon the information provided by individual crew members, such as here, as to whether they are in the clear.

The Organization notes that in discipline cases the Carrier has the burden of proof and in this case, the Carrier failed to present substantial evidence to support its position that the Claimant violated OTS Rule 23.2.1 by not fulfilling his responsibilities as the EIC on the date in question. Thus, the ten calendar day suspension that it assessed the Claimant was completely unwarranted and should, along with all other documentation related to this disciplinary action, be expunged from his personal record. Accordingly, the Organization respectfully requests the Board to sustain the claim in its entirety.

Upon a complete and thorough review of the evidentiary record along with consideration of all argument presented by the Carrier and the Organization, the Board is persuaded that the Carrier failed in its burden to proffer the required substantial evidence to prove the Claimant was negligent in not fulfilling his responsibility as the EIC pursuant to OTS Rule 23.2.1 on the date in question. We find the Carrier's argument that the Claimant could have physically positioned himself at a vantage point so as to observe the tamper's movement without imperiling his own safety at the time to be mere conjecture on its part. The evidence does not support the Carrier's position that beyond moving to a different location the Claimant could have done any more than he did to make sure that the tamper was operated in a safe manner in order to prevent the occurrence of the subject accident between the tamper and the truck. Accordingly, the claim must be sustained.

The Carrier shall pay the Claimant for all time and benefits lost as a result of being assessed the ten calendar days suspension, including all straight time hours lost, the loss of holiday pay for Memorial Day, as well as any overtime worked by the Claimant's crew between May 27 and June 5, 2011. Additionally, the Carrier must remove all reference to this disciplinary suspension from the Claimant's record.

AWARD

Claim sustained.

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 16th day of September 2013.