

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42387
Docket No. MW-42115
16-3-NRAB-00003-130068**

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

PARTIES TO DISPUTE: (**Brotherhood of Maintenance of Way Employees Division -**
(**IBT Rail Conference**
(**CP Rail System (former Delaware and Hudson**
(**Railway Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [removal from service and subsequent assessment of thirty (30) demerits] imposed upon Mr. J. Yerdon in connection with charges of violating Rules NEUS OTS Manual 23.4 effective April 3, 2005 (Maintaining safest stopping distance and safest breaking distance) for striking a piece of track equipment on November 4, 2009 was excessive and in violation of the Agreement (Carrier’s File 8-00754 DHR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Yerdon shall now have the thirty (30) demerits removed from his record and be compensated for the time lost while he was out of service.”**

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 November 4, 2009, the Claimant was operating an Anchor Applicator on a rail crew. On the track in front of Claimant's machine was another Anchor Applicator flashing its rear warning lights to alert Claimant that it had stopped. Claimant struck the machine in the rear end with his Anchor Applicator. The accident caused the operator in the rear-ended machine to lose ninety-two (92) days of work.

The Claimant was charged with violating GCOR Rule 1.1.1, Maintaining a Safe Distance ("In case of doubt or uncertainty, take the safe course.") and OTS Rule 23.4, Stopping Distance and Maintaining Safe Braking Distance ("On-track equipment must be operated at a speed that will allow the operator to stop within one-half the range of vision.").

On November 16, 2009, an investigative Hearing convened wherein Claimant acknowledged violating OTS Rule 23.4 as he did not maintain a safe stopping distance and he recognized GCOR Rule 1.1.1, Maintaining a Safe Distance. Based on Claimant's testimony, the Carrier assessed Claimant thirty (30) demerits.

On January 25, 2010, the Organization appealed the discipline asserting, in essence, that it was excessive given Claimant's cooperation during the Investigation and his employment record which does not place him in the "at risk" category. His removal from service and the assessment of 30 demerits is double discipline.

On September 14, 2010, the Carrier denied the appeal stating it acted in accordance with Rule 25.2 when it removed Claimant from service due to the accident and directed him to a drug and alcohol test which was required by FRA regulation. Claimant acknowledged violating safety rules so discipline is warranted as he endangered the safety of his co-workers and the public.

On October 8, 2010, conference convened. This matter remains deadlocked following conference and is now before the Board for a final decision.

Having reviewed the record, including the numerous awards submitted by the Organization and the Carrier, the Board finds that Claimant's testimony at the

investigative hearing constitutes substantial evidence that he violated the charged safety rules.

Although the Organization recognizes the “seriousness of the incident . . . the Organization does not believe that assessing two (2) forms of discipline . . . is justified.” That is, removing Claimant from service and imposing 30 demerits.

Rule 25.2 states that “[i]n cases involving serious infraction, an employee may be held out of service pending investigation.” The record shows that the Carrier’s practice for all crafts and classes of employee is to remove an employee from service in this type of incident where, pursuant to FRA regulation, the employee must undergo a drug and alcohol test. The Board finds the Carrier acted in accordance with Federal regulation, Rule 25.2 and its on-property practice. Removing Claimant from service was not an arbitrary or capricious act nor is it discipline as, at that point, no mark has been placed on Claimant’s personal record.

According to the Organization, 30 demerits is excessive because Claimant is not an “at risk” employee and cooperated throughout the reporting of the incident and during the investigative hearing. This Board is not authorized to displace discipline imposed on Claimant unless it is shown to be arbitrary, capricious or unreasonable. Instructive is arbitral precedent in on-property Third Division Award 29428:

“The Board finds the discipline assessed in this case to be reasonable under the circumstances. The Board held a suspension is not unreasonable for a violation of a Safety Rule.”

The Carrier’s emphasis on safety in railroad operations is the industry norm. In the circumstances of this claim, the Board finds that the discipline imposed for the proven violations of GCOR 1.1.1 and OTS 23.4 is not excessive.

In short, the Carrier met its burden of proof for removing Claimant from service and assessing discipline for safety violations. The claim is denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 5th day of October 2016.