

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42882
Docket No. MW-43670
18-3-NRAB-00003-160449**

The Third Division consisted of the regular members and in addition Referee I. B. Helburn when award was rendered.

**(Brotherhood of Maintenance Way Employees Division –
(IBT Rail Conference**

PARTIES TO DISPUTE: (
(Springfield Terminal Railway Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [ten (10) calendar day suspension] imposed upon Claimant L. Sanderson by letter dated September 18, 2015 for alleged violation of PGR-J and P-83 and for allegedly being negligent in connection with damage to a junction box for the power switch at MPS-2 (CPR-2) near Springfield, Massachusetts on June 8, 2015 was without just and sufficient cause and in violation of the Agreement (Carrier File MW-15-35 STR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant L. Sanderson shall have the discipline removed from his record and shall be compensated for all losses of pay and benefits as a result of the Carrier’s improper 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 suspension noted herein, the Claimant had 18 years' seniority in the Maintenance of Way Department and no prior discipline. During the spring and summer of 2015, the Claimant worked as a Tamper Liner Operator under Foreman Mazzantini, who had 35 years' seniority. The Production Tamper 10-6-10 used by the Claimant dated from approximately 1981. On June 8, 2015 while the Claimant was operating the tamper in manual mode, the tamper head dropped to the ground apparently with no command or input from the Claimant, crushing a switch junction box. The Carrier was informed and the next day ordered that the chassis (brains) of the tamper again be replaced. A hearing notice followed for a September 4, 2015 hearing. Thereafter the Claimant was found to have violated Safety Rules PGR-J and P83 and given a 10 day calendar suspension. A timely claim followed.

The Carrier contends that substantial evidence shows that the Claimant did not exercise the required common sense and caution in a situation where there was less operating room with the damaged junction box than with other junction boxes. The tamper had been operable in previous projects, indicating that it was operable on June 8, 2015. There was no evidence of mechanical failure. A statement not introduced at the hearing but attached to the appeal letter by the Organization should be ignored by the Board. The suspension was reasonable and appropriate in view of the Claimant's 18 years of experience.

The Organization avers that the Carrier has not proven the charges. An accident occurred, but accidents do not necessarily equal violations. Uncontradicted statements from the Claimant and Foreman Mazzantini indicate spontaneous movement of the tamper head. Previously there had been issues with the chassis, or tamper brain, causing the machine to shut down or act erratically. There is no evidence of improper operation by the Claimant. The discipline was arbitrary, capricious and excessive.

This is a case in which the Safety Rules allegedly violated were included in the hearing notice, which was appended to the hearing transcript. Therefore, there are

no grounds for an Organization assertion that the hearing notice was defective or that the Claimant's due process rights were violated, nor were such assertions made.

The Carrier believes that substantial evidence shows that the Claimant failed to exercise common sense and caution in response to unfavorable conditions, while the Organization asserts that the junction box damage resulted from the spontaneous movement of the tamper head. If the photos entered as exhibits by the Carrier would have shed light on the matter, the poor quality of the photos in evidence herein removes any value they may have had. Also of no value is the statement of Mr. D. C. Griffiths that was attached to the Organization's October 10, 2015 appeal of the suspension. It was not made a part of the on-property hearing record and therefore was provided too late to be considered by this Board. Providing "evidence" to which the other party has had no chance to respond to is simply another form of trial by ambush.

The Board has considered the uncontradicted testimony that previously there had been issues with the tamper chassis or brain that caused the machine to act erratically and that the day after the junction box incident, the chassis was again replaced. While the Carrier notes that the tamper had been operable before the junction box was disabled, the Board views the decision to replace the chassis as evidence of the Carrier's belief that there was a possibility that the machine was at fault. Therefore, the Carrier has fallen short of the substantive evidence necessary to have the claim denied. The Board sees no need to comment on the many cases provided by the Organization, except to note that they involved different fact situations and thus were not on "all fours" with the facts considered herein. The claim is sustained in accordance with Articles 26.5 and 26.7. Compensation is to include any overtime that the parties find that the Claimant would likely have worked but for the suspension.

AWARD

Claim sustained.

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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 10th day of January 2018.