

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44556
Docket No. MW-45906
22-3-NRAB-00003-200488**

The Third Division consisted of the regular members and in addition Referee Richard K. Hanft when award was rendered.

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

PARTIES TO DISPUTE: (

**(Norfolk Southern Railway Company (Former Norfolk and
(Western Railway Company**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [forty-six (46) day suspension] imposed upon Mr. T. Shull, by letter dated January 26, 2019, for alleged improper performance of duty on January 17, 2019 in connection with his failure to maintain a vigilant lookout to ensure that the Flash-Butt truck would be able to stop within half the range of vision as his vehicle traveled eastbound towards MP-PC 135.5 was arbitrary, capricious and constituted a violation of the Agreement (System File MW-PITT-19-04-SG-041 NWR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant T. Shull shall “*** be made whole for all straight time and overtime compensation lost from January 17, 2019, until he was reinstated for service on March 4, 2019. This equates to (362) three-hundred and sixty-two hours at a straight time rate of pay. Also, the Carrier has an obligation to ensure Mr. Shull’s seniority rights are intact and his benefits unimpaired.”**

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 Claimant in this matter entered the Carrier's service on May 11, 2015. At the time of the incident giving rise to this dispute, January 17, 2019, Claimant was a Class I Machine Operator in the Flash-Butt Welding Gang 113. On the morning in question, Claimant was a passenger in the flash-butt truck tramping eastbound on the main, facing forward toward the start of the job between a gauger-spiker in front of the truck and a mobile crane towing a rail polisher behind. Claimant testified that he heard the RPM's of the flash-butt truck increasing and looked up to see the flash-butt truck closing in on the slower-moving gauger-spiker. Claimant testified that he warned the operator to slow down, but his warning came too late and as the operator applied the brakes the flash-butt truck slid on the rail and collided with the gauger-spiker causing significant damage to the gauger-spiker.

The Claimant and the operator of the flash-butt truck were taken out of service and Claimant was summoned to a formal investigation on the Property commencing on February 14, 2019. Claimant was subsequently informed by letter dated February 26, 2019, that he was found responsible for violation of Operating Rule 815 and was assessed a 46-day, time served suspension.

Operating Rule 815 provides:

MAINTAIN VIGILANT LOOKOUT; CONDUCT – Each Employee must assist the operator in keeping a vigilant lookout for trains, other equipment or obstructions on or off the track including people, vehicles, animals, contractors, equipment or anything that could affect safe movement. While in motion, the operators and occupants of equipment must remain vigilant, not engage in unnecessary conversation or in boisterous conduct while equipment is in motion.

According to Operating Rule 815, all occupants of vehicles are equally responsible to remain vigilant and here, Claimant was found to be negligent in that duty.

The Organization argues that the Claimant was denied his contractually guaranteed due process rights first because he was taken out of service for the period between the incident and the formal investigation of the facts and before the Charging Officer had developed all the facts and evidence regarding the incident; and second, because due to a clerical error, a requested witness was not present at the investigation.

The Organization further argues that the Carrier failed to meet its burden of proof because it failed to prove the Claimant was negligent in his duty to remain vigilant and yet instead did warn the operator of the vehicle of the danger of a collision albeit not in time to avoid the same.

Finally, the Organization argues that the discipline assessed in this matter was arbitrary and unwarranted given the Claimant's minor and subordinate responsibility for the collision.

The Carrier, on the other hand, argues that the Claimant's own admissions made during the investigation on the property clearly demonstrate that the Claimant improperly performed his duty to maintain a vigilant lookout.

Moreover, the Carrier avers that nowhere in the System Discipline Rule is it stated that all facts and evidence must be developed prior to a formal investigation or before removing an employee from service pending a formal investigation being held.

Further, although the Carrier acknowledges that a clerical error was made that resulted in a requested witness not being present at the investigation it nevertheless points out that at the beginning of the investigation, the Hearing Officer twice offered to postpone the investigation until the requested witness could be present. Moreover, near the conclusion of the investigation, the Hearing Officer offered the option of adjourning the investigation until the requested witness could testify. Both the Organization and the Claimant declined the accommodations offered and the Carrier argues, thus waived their right to objection.

After review of the procedural arguments raised by the Organization, we find them to be without merit. The record reveals that the Claimant was afforded all his due process rights throughout the proceeding.

The Board further determines based on the record before us that there was sufficient evidence in the record to support the finding that the Claimant failed to remain vigilant as required by rule.

Once the Board has determined that there was sufficient probative evidence in the record to establish a finding of guilt, we next turn our attention to the quantum of discipline imposed. We will not set aside the Carrier's imposition of discipline unless we find it to be unreasonable, arbitrary or capricious.

While the Board has consistently upheld similar suspensions of employees whose negligence contributed to machinery collisions in the past, in the instant situation the Claimant's unblemished service record mitigates against the severity of the discipline here imposed. The Board orders that the Claimant's discipline be reduced to twenty (20) days' suspension and that the Claimant be made whole accordingly.

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 8th day of October 2021.