

## PUBLIC LAW BOARD NO. 4338

PARTIES) UNION PACIFIC RAILROAD COMPANY  
TO )  
DISPUTE) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

STATEMENT OF CLAIM:

(1) The discipline (90 day suspension assessed Track Machine Operator D. N. VanDyke for alleged violation of various company rules as indicated in Mr. C. M. Funk's letter of December 20, 1988 was arbitrary, capricious and unwarranted.

(2) The claimant's record shall be cleared of the discipline referred to in Part (1) hereof and he shall be compensated for all time lost.

FINDINGS: This Public Law Board No. 4338 finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, and that this Board has jurisdiction.

In this dispute the claimant was notified by letter dated November 9, 1988 to attend an investigation in Gering, Nebraska on December 1, 1988 to determine his responsibility, if any, in connection with an incident that occurred while he was working as the Track Machine Operator of Ballast Regulator BR-159. Gang No. 9081, facing east on No. 1 Track when his Ballast Regulator was struck by Train NPOA-08, Extra 2520-3099-3670 West on No. 2 Track at MP 406.73, Sidney Subdivision, Cheyenne Division, which resulted in damage to Company equipment indicating a possible violation of General Rules A, B, I and K and Safety Instructions 4000 and 4001 of Form 7908, Safety, Radio and General Rules for All Employees.

By agreement between the parties the investigation was held in North Platte, Nebraska instead of Gering, Nebraska. The Union objected to the hearing for the reason that the General Chairman and Assistant General Chairman of the territory involved had not received a copy of the charges preferred against claimant VanDyke. C. M. Funk, the hearing officer, stated that if the Union so desired, they would postpone the investigation. The Union deferred the issue to the claimant, and the claimant stated he preferred to proceed.

K. Durrant, Track Supervisor, testified that on November 9 at approximately 8:45 a.m. the claimant was running the BR-159 behind a Jackson 6700. Mr. Durrant stated that he was not at the location when the Ballast Regulator was struck by the train, but he did hear

radio communication between the claimant and Mr. Markle, General Foreman-Safety.

Mr. Durrant testified that when he arrived at the scene approximately five minutes after the accident occurred, he asked the claimant if he knew the train was coming, and the claimant acknowledged the train and knew it was a westbound. This witness did state that the claimant said he was not addressing him but was addressing Ron Markle.

The claimant testified there were eastbounds earlier and he was out of his machine for a while, and when he got back in, there was another eastbound called. He stated that he did acknowledge that eastbound.

The claimant testified that the eastbound had been changed to a westbound without his knowledge, and he was facing east but was right against the other machine, so he had no vision of a westbound train.

The claimant then stated that when he didn't see an eastbound train he started backing up and lowering his wing which was probably half way down when he saw the headlight, and he wasn't very far from the machine ahead of him, maybe a half pole or so, and it was too late.

The claimant testified that he acknowledged an eastbound train but did not acknowledge the westbound train. The claimant testified it was a normal thing with the other employees that the guys on the outskirts of the gang let each other know when they saw the headlights because they have a clear path of vision. He stated that on that particular date the regular operator for the Regulator up front was gone, and there was a fill-in they were using to plow-out, and he was off his machine and could not let him know about it either.

General Foreman of Safety R. Markle testified that then John Santos the Assistant Foreman, told him he better come down to VanDyke's Ballast Regulator. He testified that approximately 13 or 14 minutes earlier, he had called the claimant and told him they had a westbound train coming. He stated he called the two Ballast Regulators, the double broom.

Mr. Markle testified that it was not customary for the Ballast Regulators to work with their wing inside between the two main lines without notifying him between trains after they have been notified a train is coming unless they contact somebody. He also testified it was normal procedure for the train machine operators to notify other machine operators if they see a light coming or a headlight of a train.

Mr. Markle also testified that he was required to keep a record of the trains that go by during the course of a day and the people that he notifies. He further testified that on the date in question the claimant acknowledged the westbound train.

R. G. Hardesty, Manager of Maintenance of Way work equipment, testified that he was approximately 37 miles away when the accident occurred. He stated that when he arrived he asked the claimant if he had been notified of an approaching train, and the claimant said that he had and he had acknowledged such, but the train did not get there as quick as it usually did, and he started to lower his bucket.

Mr. Hardesty estimated the damage to be approximately \$12,000 to \$14,000. He testified that the claimant stated: "Well, what am I gonna get out of this?" On further examination Mr. Hardesty stated the claimant may have said: "What normally happens in this situation?"

John Santos, Assistant Foreman with the 9081 Section Gang, testified that he was about five pole lengths east when the Ballast Regulator was struck by the westbound train. He stated he arrived there about five minutes after it happened, and when he talked to the claimant, the claimant stated he knew the train was coming. He also stated that when the General Foreman of Safety had asked for an acknowledgement of the westbound train, he heard the claimant's acknowledgement. He stated he had heard the acknowledgement of all the operators.

The claimant testified that he asked Mr. Santos when he drove up in the Suburban: "Well, well, did you hear me acknowledge it?" and Mr. Santos answered: "No." The above was in the form of a question and Mr. Santos said "O.K."

Later the claimant requested that Mr. Santos be recalled, and he was asked if he could tell him the line of trains. Mr. Santos replied he was pretty sure there were three eastbound and then a westbound.

Mr. Santos further stated that he would like to clear up an earlier statement where he had said "No." He stated this was because the Track Supervisor hollered at the claimant that a westbound was coming, and the claimant did not answer at that time, but prior to that he distinctly remembered your answering Ron Markle with an acknowledgement.

The claimant closed by stating that he really believed he did not know the train was coming.

The Board has carefully reviewed all of the above testimony of record. The evidence is sufficient for the Carrier to find that

the claimant acknowledged a westbound train. The Carrier was justified in reaching a conclusion that when the westbound did not appear immediately, the claimant started backing up and lowering his wing. The Carrier is justified in reaching a decision that the claimant was looking for an eastbound instead of a westbound train.

There is no question but that discipline is justified. However, the Board does not comprehend the letter of discipline dated December 20, 1988 wherein Mr. Funk stated: "In consideration of the severity of the offense and in consideration of your prior discipline record, I am now ordering that you be assessed a ninety day actual suspension."

In the claimant's approximately four and one-half years of service, he had received one letter of reprimand for being absent without authority. If the letter of reprimand had been concerned with the violation of a safety rule, such could reasonably lend itself to more severe discipline herein.

Actually, a ninety day suspension is not excessive for the events involved herein. However, the ninety days was assessed in consideration of the severity of the events and in consideration of the claimant's prior discipline record.

This is a good discipline record when an employee has worked for four and one-half years and has only one minor entry of this nature. This justifies a minor reduction in the discipline assessed. The Carrier is directed to reinstate the claimant effective March 1, 1989.


AWARD: Claim sustained as per above.

ORDER: The Carrier is directed to comply with this award within thirty days from the date of this award.

DATED: March 14, 1989.

  
Preston J. Moore, Chairman

  
Union Member

  
Carrier Member