

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 5905

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES)
and) Case No. 15
ELGIN, JOLIET AND EASTERN RAILWAY COMPANY) Award No. 15

Martin H. Malin. Chairman & Neutral Member
D. D. Bartholomay. Employee Member
D. M. Gevaudan. Carrier Member

Hearing Date: March 23, 2001

STATEMENT OF CLAIM:

1. The twenty (20) demerits assessed Crane Operator G. J. **Hodgin** for his alleged violation of Maintenance of Way Rules 14.2, 14.10, 16.1, 16.4 and 16.8 in connection with the incident that occurred on February 28, 1998 while he was operating a crane at Mile Post 38 in Spaulding, Illinois was arbitrary, capricious and based on an unproven charge (System File SAC-7-98/UM-6-98).
2. As a result of the violation referred to in Part (1) above, the twenty (20) demerit marks assessed Claimant G. J. **Hodgin** shall be rescinded from his record and his record shall be cleared of this incident

FINDINGS:

Public Law Board No. 5905, upon the whole record and all the evidence. **finds** and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and. that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

On March 17, 1998, Carrier notified Claimant to report for an investigation on March 27, 1998, concerning "the incident which occurred on February 28, 1998 when you were allegedly in violation of Maintenance of Way Rules 11.2, 14.10, 16.1, 16.4 and **16.8** when you failed to stop Swingloader 383 before striking Caboose 195 at MP 38 in Spaulding, Illinois." The hearing was held as scheduled. On April 6, 1998, Carrier advised Claimant that he had been found guilty of the charge and had been assessed twenty demerits.

The critical issue in this case is whether Carrier proved the charge by substantial evidence. The record reveals that on the date in question, Claimant was operating a Swingloader and was following a Crane which was pulling a Caboose. When they reached the limits of the track warrant, the Crane stopped but Claimant did not stop and struck the Caboose.

The mere occurrence of an accident does not per se establish guilt. Carrier contends, however, that in the instant case, it must be inferred that Claimant failed to operate the Swingloader in a safe manner. Carrier argues that had Claimant operated the machine in a safe manner, he would not have struck the caboose. Carrier relies on Third Division Award No. 32798 in support of its position.

In Third Division Award No. 32798, the claimant was driving a ballast regulator and collided with a push car. No defects were found on the regulator and the claimant offered no explanation for the accident. The Board characterized the case as "a classic illustration of res ipsa loquitur. [W]here conduct causes an accident of a type that does not happen in the ordinary course of events if due care is exercised, and the instrument of harm is shown to have been under the control of one party, a case of negligence is made out in the absence of any explanation tending to show that it was not due to his want of care."

We find that the record in this case is significantly different from the record in Third Division Award No. 32798. The record before us shows that Claimant operated the swingloader for the previous fourteen days without any indication of defective brakes. He also had no indication of defective brakes on the day in question until the accident occurred. After the accident, he moved the swignloader another eight miles without encountering any further problems with the brakes.

However, the record also reveals that an inspection by a John Deere representative found that the brakes were not fully functional. The front brake was operating but the rear brake was not fully effective. It was necessary to grind the stops and to increase contact pressure between the tires and the friction drive. It also was necessary to obtain an oscillating lock update kit.

The record leaves open the possibility that Claimant was negligent by failing to brake in time to avoid striking the caboose. However, the record also leaves open the possibility that, in their unadjusted state, the brakes were capable of functioning properly most of the time but, on occasion, failing to stop the swingloader. When Carrier's garage mechanic inspected the machine, he found nothing wrong with the braking system. When the John Deere representative inspected the machine, he initially was able to stop it in forward and reverse but, when he moved it to the siding at West Chicago, he hit the brake and the machine continued to roll. The front axle stopped but the rear axle did not stop in forward or reverse. Under this scenario, Claimant had no reason to suspect that the brakes were defective until the accident occurred, but the accident was the result of brake failure rather than Claimant's negligence.

We find no evidence in the record that would support a reasonable conclusion that the accident was more likely the result of Claimant's negligence than the result of brake failure.

Under these circumstances. we must conclude that Carrier failed to carry its burden of proof.

Carrier argues that if the accident was the result of brake failure. "it seems incredible that the claimant would have operated Swingloader 383 another eight (8) miles to put this vehicle in the West Chicago yard." However, Claimant was not charged with his conduct after the accident and the circumstances for such conduct were not the focus on the investigation. Accordingly, we find Carrier's argument is not properly before the Board.

AWARD

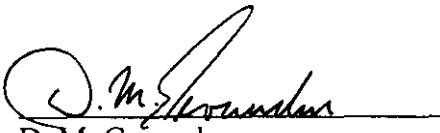
Claim sustained.

ORDER

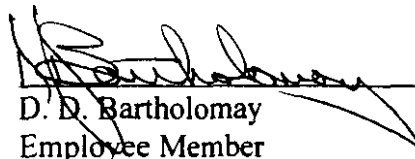
The Board, having determined that an award favorable to Claimant be made, hereby orders the Carrier to make the award effective within thirty (30) days following the date two members of the Board **affix** their signatures hereto



Martin H. Malin. Chairman



D. M. Gevaudan
Carrier Member



D. D. Bartholomay
Employee Member

Dated at Chicago. Illinois, May 12, 2001.