

SPECIAL BOARD OF ADJUSTMENT NO. 1127

**AWARD No. 4
CASE No. 4**

**PARTIES TO
THE DISPUTE:** Brotherhood of Maintenance of Way Employees

vs.

**Union Pacific Railroad Company
(Former Southern Pacific Transportation Company-Western Lines)**

ARBITRATOR: Gerald E. Wallin

DECISION: Claim sustained.

DATE: April 24, 2001

DESCRIPTION OF CLAIM:

On September 20, 2000, Claimant K. Roth operated a hy-rail speedswing machine following an inspection train in the vicinity of MP 244.50 on the Canyon Subdivision. The proximity of Claimant's machine to the train apparently activated the dragging equipment detector which caused the train to stop. The terrain was curve territory and the stretch of track involved was downhill. The weather was dry. As Claimant came around a right-hand curve, he saw the stopped train and began braking. To stop within the ½ sight distance required by Carrier rules, Claimant lowered his machine onto its rubber tires to obtain additional braking action. There was no collision and no injuries. Claimant's machine was later used in a re-enactment of the event to determine sight lines and distances.

Following investigation held October 10, 2000, Claimant was assessed a Level 3 Upgrade, which equated to a five day disciplinary suspension without pay.

The Claim in this dispute seeks to overturn the discipline and make Claimant whole for all losses.

FINDINGS OF THE BOARD:

The Board, upon the whole record and on the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties; that the Board has jurisdiction over the dispute, and that the parties were given due notice of the hearing.

As an initial observation, the notice of discipline leaves the Board in somewhat of a quandary. Since the role of this Board is appellate in nature, we must impartially review the investigative record to determine whether substantial evidence supports the Carrier's findings of misconduct. It is extremely important, therefore, that the disciplinary notice be specific and free of ambiguity regarding its findings. If the notice does not inform the Board specifically and unambiguously of the basis for the discipline, how is the Board to apply the substantial evidence test? The Board cannot speculate and make assumptions about what the Carrier's basis might have been when it is inadequately stated. Doing so would operate to assist the Carrier in satisfying its burden of proof requirements and would thereby violate the Board's obligation to provide an

impartial review.

The notice of investigation cited three separate rules as having possibly been violated. A fourth, Rule 42.2, was read into the record during the hearing. The notice of discipline, however, does not specify which, if any, of the four rules were violated. Instead, it contains only the following pertinent language:

After carefully considering the evidence adduced at the formal hearing held at Oroville, CA, on October 10, 2000, the following charges against you have been sustained.

While you were operating a speedswing and following a train in the vicinity of MP 244.50 on September 20, 2000, you did not have control of your speed, and you were not able to stop within $\frac{1}{2}$ the distance of the train without taking emergency measures.

The notice asserts that Claimant did not have control of his speed. Does this mean that Carrier determined Claimant to have violated Rule 42.2, which establishes a maximum speed of 30 mph for roadway machines? The notice does not say. Nor does the evidence support such a determination. The record contains no evidence that Claimant exceeded track speed, which was 25 mph, at any time. Moreover, Carrier's witness, at Page 18, Line 26 of the transcript, stated, "I can't determine him to be speeding."

More importantly, we cannot tell from the notice, with absolute certainty, whether Claimant was found culpable because he was not able to stop within the required $\frac{1}{2}$ distance or because he did stop within the required $\frac{1}{2}$ distance but was only able to do so because he took emergency braking measures. The statement in the notice is susceptible to both interpretations.

Considerable testimony in the record was devoted to the sight lines and distances that were determined via the re-enactment. According to the record, the re-enactment produced two different visibility sight distances to where the train was stopped on the tracks: 330 feet (Page 12, Line 28) and 300 feet (Page 17, Line 37). Using these distances, Rule 42.2.2 would have required Claimant to be able to stop not less than 165 feet and 150 feet, respectively, from the stopped train. Carrier's evidence suggests he stopped 140 feet from the train.

The parties' recognized that their measurements lacked precision. The location of the stopped train and Claimant's stopped machine were determined by reference to trackside landmarks and tiremarks on ties. The distances were determined by counting ties, which were assumed to have a spacing of 2 feet on center. Moreover, Carrier's witness testified that he stood on the outside of the curve, at the point where the train was believed to have been stopped on the tracks, to provide the maximum visibility distance. Despite the inaccuracy associated with the methods used, the evidence shows that, according to the Carrier, Claimant overran the midpoint of the stopping distance by either 25 feet or 10 feet. Claimant, however, put his stopped distance at 75 ties (Page 42, Line 5), which would be 150 feet. If true, then Claimant did stop within the required distance based on a sight distance of 300 feet.

As the Board reads the notice of discipline, Carrier credited Claimant with having stopped within the required $\frac{1}{2}$ distance but faulted him because he resorted to the use of emergency measures

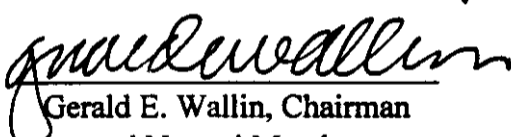
to do so. This, however, does not appear to be a proper application of Rule 42.2.2. The rule only specifies the required distance for stopping. It does not regulate the manner of doing so. Nothing in the rule prohibited Claimant from augmenting the braking action of the steel wheels by lowering his rubber tires as he did.

Our review of the record does not reveal any basis for concluding that Claimant violated any of the other rules referenced during the investigation.

Given the foregoing discussion, the Board finds that the disciplinary action is not supported by substantial evidence in the record. Accordingly, Claimant must be made whole in all respects and the corresponding disciplinary action entries in his employment records must be removed.

AWARD:

The Claim is sustained. Carrier is directed to comply with this award on or before June 1, 2001.


Gerald E. Wallin, Chairman
and Neutral Member