Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35331
Docket No. MW-35230
01-3-99-3-82

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Union Pacific Railroad Company (former Missouri-Kansas-
(Texas Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The assessment of a Level 3 discipline and a five (5) day actual suspension of Machine Operator B.J. McDaniel for alleged violation of Union Pacific Rules 42.6, 42.2.2 and 42.14.4 on September 17, 1997 was arbitrary, capricious, without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement (System File Y97346/1115221 MKT).

(2) As a consequence of the violation referred to in part (1) above, the Claimant's '. . . record be cleared of the Level 3 discipline and Mr. McDaniel be compensated for any and all wages lost in connection with the discipline assessed him. . . .'"

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, a Machine Operator with more than 20 years of unblemished service, was operating a ballast regulator over Carrier track on the morning of September 17, 1997. As the Claimant proceeded southbound through the Forest Lane crossing, there was a collision between the ballast regulator and a BMW automobile. The vehicle was damaged on the rear door of the driver's side and the Claimant's equipment derailed into a ditch.

The Claimant was subsequently notified to attend an Investigation to determine whether he violated Carrier Rules in connection with failing to yield the right of way to vehicular traffic, thereby causing the collision. After the Investigation, held on October 23, 1997, the Claimant was assessed a Level 3 discipline and was directed to serve a five-day actual suspension.

The Carrier contends that it afforded the Claimant a fair Hearing and that it proved the violation by substantial evidence. The Organization argues that there were procedural and due process defects in the handling of this case and that, on the merits, the Carrier failed to prove the Claimant's guilt.

We need not address the Organization's procedural and due process objections because the Board finds itself in complete agreement with the Organization's view that the Carrier failed to sustain its burden of proving by substantial evidence that the Claimant committed the Rule infractions of which he stands accused.

The Board is mindful of the Carrier Rules that require operators of track equipment to approach and pass through public grade crossings with their vehicles under complete control, being prepared to stop and yield the right of way to vehicular traffic. Also, movements over such crossings must be made at a speed that will allow the operator to stop in one-half the distance the track is seen to be clear. But the actual evidence adduced on this record compels the conclusion that all this was done.

The Claimant testified that as he approached the crossing, he came to a complete stop, looked both ways, and saw that all vehicular traffic was stopped. He proceeded into the crossing, all the while blowing his horn. When he was approximately three quarters of the way through the crossing, a vehicle entered the crossing and his equipment derailed.

The Carrier's conclusion that the Claimant violated the pertinent Safety Rules is based on the location of the damage to the vehicle on the driver's side. To the Carrier, the only reasonable inference to be drawn is that the Claimant was not looking ahead when the collision occurred. However, there are other explanations for the accident that are more consistent with the evidence. Statements from witnesses to the accident, as well as the police report, indicate that the signal lights at the crossing were flashing; that vehicular traffic was being held in both directions by the traffic light at the intersection; and that the BMW made a left turn onto Forest Lane and improperly proceeded through the red light and into the crossing, directly in front of the Claimant's vehicle.

The Carrier offered no evidence to contradict the Claimant's testimony concerning the events of September 17, 1997. Moreover, the corroborative evidence on this record, though hearsay, fully supports the conclusion that the Claimant approached and entered the crossing in a safe manner and unavoidably collided with the BMW. Weighed against the mere speculation and inference offered by the Carrier, we conclude that the Claimant's culpability was not proved by substantial evidence, and the claim therefore must be sustained.

AWARD

Claim sustained.

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 16th day of February, 2001.