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**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13868

Docket No. 13745

05-2-04-2-23

The Second Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

(Brotherhood Railway Carmen Division Transportation
(Communications International Union

PARTIES TO DISPUTE: (

(The Springfield Terminal Railway Company

STATEMENT OF CLAIM:

- “1. That the Springfield Terminal Railway Company violated the terms of our current Agreement, in particular Rule 13.1 when they arbitrarily assessed a sixty (60) day suspension to Carman Wilfred L. Bennett as a result of an investigation held on September 30, 2003.
2. That accordingly, the Springfield Terminal Railway Company be required to compensate Carman Wilfred L. Bennett in the amount of eight hours pay for each day that he was withheld from service. Also, allowing all benefits and privileges as a result of this discipline. Additionally, all correspondence relating to this investigation be removed from his person record and file.”

FINDINGS:

The Second 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.

By letter dated April 15, 2003, the Claimant was notified to attend a hearing. The Notice indicated that the investigation was to determine his responsibility, if any, for the charge of: "Negligence in the performance of duties resulting in a fracture to your right forearm on Sunday, April 6, 2003, while attempting to repair the sliding door on MEC 31878 at the Sappi Mill in Hinckley, Maine." The Notice specified several Rules allegedly violated. Following postponements, the investigation was held on September 30, 2003. Subsequently, the Claimant was notified that he had been found guilty and was suspended for sixty (60) days.

The Organization has raised a number of arguments at the hearing and during the on-property appeals. It questions the manner in which the hearing was conducted, the credibility decisions related to some of the testimony and evidence, the proof of the charges and importantly, the excessive nature of the discipline. The Claimant testified to the facts of the incident and stated in part that, "I don't think I did anything wrong."

Specifically, with respect to each of the charges, the Claimant states that he inspected the truck that morning, but there were no inspection reports in the truck or around to file. He maintains that all of the trucks leak fluid, "so I didn't think it was any big deal." With respect to failing to provide blue flag protection, the Claimant testified that he did put out such protection and in a conversation a few weeks later with Mr. Swett at the sight; he was informed that it was still hanging there. Additionally, he provided three statements to support that flag protection was there. The Organization further argues that the Carrier did not prove any fault on the Claimant's part. The Organization maintains that the Carrier's speculation of where the Claimant should have been positioned when performing the job was not possible. If the Claimant had operated the boom from the other side of the truck, he would not have been able to see the job. It denies that the Claimant did anything wrong and maintains that he should not be punished for an injury.

The Carrier maintains that the hearing was fair. The Hearing Officer did not limit one side from asking questions or fail to fulfill his responsibilities under the Agreement. It argues that the Claimant failed to exercise proper caution and parked his boom too close to the rail car. The Carrier further holds that the credibility decision made with regard to the blue flag protection was well grounded and proper. In the whole of the testimony and evidence, the Carrier argues that it has provided proof that the Claimant did not perform his job in a safe manner.

The Board has reviewed the hearing and finds no procedural issue of merit. On the facts, we find sufficient probative evidence of guilt. The Manager of Safety's April 6, 2003 letter about his investigation stated that the boom truck "was parked to close to the car . . . and [the Claimant] . . . was not standing in the proper location . . ." The testimony does not refute the findings that:

"This injury probably would not have happened if the operator was in the proper location and the truck was parked out away from the car allowing more room or if the operator used the controls on the opposite side of the truck on the driver side."

The pictures of the incident support the findings. No defects were found in the boom and testimony from Assistant Manager Maschino was that his inspection suggested that it was not "safe being operated from the right hand side," the side where the accident and injury occurred. This was supported by the testimony of Manager Zaccadelli who as Safety Instructor and Supervisor also stated that the Claimant shouldn't have been in the position he was in with the boxcar.

The Board has carefully reviewed the testimony and must conclude that the Carrier's credibility decision on blue flag protection can not be shown to be improper. The Carrier provided the testimony of Mr. Rancourt. The Organization provided three statements. None were Carrier employees able to testify and one was a former employee who resigned when faced with a hearing on possible theft. The Board has no reason to suggest that the Carrier's credibility decision was inappropriate.

The Board finds that in each and every issue, the transcript and record provides substantial evidence of probative value to support the Carrier's findings of guilt. The testimony herein indicates that the Claimant failed to fulfill his

responsibilities in a careful and diligent manner. The Board finds that the Carrier's conclusions are supported by the record.

Accordingly, the only question left for this Board to decide is the quantum of discipline. Here, the Organization is adamant that the Carrier has woefully failed to exercise proper progressive discipline, but instead acted in the unjustified and excess action of administering a sixty (60) day suspension. The Organization argues that the Claimant's record had five other disciplinary actions. These were a reprimand for a Safety Rule, a two day suspension for damaging a welder, a five day suspension for excessive absenteeism, a two day suspension for failure to report an injury, and a fourteen day suspension for being uncivil toward a Supervisor. There is no previous discipline for an associated event, so even if guilty, the discipline is not educational, but punitive, as his past discipline is unrelated to the incident at bar.

The Board has carefully considered the Organization's position, but is not persuaded. The Carrier argued on property that the Claimant's fractured right forearm was negligence. That given the potential for far greater danger when safety is disregarded, the sixty days was to educate the Claimant as to the importance of safety to avoid serious future incidents.

Each case must rest on its own merits. Given the full record of this case, including five prior disciplinary actions, the persuasive evidence of guilt and the potential seriousness to the Claimant and other employees of accidents, the Board will not substitute its judgment for that of the Carrier. The claim must be denied.

AWARD

Claim denied.

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ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 7th day of September 2005.