

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number **22986**
Docket Number CL-22918

Richard R. **Kasher**, Referee

(Brotherhood of Railway, Airline and
(Steamship Clerks, Freight Handlers,
(Express and Station **Employes**

PARTIES TO DISPUTE: (

(Terminal Railroad Association of St. Louis

STATEMENT OF CLAIM: Claim of the System **Committee** of the Brotherhood (GL-8803)
that:

1. Carrier violated the Clerks' Agreement when it found Mr. D. T. **Gilmore** in violation of its Operating Rules J. and G. following an investigation held April 7, 1978.

2. Carrier's action of discipline in assessing Mr. **Gilmore's** personal record with being in violation of its Operating Rules J. and G., was not supported by proof, evidence or the record, therefore Carrier's decision was ill-founded and completely unjustified.

3. Carrier shall now be required to expunge all reference to a violation of its Operating Rules J. and G. from Mr. Gilmore's personal record.

OPINION OF BOAFD: Claimant is a Yard Clerk with a seniority date of August 22, 1967. While on duty as a Yard Clerk, **working** Job 50-E, with the **hours** of **11:00** p.m., November 25, 1977 until 7:00 a.m., November 26, 1977, Claimant was driving a Carrier-owned vehicle, Van #411, when it struck the superstructure of the McKinley Bridge. The accident occurred at approximately 2:00 a.m. on November 26, 1977. The van was extensively damaged and Claimant was seriously injured. There were no witnesses to the accident.

As a result of the accident, Terminal Superintendent B. R. **Stubblefield** wrote a letter to Claimant, notifying him that an investigation would be held to determine whether Claimant failed to operate **the van** in a safe and proper **manner**. That letter mentioned possible violations of Rules J and G. **Rule G** concerns the use of intoxicants while on duty and was subsequently dropped by the Carrier. Role J reads as follows:

"J. **Employes must** exercise care to avoid injury to themselves or others. They **must** observe the condition of equipment and the tools they use in performing their duties and when found defective will, if practicable, put them in safe condition, reporting defects to the proper authority."

The investigation was conducted on April 6, 1978, and the Carrier concluded that Rule J was violated. The Carrier, by letter dated April 14, 1978, **informed** Claimant that he was suspended for six (6) months **commencing** on the date of the accident. **On** the same date, April 14, 1978, the Carrier sent Claimant a second letter informing him that the six (6) month suspension **was** to be modified: Claimant could return to work upon receipt of proper medical release. Claimant obtained the appropriate medical release and returned to his Yard Clerk duties on May 16, 1978.

The claim before this Board seeks to erase from Claimant's record the **Rule J** violation. The question presented is a **matter** of proof. The essence of the Organization's argument is that the Carrier has failed to present any evidence that Claimant was, in fact, negligent in his operation of the Carrier-owned vehicle. The claim must be sustained.

The evidence submitted by the Carrier consists of: (1) several photographs of the badly damaged van, which include glimpses of a partially empty bottle of Schnapps; (2) the fact that Claimant was so seriously injured that he needed hospitalization and medical care for approximately four months; (3) the fact that the reporting police officer gave Claimant a ticket for "Careless Driving" (this citation was subsequently dropped for **lack of** evidence).; and (4) speculation, based on the aforementioned photographs, that Claimant operated the vehicle at an excessive rate of speed.

Despite the photographs, the Carrier has not supported the alleged Rule J violation with any probative evidence of carelessness. The evidence is all **conclusionary**. The photographs, by themselves, cannot lead to the conclusion that the van was being operated carelessly or at a high rate of speed; nor does the length of Claimant's recovery demonstrate any negligence on his part. The finding of negligence was based entirely on surmise and speculation. This Board **must** accordingly sustain the claim.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employee involved in this dispute are respectively Carrier and **Employee** within the meaning of the **Railway** Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

Award Number 22986
Docket Number CL-22918

Page 3

That the Agreement was violated.

A W A R D

Carrier is ordered to expunge all reference to a violation of
Operating Rule J from Claimant's personal record.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Pauler
Executive Secretary

Dated at Chicago, Illinois, this 29th day of September 1980.