

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24816
Docket Number CL-24612

George V. Boyle, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employees
(
(Alton and Southern Railway Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-9588)
that:

(1) Carrier violated the Clerks' Rules Agreement, in particular Rule 10, when it suspended Mr. Ray D. Bennett from its service for a period of sixty days beginning June 10, 1981, following investigation held June 5, 1981. (Carrier's File 1636-207)

(2) Carrier shall now be required to compensate Mr. Bennett eight (8) hours pay, each work day, five (5) days per week, beginning June 10, 1981 through August 8, 1981; and, shall also be required to expunge the investigation record from his personal record.

OPINION OF BOARD: The Claimant was involved in an accident while driving a carryall on the Carrier's property. This was admitted by the Claimant and about this there is no dispute. However, the degree of culpability and assessment of penalty are matters of disagreement.

The Claimant testified that while driving at about 15 miles per hour on a clear wet road, two dogs ran in front of this vehicle. This caused him to swerve to the left. The carryall left the road bed and struck a flat car doing considerable damage to the vehicle, amounting to \$6,000. After a proper hearing the Claimant was suspended for sixty (60) days for "failure to have company vehicle No. 43 under proper control at all times".

The Employes, on behalf of the Claimant asserts that (1) Since "no one witnessed the accident ... the Superintendent ... could only surmise or guess that Claimant might have been negligent in some manner". (2) That the Carrier failed to "meet its 'burden of proof' and produce positive and probative evidence to support its findings and decision ..." that the Claimant "was operating the vehicle in a 'careless manner' ..."

In determining whether or not the Carrier's action was "harsh, excessive and an abuse of discretion" as claimed by the Employes, it is axiomatic that the Board may not consider questions of witness credibility nor substitute its judgment unless it is demonstrated that the Carrier's action was arbitrary, capricious or unreasonable. Therefore it is proper to consider on what basis the Carrier took action and determine the appropriateness of such action.

While there were no other witnesses to the accident other than the Claimant, the Carrier was able to reconstruct a portion of the incident from physical evidence at the scene:

- the vehicle was traveling on a road seventeen (17) feet wide with a four (4) foot clearance between the road and the track on which was the flat car which was struck;
- the road was black top, in good condition, although wet;
- the carryall left the road and traveled a distance of fifty-seven (57) feet on the ballast before it struck the flat car;
- after hitting the flat car, the carryall continued in contact with it for thirty-two (32) feet before it came to a stop;
- the carryall sustained considerable damage amounting to \$6,000.

From this evidence the Carrier concluded that the Claimant did not have the vehicle under proper control and/or that he was negligent in handling the vehicle in a careless manner and/or that he was exceeding the proper speed for the road in its condition at that time. In these conclusions the Board must concur. This was not surmise, conjecture, supposition or guess-work. There was substantial physical evidence that the vehicle could have been stopped before it did come into contact with the flat car, provided the carryall was being used with due care and regard for safety and potential, though unexpected hazards involved in operating any vehicle. The dictionary defines "negligent" as, "lacking in due care or concern". In legal questions, "negligence" is defined as, "the omission or neglect of any reasonable precaution care or action."

Regardless of whether or not the Claimant was startled by the two dogs, it is both reasonable and logical for the Carrier to conclude that the vehicle would be able to avoid serious damage if it was moving at a safe rate of speed and being operated by a reasonably circumspect driver.

In light of this, the Board must conclude that the Carrier's met the burden of proof and its action is within proper bounds of discretion and not unduly harsh.

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 Employees involved in this dispute are respectively Carrier and Employees 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

That the Agreement was not violated.

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Page 3

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Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 16th day of May, 1984