

The Third Division consisted of the regular members and in addition Referee Mary H. Kearney when award was rendered.

(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(St. Louis Southwestern Railway Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The one hundred forty-eight (148) days of suspension imposed upon Machine Operator A. E. Stoddard for alleged violation of Rules 2245 and 2247 on November 19, 1985 was unjust, unwarranted and on the basis of unproven charges (System File SSW-D-1213/53-894).

(2) The claimant's record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered from November 26, 1985 through April 24, 1986."

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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 waived right of appearance at hearing thereon.

Claimant began working with the Carrier on October 30, 1980. On November 19, 1985, Claimant, who was then assigned and working as a Boom Truck Operator, was driving Boom Truck 17031 ninety-two miles to Topeka, Kansas. As Claimant entered Topeka he exited the I-70 Freeway. As Claimant descended the exit ramp he claims the foot brake failed and that the emergency brake would not stop the truck and trailer, which was loaded with ties weighing 8,000 pounds. The truck finally came to a stop after it turned over on its side and skidded into a power line pole at the bottom of the ramp. The accident caused \$15,000 worth of damage to the truck and \$2,000 worth of damage to private vehicles.

About thirty minutes after the truck turned over the Assistant Work Equipment Supervisor arrived to inspect the accident scene. Among other things, he observed tools from the truck scattered around the area, seat belts behind the seats, skid marks indicating the brakes had applied and no visible leakage from the brakes.

The next day the Assistant Work Equipment Supervisor and a Mechanic inspected the brake system of the truck. This inspection also disclosed no brake leakage. They also tested the brake system under various conditions and observed no brake failure.

The Claimant was withheld from service pending investigation of the accident and following a formal Investigation held on January 7, 1986, was suspended until April 24, 1986, i.e., a total of 148 days.

The Organization claims first that the Carrier improperly applied Article 14(A)1 when it suspended Claimant pending Investigation. Article 14(A)1 provides in pertinent part:

"An employee who has been in service sixty (60) days or more shall not be dismissed or disciplined except as provided in this agreement without a fair and impartial investigation. They may, however, in serious cases, be held from service pending such investigation."

The Organization argues that this Board has consistently held that a suspension pending Investigation is proper only "...when the nature of the offense in all the circumstances is such that continuance of the employee in service pending investigation would endanger the safety of operations, interfere with the orderly performance of work or disrupt the administration of discipline." Third Division Award 6659.

This Board has also repeatedly emphasized that the Carrier's right to remove an employee pending Investigation must be exercised with judgment and it must be carefully balanced against the employee's right to be afforded all Agreement due process considerations. Third Division Award 25118, for example.

In the instant case the Carrier was faced with apparent violations of Safety Rules and an accident that caused considerable damage to Carrier and private property and which could have resulted in personal injuries, but fortunately did not. After scrutinizing the record and arguments, the Board finds insufficient basis to second guess the Carrier's decision to remove Claimant from his position of Boom Truck Operator before the formal Investigation and concludes, therefore, that the Carrier's invoking of the exception contained in Article 14(A)1 was proper.

Turning to the primary substantive Claim before the Board, the Organization asserts that the Carrier failed to present credible evidence that Claimant failed to exercise precautions to prevent damage to Truck 17031 and loss of tools. The record demonstrates, however, that although Claimant testified that the accident in question occurred because the brakes on the truck failed, the inspection that a Carrier Officer performed minutes after the accident had happened and a second inspection of the truck a day later, showed that the brakes were in operating order. Testimony further discloses that a short time before Claimant reached Topeka and experienced the subject accident, a down pipe broke on the truck's manifold creating, in Claimant's words, a loss of power. Although Claimant was unable to get the pipe fixed he decided, nevertheless, to proceed on to his destination in Topeka.

The Claimant testified that eight days before the accident, he was driving the same truck down an exit ramp and had to apply the foot brake several times before it functioned. The record, however, contains no indication that Claimant reported this mishap to the Carrier.

Further, Claimant admitted at the Investigation that he was not wearing his seat belt at the time of the accident. His response to the scattering of tools over the accident area was that he had secured the tools as well as he could but that the locks on the tool box were all either broken or missing. Again, however, the record reveals no indication that Claimant had reported this pre-existing condition to Supervision.

The above facts from the record indicate a number of precautions available to Claimant that he failed to take. The Carrier's burden is to show by substantial evidence that Claimant committed the violations. The Board finds that this burden has been satisfied.

In defense of Claimant, however, the Organization claims that Carrier Officers were, in fact, aware of the defects of Boom Truck 17031, most particularly the faulty brakes. The record shows that on November 4, 1985, Claimant did inform the Acting District Manager that no plug was in a socket and that a corresponding electrical wiring cord had been cut, which Claimant testified at the Hearing was a terminal connector which connected all terminal wires to the trailer. Accordingly, he claims that this would cause the trailer brakes to malfunction. Claimant also testified that the Carrier knew about the brakes because Supervisors periodically drive the trucks.

In light of the above, further testimony demonstrates that although Claimant stated at the Hearing that the unplugged and broken terminal connector would cause the brakes to malfunction, when he reported the problem to the Carrier Officer on November 4, 1985, he stated only that the turn signal lights were malfunctioning and he did not report any brake malfunction as a result of the defect. Further, an employee testified that on November 11, 1985, a week after Claimant informed his Supervisor about the turn signal lights, that the employee observed while riding with Claimant, that the brakes did not immediately apply. The record reveals no indication, even after this

had happened, that Claimant informed the Carrier specifically about a brake problem. Moreover, the record shows that Claimant continued to drive the truck between November 4, and November 19, 1985, indicating that if there was a problem with the brakes it arose intermittently and, therefore, would not necessarily be detected by Supervisors who occasionally may have driven the truck.


The Board cannot ignore the Carrier's failure to repair the turn signal lights between November 4, and November 19, 1985, and it deems this lack of response by the Carrier as less than prudent, but it also cannot conclude, as the Organization suggests, that this omission outweighs all of the above-noted instances where Claimant inexplicably failed to exercise precautions available to him. Furthermore, Claimant's prior disciplinary record, which the Carrier took into consideration when it assessed the penalty against Claimant, shows that in 1985 alone Claimant was cited with four other Rule violations, resulting in three suspensions. Given these factors and its overall review of the record, the Board finds no basis upon which it could properly substitute its judgment for that of the Carrier by reducing the amount of discipline assessed.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Defer - Executive Secretary

Dated at Chicago, Illinois, this 29th day of March 1990.