

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30046
Docket No. MW-29737
94-3-91-3-96

The Third Division consisted of the regular members and in addition Referee James E. Mason when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
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(Elgin, Joliet and Eastern Railway Company

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

1. The ten (10) demerits assessed against IETO W. Eiland for alleged failure to perform his duties in a safe manner resulting in his vehicle coming into contact with a transmission tower on December 9, 1989 at #20 Warehouse was arbitrary, capricious, without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement (System File SAC-5-90/MM-1-90).
2. As a consequence of the violation referred to in Part (1) hereof, the Claimant's record shall be cleared of the charge leveled against him and the discipline assessed in connection therewith shall be rescinded."

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 waived right of appearance at hearing thereon.

The Claimant in this case was employed as an Industrial Elevating Transporter Operator (IETO). This occupation was employed to operate an eight axeled vehicle which is utilized to transport steel products within the U.S. Steel plant area at Gary, Indiana. On December, 9, 1989, Claimant was operating his loaded vehicle along an authorized route when he and his loaded vehicle became involved in a collision with a radio transmission tower. There is no indication relative to the dollar amount of the damage or the extent of the damage. However, after the collision, the

vehicle was operable and was subsequently moved by the Claimant to Carrier's repair shop.

As a result of this incident, Claimant was notified by letter dated December 14, 1989, to appear for an Investigation on December 19, 1989, to answer to a charge of "allegedly failed to perform the duties of your assignment in a safe manner * * * and allegedly engaged in an unsafe practice by failing to exercise good judgment in not having your vehicle under control when your assigned vehicle came in contact with a transmission tower incurring damages to both vehicle and tower." The hearing was held as scheduled at which time Claimant was present, represented and testified on his own behalf. Following completion of the Investigation, Claimant was notified by letter dated December 29, 1989, that he was found to be "responsible as charged, thereby in violation of Driving Rules 16 and 17 of the Safety Rules * * *." As a result of this finding, Claimant was assessed ten demerits as discipline. On this Carrier, 100 demerits results in dismissal.

Driving Rule 16 reads as follows:

"16. The safe operation of Company owned motor vehicles depends upon competent, alert operators."

Driving Rule 17 reads as follows:

"17. All operators must drive defensively and must use good judgment at all times."

At the Investigation, Claimant testified that while negotiating the multiple curves along the route being traversed with his loaded vehicle, the steering mechanism of the vehicle temporarily locked and when he applied the brakes, they did not work promptly and properly resulting in the collision with the transmission tower. Claimant stated that earlier in his shift he had experienced intermittent difficulties with the steering mechanism but that the condition had appeared to correct itself. After the collision had been viewed by the Assistant Trainmaster and a Motor Car Repairman, Claimant operated the vehicle, without incident, to the repair shop where it was thoroughly examined by another Motor Car Repairman. The Motor Car Repairman who was initially on the scene made no inspection of the vehicle's working mechanism.

For reasons known only to the Carrier, the "other" Motor Car Repairman who actually inspected the vehicle at the repair shop and who could have given first-hand testimony relative to the condition of the vehicle at the time in question was not called to testify at the Investigation. Rather, Carrier called to testify only the

Assistant Trainmaster and a Motor Car Repairman neither of whom witnessed the collision or made any first-hand determinations relative to the operating condition of the vehicle. In any discipline case, the Carrier has the primary responsibility to elicit all pertinent information, evidence and testimony which has a direct bearing on the matter under investigation. In this case, Carrier failed to do that.

This Board has repeatedly held that the proof of a charge must be supported by substantial evidence. We have often reminded the parties of the definition of "substantial evidence" as set forth by the U.S. Supreme Court (Consolidated Edison v. N. L. R. B., 305, US 197 ,299), to wit:

"Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

In this case, the hearing record does not contain substantial evidence that Claimant failed to perform his duties in a safe manner or failed to exercise good judgment or was less than a competent, alert operator. The discipline as assessed cannot be permitted to stand.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Catherine Loughrin
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 17th day of February 1994.