

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 32566
Docket No. MW-33468
98-3-96-3-995

The Third Division consisted of the regular members and in addition Referee Edward L. Suntrup when award was rendered.

(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(CSX Transportation, Inc. (former Baltimore and
(Ohio Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (withheld from service and subsequent dismissal) imposed upon Foreman R. W. Riley in connection with the charge of ‘... responsibility in connection with vehicle accident at Riverton Yard on December 12, 1995 at 1045 hours, involving company vehicle 49701. . . .’ was arbitrary, capricious without just and sufficient cause [System File B-D-1522/12(96-224) BOR].
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be reinstated to service with seniority and all other benefits unimpaired and he shall be compensated for all wage loss suffered.”

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 were given due notice of hearing thereon.

On December 26, 1995 the Claimant was advised to attend an Investigation to determine facts and place responsibility, if any, in connection with a vehicle accident which occurred at Riverton Yard on December 12, 1995 at 10:45 P.M. According to the charge letter the accident resulted in some \$1,100.00 in damage to a company vehicle and the Claimant was assessed blame. After an Investigation was held at the Roadmaster's office in Glenwood Yard, Pennsylvania, the Claimant was advised that he had been found guilty of the charges levied against him. He was discharged. According to the letter of discharge the supreme penalty was levied not only because of the seriousness of the accident, but also because it was the second one the Claimant had been involved with in 1995.

The discipline was appealed by the Organization on the property in the proper manner under Section 3 of the Railway Labor Act and the operant Agreement up to and including the highest Carrier Officer designated to hear such. Absent settlement of the claim it was docketed before the Third Division for final adjudication.

The Claimant's Supervisor on December 12, 1995 was a Roadmaster who testified at the Investigation. According to the Roadmaster, who inspected the truck after the accident, and whose testimony is corroborated by that of the Claimant himself, the stake truck which the Claimant was driving passed too close to a parked dump truck in the Carrier's Riverton Yard. The result was that the dump truck's mirror was hit by the truck the Claimant was driving. As a result the mirror and door on the dump truck sustained considerable damage. According to the accident report filed by the Claimant:

"... We were going west by Riverton Yard Office and approached (a) dump truck which was on my left, (on my) driver's side. (I) slowed to check clearance to pass (the) dump truck. The front end of my truck cleared by the door (of the dump) truck and the upper portion of (the) stake bed (of my truck) came in contact with the door on (the dump) truck. ..."

According to testimony by the Roadmaster:

“... Mr. Riley just made an error in judgment and didn’t get far enough over to his right to clear by the bridge truck and the corner of his stake bed caught the mirror on the truck and bent the door in. . . .”

According to testimony at the Investigation by the Driver of the dump truck, who was a Tunnel Mechanic, the following occurred:

“Well, we had just came from down the road to get the filters for our front end loader. We turned around and backed up to the loader so we could hook our jumper cables from our batteries to the loader batteries, and we had stopped and one of the other fellows that was with us had got out, was hooking up the jumper cables and Mr. Waggoner [the Relief Foreman who also testified at the Investigation] was on the passenger side. And I seen the company truck up at the tower and it started coming this way. I told Mr. Waggoner, I said there’s a truck coming, so don’t open the door, said I might have to pull up and let him through. But when he came through he just caught the mirror and the door . . . [which] . . . buckled . . . [and the impact] . . . pull[ed] the top edge of the door away from the body of the truck. . . .”

According to the Tunnel Mechanic, it was his opinion that the Claimant had not been driving at a cautious speed which would have been “. . . slow enough to be able to look through [the] rear view mirror [to] make sure that [he] could pass [my] vehicle without catching the mirror. . . .”

According to testimony by the relief Foreman the passenger side of the dump truck was shut and latched when the Claimant’s truck struck its mirror and “. . . pulled it out of its socket [and then] caught the edge of the door just a little bit and pulled it out like 3/4s of an inch. . . .” When asked during cross examination if he thought the Claimant was driving at a safe speed when the accident occurred, he answered “. . . apparently not. It don’t think he was going at a safe speed. . . .”

The Trackman who was sitting on the passenger side of the truck which the Claimant was driving when the accident occurred opined, in testimony, that the top of the truck causing the accident caught the top of the door, not the mirror, but he also admitted that he was sitting on the opposite side of the truck causing the accident when it occurred and the Board can but reasonably conclude was not in a good position to

have seen exactly what happened. According to this witness the truck was going very slow... "barely moving. . ." when the accident occurred.

In testimony at the Investigation the Claimant admitted that his truck struck the dump truck, although he thought he had enough room to get by it. He stated that he did not see whether he hit the door or the mirror of the dump truck. The Claimant opined that he was going "... at most 3 miles an hour. . . ." He also stated that the road on which he was driving was filled with pot holes. When asked who was to blame for the accident the Claimant stated that he couldn't really state who was to be blamed. He did add that this was just his opinion.

A review of the record before the Board warrants conclusion that the Claimant was responsible for the accident. As a result of either negligence or bad judgment the truck he was driving passed too close to another truck and caused some \$1,100.00 worth of damage to another truck. On merits the Claimant is guilty as charged.

The only remaining issue before the Board is whether the discipline assessed by the Carrier was reasonable. Arbitral precedent in this industry dictates that a Claimant's past record is a factor to be considered when assessing the quantum of discipline (Second Division Awards 5790, 6632; Third Division Awards 21043, 22320, 23508). The Carrier argued that the Claimant was deserving of dismissal because he had been assessed a 30 day suspension in February 1995 for negligence involving a motor vehicle and that this suspension had been upheld by Public Law Board No. 3561, Award 2029. The Board obviously cannot condone what appears indeed to be two instances of negligence by the Claimant in the same year in an industry where safety and attentiveness thereto is of primal importance. On the other hand, this must be weighed, as extenuating circumstance, against the fact that the Claimant is a long-term employee with 18 years of service. Aside from the acts of negligence in 1995 the Claimant has a clean record and he has been, as far as the Board can determine from information provided to it, a good employee. Obviously, if the Claimant commits further acts of negligence in the future which would establish a bonafide pattern of such behavior the Carrier would be justified in taking extreme measures to protect its property, the Claimant's fellow employees, and the Claimant himself.

But in view of the full record before it at this time the Board does not believe that it would be unreasonable to permit the Claimant to prove his continued worth to his employer and the Board will so rule. The Claimant shall be reinstated to his old position

with the Carrier, with seniority unimpaired, but without pay for time held out of service since January 18, 1996.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 29th day of April 1998.