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**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35849
Docket No. MW-34664
01-3-98-3-250**

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Grand Trunk Western Railroad Company (former Detroit,
(Toledo and Ironton Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [five (5) day suspension] imposed upon Mr. T. M. Mulford for alleged failure to properly and safely secure Company Truck 76335 on October 29, 1996, which resulted in said truck being blown across the parking lot and striking and damaging Company Truck 2082A on October 30, 1996, was arbitrary, capricious, on the basis of unproven charges and the hearing that was neither fair nor impartial (Carrier's File 8365-1-585 DTI).
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be afforded the remedy in Rule 34(e).”

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.

At the time of the incident in question the Claimant had over 24 years of unblemished service with the Carrier. On October 29, 1996, the Claimant was assigned to operate Dump Truck 76335 to distribute asphalt at a road crossing that was being repaired. At the end of that workday, between 4:00 and 4:30 P.M., the Claimant parked Truck 76335 in its regular spot at the lower end of an inclined parking lot in Flat Rock Yard. As was normal practice, the truck was parked with the dump box in an upright position, in order for any excess asphalt to flow to the bottom. The truck was parked in gear with the air brakes set. The Claimant left the keys on a hook in the Foreman's office, which was unlocked.

During the evening of October 29 and the early hours of October 30, a severe windstorm passed through Flat Rock Yard. On the morning of October 30, Foreman Sorah reported to Track Supervisor M. S. Link that there was a problem with Truck 76335's canopy. A Mechanic was then directed to make authorized repairs. On October 30, the Claimant did not enter Truck 76335, but instead was directed to proceed to American Crane to obtain a crane for another project.

It is noted that at approximately 7:30 A.M. on October 30, Truck 76335 was still parked at the lower end of the parking lot where it had been parked the night before. At approximately 9:00 A.M., Locomotive Foreman J. Belcher was in his office at Flat Rock Yard and an anonymous employee called and indicated that Foreman Belcher's Truck 2082A was damaged. Foreman Belcher inspected Truck 2082A, found the damage, and also discovered Truck 76335 adjacent to his truck. The damage to Truck 2082A was estimated to be \$1,357.72. The Carrier determined that Truck 76335 had caused the damage to Truck 2082A. However, the Carrier was unable to determine how Truck 76335 had moved 150 feet upward on a slight incline and collided with Truck 2082A.

It appears that between 7:30 A.M. and 10:00 A.M., Truck 76335, which was unoccupied, somehow moved approximately 150 feet uphill across the parking lot and came into contact with Truck 2082A. The Carrier contends that the Claimant was the last individual to drive the truck on October 29, though it acknowledges that a Mechanic looked at the canopy of Truck 76335 on the morning of October 30, prior to the collision.

The Claimant was instructed to attend an Investigation on December 10, 1996 in which he was charged with failure to properly and safely secure Dump Truck 76335 after operating the truck on October 29, 1996. According to the notice, the Claimant's actions allegedly allowed the truck to be blown across the parking lot, due to high winds, and strike company Truck 2082A on October 30, 1996, causing damage in the amount of \$1,357.72. After a number of postponements, the Investigation proceeded on February 10, 1997. As a result of the Investigation, on March 10, 1997, the Claimant was found guilty of the charge of having failed to properly and safely secure Truck 76335 after operating the truck on October 29, 1996. Pursuant to this decision, the Claimant was issued a five day record suspension.

The Organization claims that the discipline was unwarranted because the charges were unproven. It claims that the burden of proof in a discipline matter is on the Carrier and its burden of proof has not been met. The Organization contends that the Carrier failed to afford the Claimant a fair and impartial Hearing because Track Supervisor Link and Mechanic Floyd were not present at the Investigation. The Organization claims this was improper because Link and Floyd had firsthand knowledge of the incident and the Claimant was unable to confront his accuser. The Organization notes that it objected to the continuation of the Investigation without Link, but this request was denied. Further, the Organization claims that the Carrier failed to present sufficient evidence to prove that the Claimant failed to properly and safely secure his vehicle on October 29, 1996. There was no evidence presented that the Claimant's actions actually led to the damage of Truck 2082A. The only evidence presented is that the Claimant did exactly what he was supposed to do on October 29 and that damage occurred on October 30. Thus, the Organization claims that the discipline imposed on the Claimant was arbitrary and capricious and should be overturned.

Conversely, the Carrier takes the position that it met its burden of proof. First, the Carrier states that the procedural objections raised by the Organization are unsupported by the evidence. According to the Carrier, the Claimant was the last individual responsible for the operation of Truck 76335 on October 29 and the accident occurred the following morning. In the interim, the truck remained parked and was unused, although a Mechanic did change a fuse in the truck. Thus, the Claimant, being the last individual to drive the truck, caused the damage. The Carrier asserts that it met its burden of proof to show that the Claimant failed to properly and safety secure the truck. Finally, the Carrier argues that the discipline was appropriate based on the nature of the offense.

In discipline cases, the Board sits as an appellate forum. We do not weigh the evidence de novo. As such, our function is not to substitute our judgment for the Carrier's, nor to decide the matter in accord with what we might or might not have done had it been ours to determine, but to pass upon the question of whether there is substantial evidence to sustain a finding of guilty. If the question is decided in the affirmative, we are not warranted in disturbing the penalty unless we can say it appears from the record that the Carrier's actions were unjust, unreasonable or arbitrary, so as to constitute an abuse of the Carrier's discretion. (See Second Division Award 7325, Third Division Award 16166.)

After a review of the evidence, the Board finds that there was not substantial evidence in the record to sustain the Carrier's position. The Carrier proved that the Claimant was responsible for the operation of Truck 76335 on October 29, 1996. The Claimant operated the truck as he did on other days. At the conclusion of his work day, he parked the truck with the air brakes on and with the dump box in an upright position so that any loose asphalt would fall to the bottom. The Claimant then placed the keys in the unlocked Foreman's office as he did on all other days. During that evening and the following morning, high winds were present in the yard. On the following day, there was a complaint about the canopy of Truck 76335 and a Mechanic was dispatched to fix it. At the same time, the Claimant was sent elsewhere to obtain a crane and did not drive Truck 76335 at all on that day. Sometime later that morning, Truck 76335 moved approximately 150 feet on an upward incline and struck Truck 2082A causing damage.

The Board notes that there is no substantial evidence to prove that the Claimant in any way caused the accident. The only record evidence is that he was responsible for driving Truck 76335 on the previous day. This is not enough to prove that he was responsible for the accident. There must be more direct evidence to prove culpability. In conclusion, the Board cannot find that there was substantial evidence that the Claimant failed to properly and safely secure Truck 76335 in a safe manner.

Thus, the Claimant shall be afforded the negotiated remedy provided in Rule 34(e) as requested.

AWARD

Claim sustained.

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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 18th day of December, 2001.