

****CORRECTED****

**Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40348
Docket No. MW-40845
10-3-NRAB-00003-090133**

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

**(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Soo Line Railroad Company (former Chicago,
(Milwaukee, St. Paul and Pacific Railroad Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [five (5) calendar day suspension effective Saturday, June 30, 2007] imposed upon Mr. R. Reveles for alleged violation of General Code of Operating Rule 1.1.2 and OTS Core Safety Rule - Item #7 in connection with his personal injury as a result of being struck by CP Material Truck at approximately Mile Post 100.5 on the Watertown Sub on April 26, 2007 was arbitrary, capricious, unjust and in violation of the Agreement (System File D-07a-07-550-02/8-00507 CMP).
- (2) As a consequence of the violation referred to in Part (1) above, all reference to this discipline shall be removed from Mr. R. Reveles' record and he shall be compensated for any and all lost wages and have all rights and benefits restored that may have been lost as a result of this suspension.”

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.

This claim protests discipline imposed on the Claimant for violating Safety Rules in connection with a knee injury he sustained on April 26, 2007 when he was struck in the lower back by a material truck traveling in a backward motion while he was walking westward on tie-ends on the south side of No. one track toward his section truck. The Claimant, a Laborer with the Cudahy section truck crew assigned to perform rail change out duties, and Whedon, the Material Truck Driver, were given notice of a formal Investigation to be held for the purpose of developing facts and placing responsibility, if any, in connection with the April 26, 2007 incident; no Rule violations were cited in the Hearing notice. As a result of the Investigation conducted on June 15, 2007, the Claimant was found guilty of failing to be alert and attentive in not hearing the backup alarm on the truck and not anticipating its arrival in violation of General Code of Operating Rule 1.1.2 and OTS Core Safety Rule - Item No. 7. Whedon was absolved of any responsibility for the incident and was not disciplined.

At the Investigation, the Claimant and Whedon testified, as did Acting Cudahy Section Foreman Dennis Roth who was waiting 250 feet down line in the section truck and viewed the Claimant being struck from his driver's side mirror, Truck Maintenance Supervisor Timothy Dietrich, who was not present during the incident but investigated thereafter, and employee Collura who was flagging the north side of the Barker Road crossing while the Claimant was on the south side, and never saw the Claimant get struck. Whedon testified that he never saw the

Claimant at the Barker Road crossing and was given the signal that it was clear to back up into the crossing by Collura, and that he did not learn that the truck had struck the Claimant until he was told this when he arrived at the job site. Whedon stated that the backup camera on the truck was not able to distinguish shapes due to the rain, a malfunction he reported previously to his supervisor, but that the backup alarm of the truck was working very loudly when he backed down the track at a very slow walking speed of four to five miles per hour. The Claimant, who does not read or write English and partially used an interpreter at the Investigation, stated that there was nothing wrong with his eyes or ears, but that he did not hear the backup alarm from the truck or see it backing up when he was flagging at the crossing or walking down the track. The Claimant walked west on the No. one main line when he finished flagging because his section truck was about 300 feet away and he was walking toward it. He did not know why he did not wait for the material truck to go by him when he was flagging, except for knowing that he had a distance to go before reaching his truck. He was clearly confused about where the trucks put on the track or in what order, testifying counter to all others that the section truck went through the crossing before the welding truck, explaining that the reason he stayed on after his truck went through the crossing was to help the welding truck get on hi-rail. The Claimant had no radio and was not in communication with Roth, who had unsuccessfully attempted to get Whedon to pick up the Claimant as he passed him. The Claimant fell to his knee when he was struck by the truck, but did not receive any first aid or medical attention. Roth helped him fill out his injury report at the Claimant's request.

The Organization argues that the Notice of Investigation did not meet the Agreement specificity requirements, thereby denying the Claimant of Agreement due process, citing Third Division Awards 11019, 11222, 14801, and 16330. It asserts that the Carrier failed to sustain its burden of proving the charges against the Claimant, because all testimony was second hand, and Dietrich's conclusions were based on assumptions, not facts. The Organization notes that just because there is an accident does not mean that any Rules were violated, and that the Carrier cannot rely merely on speculation, citing Third Division Awards 16166 and 30849. Finally, the Organization contends that the discipline imposed on the Claimant was arbitrary, unjust and disparate, because, at best, the Claimant was only partially responsible and the Truck Driver received no discipline, relying on

Second Division Award 8918; Third Division Awards 24697, 32051; Public Law Board No. 3749, Award 1.

The Carrier contends that the Claimant was given an impartial Investigation and his rights were not abridged. It avers that the evidence supports the finding of the Claimant's guilt of the charges by substantial evidence, because it reveals his lack of attention and alertness in failing to hear the backup alarm and his failure to take a safe route walking on ties knowing that a truck was backing up. The Carrier argues that the Claimant was negligent, failed to exercise good judgment and violated Safety Rules, which support its decision to discipline him, citing Third Division Awards 8502, 11775, 11865, 14066, 14197, 14770, and 19411. The Carrier asserts that the Organization's remedy request is improper and excessive under the Agreement, which only provides for actual wage loss, and posits that the discipline imposed was reasonable, relying upon Third Division Awards 37381, 37584, 35711; Public Law Board No. 6546, Award 11; Public Law Board No. 3882, Award 142; Public Law Board No. 6240, Award 14; Public Law Board No. 5896, Award 199.

A careful review of the record convinces the Board that, although Dietrich's testimony at the Investigation was derived from second hand information, the undisputed evidence establishes that the Claimant was walking westward on the ties when he knew or should have known that the material truck was behind him and would be backing up and traveling in the same direction down the track, and that he failed to hear the admittedly loud back up alarm on the truck which was proven to be in operating order at the time of the incident. These facts, along with the Claimant's confusing recollection of the events in question provide substantial evidence to support the Carrier's conclusion that the Claimant was in violation of the cited Operating and Safety Rules. The fact that the Hearing notice did not cite any Rules does not prove that the Claimant was denied Agreement due process, because he and his representative were made aware that the Investigation was to deal with a determination as to whether there was any responsibility to be assessed with respect to his knee injury on April 26, 2007. While citation of the Rules placed into evidence at the start of the investigation would have been preferable, we are of the opinion that the Claimant was not prejudiced in the ability to represent and defend his interests at the Investigation.

We are also of the opinion that the Carrier's determination not to assess discipline against the Truck Driver in this case is insufficient to establish disparate treatment. The Investigation evidence provides no basis to establish that Whedon improperly operated his equipment or should have anticipated that the Claimant would be walking on the ties after he was given the hand signal to proceed across the crossing and did so slowly and with his back up alarm operational. The record shows that Whedon had informed his Supervisor that the back-up camera on the truck was ineffective in revealing shapes during rainy weather, and that such weather conditions existed at the time of the incident. In these circumstances, we cannot conclude that the Claimant and Whedon bore equal responsibility for causing the accident, or that the Claimant was only partly responsible for his knee injury, as was the situation in the cases relied upon by the Organization. The discipline notice states that the five-day suspension imposed upon the Claimant was in accordance with the Carrier's C.P.R. "Positive Behavior & Performance Policy." The Organization did not take issue with this assertion, and the record contains evidence of discipline imposed upon the Claimant on prior occasions. Accordingly, the Board cannot find the penalty assessed to be unreasonable, and the claim is denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 1st day of March 2010.