

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Southern Pacific Transportation Company (Eastern Lines)

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

(1) The five (5) day suspension of Labor Driver A. A. Cervantes for alleged responsibility for overturning Boom Truck 20059-RD in violation of Rules 607 and I on February 18, 1988 was without just and sufficient cause, arbitrary and on the basis of unproven charges (System File MW-88-113/472-19-A).

(2) The Carrier violated the Agreement when it failed and refused to compensate the Claimant for wage loss incurred in attending the hearing held, in connection with the charges referred to in Part (1) hereof, at San Antonio, Texas on March 16, 1988 (System File MW-88-130/472-69-A).

(3) As a consequence of the violation referred to in Part (1) hereof, the Claimant shall be allowed forty (40) hours' pay at his pro rata rate of pay and his record shall be cleared of the charge leveled against him.

(4) As a consequence of the violation referred to in Part (2) hereof, the Claimant shall be allowed sixteen (16) hours' pay at his pro rata rate of pay."

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, a labor driver, was notified to report to an Investigation concerning a February 18, 1988 accident in which the boom truck he was operating overturned while unloading a frog from a gondola. After the Hearing, he was suspended for 5 days for violating Rules 607 and I.

Claimant also separately claims that he is entitled to be paid for his time spent attending the Hearing, and for his travel expenses and travel time to and from the Hearing. The two claims have been consolidated and are properly before this Board.

The Carrier argues that the suspension is appropriate. It contends that the accident was the result of Claimant's negligence in operating the boom truck, and that the penalty was lenient in light of the potential danger to employees and property. It noted the Claimant was an experienced driver, and that his crew had unloaded this type of frog before.

The Organization contends that the suspension is not supported by substantial evidence. It notes that the Carrier has the burden of proof in discipline cases. It argues that the fact that an accident occurred does not prove negligence. The Organization argues that the accident was caused by the Carrier's failure to provide Claimant with proper and safe equipment.

In the second claim, the Organization contends that Claimant should be paid one day's pay for attending the Investigation, one day's pay for travel time, and travel expenses. The Carrier argues that employees are only paid for attending the Investigation if the discipline is not sustained, and that the Agreement does not provide payment for travel time and expenses.

This Board sustains the suspension claim. It concludes that the Carrier failed to meet its burden to provide substantial evidence that the accident was caused by Claimant's negligence and lack of care, both of which are prohibited by Rule 607 and I. The Board concludes that no discipline is appropriate.

This Board accepts the Roadmaster's conclusion that the truck overturned because the telescoping boom was not properly set for the 6,000 pound frog. This Board agrees that negligence is not proved by the fact that an accident occurred. Public Law Board No. 4055, Award 5. Here, the Carrier presented insufficient proof of Claimant's negligence. The record shows that, at the time of the accident, important equipment needed to properly operate the boom was missing.

The Roadmaster, Foreman and the Claimant each testified that one of the truck's two boom radius indicators was missing. The Roadmaster did not know the location of the missing indicator. However, the Foreman and the Claimant testified that the indicator was missing from the operator's side, and the Board so finds. The Foreman also testified that the second indicator was defective. In the absence of contrary testimony, this Board so finds. The Board also finds that these problems had been reported to the proper authorities prior to the accident, and that they were not remedied until after the accident.

The Board cannot conclude from the record that the owner's manual, and the instructional placard for operating the telescoping boom, were missing from the truck at the time of the accident. That conclusion would require the Board to resolve directly conflicting testimony of the Roadmaster, the Foreman and the Claimant. That resolution is best left to the Hearing where the witness' demeanor can be observed.

The absence of the indicator on the operator's side, as well as the defective condition of the indicator on the other side, precludes a finding that the accident was caused by the Claimant's negligence. This is true even if the owner's manual and the placard were present. The Organization does not need to prove that the accident was caused by faulty equipment. Rather, the Carrier must prove that the accident was caused by the Claimant's negligence. The Carrier has not done so.

As to the second claim, this Board agrees with the Organization that the Carrier is required to pay the Claimant one day's pay for attending the Hearing, since the charge was not sustained. The pay Claimant lost for attending the Hearing is included in payment for "assigned working hours actually lost," required by Article 14(F) of the Agreement, when the charge is not sustained. Other decisions of this Board have interpreted very similar provisions in other Agreements in this manner. This Board rejects the Organization's claim for travel time and expenses. That claim is neither provided for, nor supported by, Article 14, as the cases cited above demonstrate.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 29th day of August 1991.