

The Third Division consisted of the regular members and in addition Referee Hugh G. Duffy when award was rendered.

(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Duluth, Winnipeg & Pacific Railway Company

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

(1) The Carrier's decision to disqualify and suspend Track Inspector/Rail Lubricator Mr. John R. Ritacco for his alleged '... failure to yield the right of way on June 10, 1989 ***', was arbitrary, capricious, based on unproven charges and in violation of the Agreement (System File G.89-118).

(2) As a consequence of the violation referred to in Part (1) hereof, the Claimant's track inspector/rail lubricator seniority shall be reinstated, his record shall be cleared of the charges leveled against him and he shall be paid 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 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 was charged with violating Rules 3193 and 3257 of Carrier's Safety Rules after being involved in a crossing accident on June 10, 1989 while operating a Hy-Rail vehicle. As a result of the accident, Claimant suffered personal injuries and the Hy-Rail vehicle was destroyed. Subsequent to a Hearing, Claimant was found guilty as charged and assessed the penalty of a one-week suspension and disqualification as a Track Inspector/Rail Lubricator.

Claimant testified that he was patrolling his assigned territory on the date in question. As he approached the Maple Grove Road crossing near Milepost 19.2, he came to a complete stop, looked both East and West, and, observing no vehicular traffic, proceeded forward through the crossing. The next thing that he recalled was that his vehicle had been struck broadside by another vehicle and had been knocked off the rails and into the ditch.

Claimant subsequently gave a statement to the St. Louis County Sheriff. However, neither this statement nor the police report were offered as evidence by the Carrier. There were no other eyewitnesses to the accident.

It is well-established that the Carrier has the burden of proving by "substantial evidence" that Claimant is guilty of the charges. The Supreme Court has defined the term as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" (Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229).

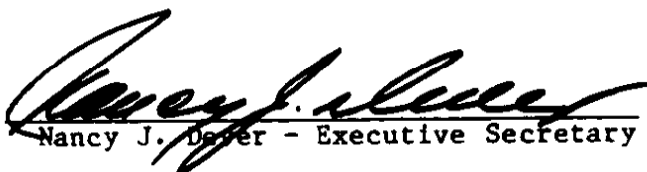
Here the Carrier has established only that a vehicle was destroyed and that Claimant suffered personal injuries. The mere fact that Claimant was involved in an accident does not mean that he is presumed to be at fault and subject to discipline. The Board thus concludes that the Carrier has failed to support its finding of guilt by substantive evidence and that such finding was therefore arbitrary. Accordingly, we will sustain the claim.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dwyer - Executive Secretary

Dated at Chicago, Illinois, this 7th day of May 1992.