NATIONAL RAILROAD ADJUSTMENT BOARD

Form 1 THIRD DIVISION Award No. 29603

Docket No. MW-29883

93-3-91-3-264

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman 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 three (3) day suspension from duty assessed against Trackman R. L. Miller for alleged '... responsibility for: (1) Negligence while operating company vehicle 328D on February 3rd, 1990...' and violation of '...Rule 7...' was on the basis of unproven charges, arbitrary, without just and sufficient cause and in violation of the Agreement (Carrier's File 8365-1-288 DTI).

(2) The five (5) day suspension from duty assessed against Trackman R. L. Miller for alleged '...responsibility for (1) Negligence while operating company vehicle 328D on February 9th, 1990...' and violation of '... Rule 7...' was without just and sufficient cause, arbitrary, on the basis of unproven charges and in violation of the Agreement (Carrier's File 8365-1-289).

(3) As a consequence of the violation referred to in Part (1) hereof, the Claimant's record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered.

(4) As a consequence of the violation referred to in Part (2) hereof, the Claimant's record shall be cleared of the charges leveled against him 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 employe or employes involved in this dispute are respectively carrier and employe 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 entered the Carrier's service on September 30, 1974, and holds seniority as a trackman.

This dispute was handled as two separate claims at the initial and appellate levels of handling, but the claims were combined at the highest appellate level. The Claimant was driving the same vehicle when each incident occurred.

The first accident occurred on February 3, 1990, when Claimant and his passenger, the Foreman, went to Socony Oil Co., in Trenton, Michigan, in company vehicle 328D to clean a switch located near the Woodhaven lead. Vehicle 328D is a "hi-rail" vehicle (a pick-up truck altered to enable it to travel on railroad tracks when required.) According to the Claimant and the Forman the roads leading to Socony Oil were not icy. However, when Claimant and the Foreman turned into the lot, they discovered the roadway was very icy. When the Claimant entered the gate off of the west road and attempted to make a turn, the vehicle "lost itself" on the ice and slid into a guardrail. Although the truck sustained minor sheet metal damage to the fender, hood and grill, it was still operable and the crew continued to use the vehicle without any repairs being made. On the following Monday morning, the incident was reported to the Roadmaster.

For the next several days, Claimant continued to work as a truck driver for the crew. On February 9, 1990, the Claimant's crew was assigned to work at Rouge Yard. The Yardmaster contacted

the Foreman who was operating a backhoe at the time, and advised him that a switch, located at the end of Cordin Four, was "difficult to throw." The Foreman instructed the Claimant to take the truck and go inspect the switch.

The Cordin Four switches are located at an unpaved service road, which is the only access to the area in which it was necessary for Claimant to gain entry. The road is narrow and terminates in a dead end, so it is necessary to either drive in and back out, or back in and drive out. On this date, the ground had been frozen, but was beginning to thaw on the surfaces exposed to the sun. The service road, according to the Claimant, was "muddy and rutted," and when Claimant attempted to back his truck along the service road, the vehicle "slipped into a rut, its momentum carrying into and striking a tri-level rail car. Claimant was able to drive the truck out of the rut, inspected the switch as instructed, and returned to the Foreman's location to report the incident. On the following Monday morning, the Roadmaster received the accident report in connection with this incident.

On February 23, 1990, the Carrier addressed two letters to the Claimant charging him with negligence in connection with the two accidents which took place on February 3 and 9, 1990. The hearings were held on March 7, 1990, and Claimant was found guilty of the charges. Claimant was assessed a three day suspension in connection with the February 3, 1990 incident which resulted in approximately $1,730.00 damage to the vehicle, and a five day suspension in connection with the February 9, 1990, accident which resulted in approximately $750.00 worth of damage to vehicle 328D.

At both investigations, the Organization objected to the charges based on the contention that they were vague. Further, the Organization asserted that the "Hearing Officer was prejudiced and that he tried to control the outcome of the investigation." The Organization contends that the Carrier has presented "absolutely no evidence whatever" in ascertaining the Claimant's guilt, and that the Carrier's entire case rests on "its bare assertion that the Claimant was negligent merely because he was involved in a vehicle accident." Finally, the Organization points to the Foreman's testimony in which he stated, that on both occasions the Claimant was operating the vehicle safely, and that he had "never known the Claimant to drive in an unsafe manner."

According to the Carrier, Rule 7 is pertinent to this dispute. Rule 7 is a general safety rule which requires that "In all cases of doubt or uncertainty, the safe course must be taken." Carrier contends that Claimant is a 16 year employee who was well experienced in the operation of the hi-rail vehicle. Further, the

Carrier asserts that as the Claimant left Socony Oil without incident, "he could have also entered the premises with more caution than was done." Finally, the Carrier maintains that in both instances, the Claimant should have "parked the vehicle and walked to the location where the work needed to be done" when he discerned the conditions were less than favorable.

There is no support on the record before us for the Organization's protest that the charges leveled against Claimant were overly vague. A review of the transcript of the hearing indicates that he had ample understanding of the incidents at issue to formulate an informed defense.

Testimony on the record and behavior of Carrier subsequent to the first incident (February 3, 1990) support the Organization's contention that this constituted an unavoidable accident. There is nothing on the record to suggest that Claimant had been careless in his operation of the hi-rail on the Socony Oil Company property. Moreover, Carrier continued to permit Claimant to operate the truck in question until the second incident occurred. Thus, by its own action (or lack thereof) Carrier defeats its own position with respect to discipline assessed for the first incident, and that part of the grievance must be sustained.

With respect to the second incident, however, Carrier has met its burden of persuasion. Claimant was an experienced driver who should have been expected to assess the road situation and take necessary precautions to avoid the accident at issue. In light of the sustaining of the first part of this claim, however, his discipline should appropriately be the three day suspension appropriate to a "first offense" violation, rather than the five day suspension actually assessed. Accordingly, Claimant shall be made whole for five of the eight days suspension served.

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 9th day of March 1993.