

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30061
Docket No. MW-30565
94-3-92-3-319

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
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(Elgin, Joliet and Eastern Railway

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

1. The discipline imposed upon B&B Carpenter Foreman T. Legner [five (5) demerits] and B&B Carpenter M. Clinton [twenty-five (25) demerits] for responsibility in connection with Truck 524 being struck by Rail Car ACFX 40605 on October 2, 1990 and for withholding information or failing to make a factual report of same, was excessive and on the basis of unproven charges (System File SAC-20-90/UM-21-90).
2. The discipline imposed upon Claimant Legner shall be rescinded or reduced and his record cleared of the incident involved here.
3. The discipline imposed upon Claimant Clinton shall be reduced to the degree of discipline commensurate with the crime."

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.

On October 2, 1990, while assigned to the road carpenter crew, Claimant Clinton parked a Carrier truck next to Beven Lead, located on the Carrier's River Line in the vicinity of Minooka, Illinois. Sometime later that day, a train crew shoving hopper

cars into Beven Lead struck the truck. The train crew subsequently reported the incident to their supervisor, but the carpenter crew did not.

On the day of this incident, Claimant Legner was on vacation. When he returned to work the following day, he learned of this incident from his crew. They told him not to worry about it. It was not until the crew was confronted by the Division Engineer on October 4, 1990, that the crew members acknowledged the incident.

Subsequent to a formal Investigation, Claimant Clinton was assessed twenty-five demerits and Claimant Legner was assessed five demerits. In addition, the employee who substituted for Claimant Legner received twenty demerits and the conductor of the train crew was assessed ten demerits.

Looking at Claimant Clinton first, we find that he does not deny parking the truck in such a way that it was fouling the track. The Organization, however, argues the responsibility lies with the train crew, which should have taken the necessary action to prevent their train from striking the truck. While the Organization does not label it as such, this defense is similar to the last clear chance doctrine in tort law, where a negligent plaintiff may recover if the defendant could have taken action to avoid the plaintiff's injury. Thus, if this were Claimant Clinton's truck and he could establish the train crew could have stopped the movement before striking the truck, he might recover damages. This is not, however, tort law and Claimant Clinton is not a plaintiff. If we were to continue the analogy, though, we would find that the Carrier is the injured plaintiff and both Claimant Clinton and the train crew were joint tortfeasors. Claimant Clinton, simply by parking where he fouled the track, was negligent. The later conduct of the train crew does not relieve him of responsibility.

We also find significant that Claimant Clinton intended to conceal this incident from the Carrier. When asked to explain why he told Claimant Legner not to worry about the incident, Claimant Clinton testified:

"At that time the train crew said they weren't going to report and I didn't want to get them in trouble. Like I said, the truck had a scrape in it, I didn't feel that... the doors opened and closed... and the past practice has been that... and not with you and I don't want to mention any names, but if it wasn't anything so serious that it couldn't be fixed, then it was better not to say anything and just go on if it wasn't a major deal, which I didn't feel that the scrape on the truck was a major deal."

Finding sufficient evidence in the record to support the charge against Claimant, we do not find the assessment of twenty-five demerits to be excessive. It is appropriate that he receive greater discipline than the conductor, who reported the incident to his supervisor.

Turning to Claimant Legner, we find sufficient evidence to conclude he was aware of the incident when he returned to work. At that point, his supervisory position made him responsible for seeing that the incident was reported to the proper person. By not investigating further, he participated in the efforts to conceal the incident. Under the circumstances, five demerits was neither unreasonable nor excessive.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Catherine Loughrin
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 17th day of February 1994.