Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No.39511
Docket No. MW-39068
09-3-NRAB-00003-050511
(05-3-511)

The Third Division consisted of the regular members and in addition Referee Danielle Hargrove 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 immediately] imposed upon Mr. D. V. Dickman under date of May 25, 2004 for alleged violation of Safety Rules 559(k), 118 and 585, in connection with the incident on April 8, 2004 at Portage, Wisconsin when Truck No. 772 struck the section garage with the boom extended, was arbitrary, capricious and excessive (System File D-07a-04-390-01/8-00459 CMP).

(2) As a consequence of the violation referred to in Part (1) above, all reference to this discipline shall now be cleared from Mr. D. V. Dickman's record and he shall be compensated '. . . for all lost wages, including but not limited to all straight time, overtime, paid and non-paid allowances and safety incentives, expenses, per diems, vacation, sick time, health & welfare and dental insurance, seniority and any and all other benefits to which entitled, but lost as a result of Carrier's arbitrary, capricious, and excessive discipline in suspending claimant for five (5) calendar days.'"

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.

At the time of the incident that gives rise to this cause, the Claimant established and held seniority within the Maintenance of Way and Structures Department dating from January 19, 1969. He was assigned and worked as a Machine Operator on the Portage, Wisconsin, section gang. He also customarily performed the duties of operating the section truck assigned to his gang. Before this incident, the Claimant had no record of prior discipline.

On the morning of April 8, 2004, the Claimant replaced defective tie-down straps to the gang's truck. In order to gain access to and remove the defective straps, the Claimant backed the truck out of the garage and raised the boom. After replacing the straps, the Claimant left the truck parked outside the garage and performed other tasks in the area. The Claimant returned to the truck and moved it back into the garage; however, he forgot that the boom was still raised on the truck.[1] The boom struck the garage damaging the boom and the building.

[1] The Organization highlights that the truck was in poor condition and in need of maintenance and various repairs. Specifically, it notes that the various safety devices, such as a warning light and audible alarm system designed to alert the operator when the boom is not properly secured in the boom cradle, were not working. It further points out that a laminated "Crane In Use" placard was missing from the truck. The Organization argues that the Carrier was ultimately responsible because had these safety devices been operative, the incident would not have occurred.

A formal Investigation was conducted on May 11, 2004. By letter dated May 25, 2004, the Carrier notified the Claimant that it had determined that the Claimant violated Safety Rule 559 (k) and Safety Rules 118 and 585. The Carrier assessed a five calendar day suspension purportedly after considering the Claimant's admission of responsibility and his lack of a disciplinary record. There is no dispute concerning the facts of the case or of the Claimant's guilt of the alleged Rule violations. However, the Organization objects to the suspension as arbitrary, capricious, and excessive for various reasons. First, it argues that the Carrier knew that the truck was in disrepair and that the safety devices were inoperative or not present; therefore, it is the Carrier's fault, in essence, that the Claimant forgot that the boom was raised.[2] Second, it argues that others who made similar mistakes with more substantial damages were not disciplined and, therefore, the discipline is disparate.

Addressing the argument of disparate treatment, we dismiss the claim, as there was no credible evidence produced on the record to support such a claim. Regarding the argument that the Carrier's alleged negligence was the "major contributing factor," without which the incident would not have occurred, and mitigates the Claimant's negligence, we disagree.

We agree with the Carrier that this case is not about a malfunctioning truck (as in poor repair as it may have been). This case is purely and simply about the Claimant forgetting to lower the boom into its cradle before moving the truck back into the garage. The Organization rightfully points out that the safety devices are useful in assisting Operators; however, it is in conjunction with the Operator remaining vigilant and diligent about operating the truck and the boom safely. The relied upon safety devices complement an otherwise diligent employee. They are not a substitute for an Operator remaining alert while operating his vehicle. In this case, the Claimant was personally aware of every defect, including the absence of the safety devices and placard; yet, he still chose to operate it with the obvious understanding of the effect of the defects. We cannot and will not find the Carrier at fault for the Claimant's own unfortunate act of negligence in this case. We agree wholeheartedly with the many cited Awards that do not exculpate the Claimant for his own negligence by pleading the negligence of others. Although the safety devices are designed to be preventative in

[2] The Organization argues that the Carrier was aware of the condition of the truck but failed to take any timely action to ensure the needed repairs were done.

nature, they are only useful if they are operative. In the end, the Claimant's acts caused the damages in this case.

Regarding the assessed discipline, the record evidence reveals that the Carrier considered all facts and circumstances. The Organization failed to prove that the Carrier acted in an arbitrary, capricious, or discriminatory manner. As many Awards have stated, it is not for the Board to second guess the sound discretion of the Carrier, absent any record evidence that the discipline was discriminatory, unjust, unreasonable, capricious, or arbitrary so as to constitute an abuse of that discretion. We do not find a five-day suspension to be unsupported, excessive, or an abuse of the Carrier's discretion.

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 2nd day of February 2009.