

BEFORE PUBLIC LAW BOARD NO. 1837

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

And

NORFOLK & WESTERN RAILWAY COMPANY

Case No. 129

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The five (5) days of suspension assessed Machine Operator J. J. Bainter for alleged failure to follow instructions when, at Mile Post CF 122.3, he allegedly permitted his machine to come into contact with stones, breaking windows in a private building adjacent to the tracks, was capricious, unjust, unwarranted, disparate, unreasonable, and in violation of the Agreement (Carrier's File MW-FTW-99-89-LM-422).
2. Machine Operator J. J. Bainter shall have all mention of the charge and discipline leveled against him removed **from** his record and he shall be compensated for all monetary loss he suffered as a result of his **five** (5) days of suspension from the Carrier's services beginning **January 3** and continuing through **January 7, 2000**.

FINDINGS:

Claimant J. J. Bainter was employed by the Carrier as a machine operator at the time of this claim.

On October **12, 1999**, the Carrier notified the Claimant to appear for a formal investigation to determine his responsibility, if any, in connection with his failure to follow instructions when on October 6, 1999, at approximately **1:50 p.m.** at Milepost CF 122.3, in the proximity of Muncie East Yard, he permitted his machine to come into contact with stones, breaking windows in a private building adjacent to the tracks.

After several postponements, the hearing took place on December **3, 1999**. On

December 17, 1999, the Carrier notified the Claimant that he had been found guilty of all charges and was being assessed discipline of a five-day actual suspension, commencing January 3, 2000, and terminating on January 7, 2000.

The Organization filed a claim on behalf of the Claimant, arguing that the Carrier used the investigation to dispense unwarranted discipline not for the Claimant's conduct but as retribution for his union activities. The Organization also maintains that the letter of charge was vague and nonspecific in nature and that the Claimant could not have been involved in the incident on October 6, 1999, as he was not at the site at issue. In addition, the Organization contends that the Carrier failed to respond to its four requests for clarification of the letter of charge, documentation supporting the charge against the Claimant, and **specific** witnesses to be present at the investigation. The Organization contends that the Carrier has never attempted to control witnesses called to attend an investigation as it has in this case. The Organization claims that the Carrier's failure to respond to the Organization's requests denied the Claimant **sufficient** and accurate information to adequately prepare a defense. In addition, the Organization argues that the Carrier's conduct was to ensure it could control the outcome of the investigation and ensure its ability to assess discipline to the Claimant. The Organization maintains that the Carrier chose to treat the Claimant in a totally different fashion **from** other employees charged with the same violation. The Organization argues that the Carrier failed to give any consideration to the Claimant's contractual rights or the past practice on the property. The Organization further contends that the equipment used by the Claimant has often, based on its past history, caused collateral damage to property. The Organization argues

that, other than the Claimant, it could not find any record of any member being charged or assessed discipline for any damage to property as a result of operating a brush cutter. The Organization maintains that brush cutters are very dangerous to operate and the Carrier has failed to provide its operators with any specialized training or **manuals** on this equipment, which is fundamentally flawed and incapable of performing its designed function in a safe fashion. The Organization asserts that the Carrier is guilty of subjecting its employees to an unsafe situation by allowing brush cutters to be used without proper training, as well as subjecting the general public to a hazard. The Organization claims that the Carrier desired to maximize the productivity of the equipment while totally disregarding the safety of its employees and the public and that it is the Carrier who must take full responsibility for any collateral damage caused by this equipment, not the Carrier's machine operators. The Organization argues that the assessment of discipline must be distributed with an even hand and reasonable consistency and that the Carrier has failed in this situation. The Organization argues that it was clearly inappropriate to hold the Claimant to a higher standard than every other brush cutter operator. The Organization also contends that the Carrier failed to produce sufficient evidence that the Claimant was guilty of failing to follow instructions in that it failed to produce any witness that stated he or she saw any damage actually caused by the Claimant. The Organization claims that the Carrier based its assessment of discipline on witnesses who were not qualified to operate a brush cutter and were not present when the incident occurred. In addition, the Organization argues that the Carrier also implied that the Claimant should have resisted or refused the instructions given to him to perform the

work on the date in question. However, the Organization claims that the Carrier contradicts itself based on an incident the Claimant was involved with in 1983. In that incident, the Claimant refused to perform what he considered an unsafe act very similar to the one in this case, but was issued discipline for it by the Carrier. Therefore, the Organization argues that the Claimant simply followed the orders he was given in this instance in order to avoid discipline.

The Carrier denied the claim, arguing that its notice fully apprised the Claimant and the Organization of the matter under investigation and fully complied with the schedule agreement. The Carrier acknowledges that the date of the incident on the notice should have been indicated as October 5, 1999, but that that was simply a clerical error and the Claimant and Organization were well aware of the actual date of the incident. The Carrier contends that the wording of the, notice was clear and gave the Claimant and the Organization ample opportunity to present a defense. The Carrier also maintains that the Organization's request for documentation prior to the investigation was denied because the parties' agreement does not contain any discovery process. The Carrier also claims that the witnesses requested by the Claimant were not working with the Claimant on the date in question. In addition, the Carrier argues that no evidence presented at the investigation proved that the Claimant did not cause damage to a private building resulting in a damage claim against the Carrier. The Carrier contends that it afforded the Claimant a fair and impartial investigation and that the evidence adduced at the investigation clearly established that the Claimant improperly operated the brush cutter. The Carrier maintains that the five-day suspension assessed the Claimant was actually

quite lenient in view of the potential damage and/or injury which could have occurred and in light of the **Claimant's** poor past service record. The Carrier does not deny the fact that there are circumstances when damage occurs during the operation of brush cutters. That is why the Carrier gave the Claimant specific instructions regarding the safe operation of the brush cutter and instructed him to be more observant when cutting around private property and at other specified locations, as well as to cut no less than eight inches. The Carrier claims that the Claimant signed a letter confirming said instructions. The Carrier asserts that the Claimant operated the brush cutter with the blades only one or two inches off the ground and thereby violated the instructions given to him by the Carrier.

The parties being unable to resolve the issues, this matter comes before this Board.

This Board has reviewed the procedural arguments raised by the Organization, and we find them to be without merit.

This Board has reviewed the record and testimony in this case, and we find that there is sufficient evidence in the record to support the finding that the Claimant acted improperly by failing to follow instructions while operating his brush-cutting machine. The record reveals that the Claimant and his gang were instructed, that when cutting around private property, they were to not have their blades less than eight inches above the ground. The record reveals that the Claimant in this case operated his brush cutter with the blades only one or two inches off the ground and, as a result, he ran over the stones causing broken windows to private homes in the vicinity. There was sufficient physical evidence that the blades of the machine were cutting lower than the eight inches,

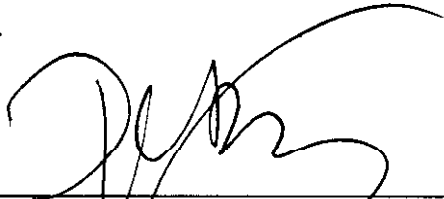
which was against the instructions of the supervisor.

Once this Board has determined that there is sufficient evidence in the record to support the guilty finding, we next turn our attention to the type of discipline imposed, This Board will not set aside a Carrier's imposition of discipline unless we find its action to have been unreasonable, arbitrary, or capricious.

Given the previous disciplinary record of the Claimant and the clear-cut wrongdoing that was proven in this case, this Board **cannot** find that the Carrier acted unreasonably, arbitrarily, or capriciously when it issued a five-day suspension to the Claimant. Therefore, the claim must be denied.

AWARD:

The claim is denied.



PETER R. MEYERS
Neutral Member



CARRIER MEMBER

DATED: 5/18/01



ORGANIZATION MEMBER

DATED: 5-18-01