PUBLIC LAW BOARD NO. 7566

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION IBT RAIL CONFERENCE	)	Docket No. 32
and	)	
CANADIAN NATIONAL/WISCONSIN CENTRAL LTD.	)	Claimant: T. O'Keefe

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

1. The discipline [a sixty (60) working day suspension beginning on August 2, 2010 and continuing until October 25, 2010, and a fifteen (15) working day suspension beginning on October 25, 2010 and continuing until November 13, 2010 as well as an eighteen (18) month suspension of rights to hold a position as employe in charge] imposed upon Truck Crane Operator T. O'Keefe for the alleged violation of USOR- General Rule A Safety, General Rule C - Alert and Attentive, Rule 100- Rules, Regulations and Instructions, LIFE Manual Section II, 1b- Job Briefings, 1h- Comply with all rules & policies related to job task, 13- Work environment unsafe conditions, E4 - Cranes, Derricks and Hoists and CN Engineering Safety Practices, Section 8 - Tag Lines and Hand Lines, in connection with an incident while unloading rail on July 31, 2010 resulting in a personal injury sustained by employe L. Newsome, is on the basis of unproven charges, unjust, unwarranted, disparate and in violation of the Agreement (Carrier's File WC-BMWED-2010-00042).

2. As a consequence of the violation referred to in Part 1 above, Claimant T. O'Keefe shall receive the remedy prescribed in Rule 31I of the Agreement."

Findings:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier or employee within the meaning of the Railway Labor Act as approved June 21, 1934.

Public Law Board 7566 has jurisdiction over the parties and the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Organization contends that there is no substantial evidence in the instant matter for four reasons. First, the only Carrier witness was not on scene during the occurrence and his testimony was therefore hearsay. Second, employee Newsome was in the gondola car but was not called as a witness. Third, the Carrier witness contradicted himself whether there was a policy of an employee being in a gondola car during rail removal. Fourth, employee Newsome violated the cited rules but was not charged.

The Carrier responds that Claimant caused a personal injury to a coworker who was working as a helper while unloading rails using a gondola. Claimant violated the rules because he did not

know his coworker's location. Claimant could not see the helper during the unloading operation and he was required to know that the helper was in the clear. A tag line should have been used.

The Board sits as an appellate forum in discipline cases. As such, it does not weigh the evidence *de novo*. Thus, it is not our function to substitute our judgment for the Carrier's judgment and decide the matter according to what we might have done had the decision been ours. Rather, our inquiry is whether substantial evidence exists to sustain the finding against Claimant. If the question is decided in the affirmative, we are not warranted in disturbing the penalty absent a showing that the Carrier's actions were an abuse of discretion.

After a review of the record, the Board finds that there is no substantial evidence to sustain the charges. There is no Rule prohibiting an employee from being in a gondola car while unloading rail. The Carrier witness testified that it was an unwritten Rule, but did not tell Claimant and his helper during the job briefing and could not recall ever telling Claimant of the unwritten Rule. He later admitted in his testimony that there was no Rule prohibiting the employee from being in the gondola car. The evidence establishes that Claimant would have been unable to perform the rail removal without having his coworker in the gondola car hooking up the rail tongs because the tongs must be centered on each rail.

Further, the evidence also established that a Carrier supervisor gave the job briefing to Claimant on the day of the incident. If the Carrier had some unwritten policy about the gondola car, then the Carrier supervisor should have informed Claimant and his coworker. Further, there is no Rule in the record that indicates that a tag line was required. If there were specific instructions they should have been relayed to the employees working the job. Claimant used the tongs and there was no Rule prohibiting the use of the tongs. Claimant cannot be found liable for violating Rules for which he had never been notified.

Claimant's coworker was injured. However, as many Awards have stated, an employee getting injured does not automatically establish that the employee was violating a Rule. Claim sustained.

Award:

Claim sustained.

Brian Clauss, Chairman

Cathy Cortez, Carrier Member

Peter Kennedy, Organization Member

Signed on June 10, 2013