

BEFORE PUBLIC LAW BOARD NO. 1837

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
and
NORFOLK & WESTERN RAILWAY COMPANY

Case No. 78

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

1. The sixty (60) day suspension and disqualification of Machine Operator R. E. McFarling for his alleged responsibility in the collision of a ballast regulator and an anchor machine was without just and sufficient cause, discriminatory, excessive, and in violation of the Agreement (File MW-FTW-89-35).
2. The Carrier violated the Federal Railroad Safety Act of 1970 (45 U.S.C. 441) as amended by the Rail Safety Improvement Act of 1988 when it assessed the sixty day suspension and disqualification, which was shown to be excessive and discriminatory punishment for the alleged offense, because the Claimant had filed complaints with the Federal Railroad Administration, the Illinois Commerce Commission, the McLean County Health Department, the Tazewell County Health Department, and the Illinois State Health Department concerning the unsanitary living conditions forced upon Maintenance of Way Employees required to live in camp cars.
3. As a consequence of the violations referred to in Part (1) above, the Claimant shall be allowed the remedy prescribed in Rule 22(e) of the Agreement.
4. As a consequence of the violation referred to in Part (2) above, the Claimant shall be allowed twenty thousand dollars (\$20,000.00).

FINDINGS:

Claimant F. E. McFarling was employed by the Carrier as a machine operator.

On September 6, 1989, the Carrier notified the Claimant to appear for a formal investigation in connection with the

following charges as a result of an August 31, 1989, accident, which the Organization contends was a retaliatory maneuver on the part of the Carrier to impose discipline upon the Claimant for his activities in reporting railroad safety violations on the part of the Carrier to various federal, state, and county agencies:

. . . to determine your responsibility in connection with violation of NS Operating Rule 814, resulting in B/R 8604, which you were operating on August 31, 1989, at Mile Post SP-389.8, Congersville, Illinois, running into AAM 8604 which, in turn, shoved that machine into AAM 8605, injuring Operator of AAM 8604 L. V. Robinson, and causing damage to AAM 8604.

The hearing took place on September 15, 1989; and on September 22, 1989, the Carrier notified the Claimant that he had been found guilty of the charges against him and was being assessed a sixty (60) day suspension and loss of all of his machine operator rights. He was also instructed to make his displacement and protect his assignment on October 31, 1989.

The Organization filed a claim on the Claimant's behalf, challenging his discipline on the grounds that the Carrier violated the Federal Railroad Safety Act of 1970 when it disciplined the Claimant for reporting safety violations on the part of the Carrier to various federal, county, and state agencies promoting rail safety and used the August 31, 1989, incident as a pretext to discipline the Claimant for engaging in protective activities; that the Carrier's actions were retaliatory; that the Claimant was improperly withheld from service prior to the investigation since the Claimant did not

commit a serious rule infraction and the machines involved in the accident on August 31, 1989, continued to remain in service; that the Carrier violated Rule 22 (a) when it did not timely hold the investigation; that the Claimant was subjected to an investigation that was neither fair nor impartial; that the Carrier failed to prove the charges against the Claimant; that the Carrier failed to properly maintain the equipment that the Claimant operated; and that the Claimant was severely disciplined to the extent that it was discriminatory, arbitrary, and excessive.

The Carrier denied the Organization's claim on the grounds that the Claimant was proved to be guilty as charged based on the evidence produced at the investigation; that the Claimant failed to exercise care and properly operate a ballast regulator in accordance with Operating Rule 814; that the Claimant admitted his guilt; that the discipline assessed the Claimant was warranted since the Claimant failed to demonstrate the proper respect for safety and caution in the operation of the Carrier's equipment; that the Carrier's equipment was functioning properly and was not the cause of the incident; that the disqualification of the Claimant was warranted in consideration of the seriousness of the offense; that the Claimant was afforded a fair and impartial investigation--the Claimant was notified of the hearing, allowed to be accompanied by his duly authorized representative, ask questions, and present evidence; the Carrier had the right to withhold the Claimant from service pending the investigation for safety purposes; that due to the seriousness of

the Claimant's offenses, the procedural defects on the part of the Carrier are without merit; and that the discipline assessed the Claimant was in line with the type of offense the Claimant was charged with in this particular case.

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

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

With respect to the substantive charges against the Claimant, this Board has reviewed the evidence and testimony in this case and we find that there is sufficient evidence in the record to support the finding that the Claimant violated Operating Rule 814 on August 31, 1989 when he failed to properly operate a ballast regulator and was responsible for the collision which caused personal injury and property damage. The Claimant admitted that he failed to comply with Operating Rule 814 when he operated the machine in a negligent manner and did not keep a sufficient watch ahead of him in the direction the machine was moving.

Operating Rule 814 requires that "on-track equipment must at all times be prepared to stop within half the range of vision". Rule 814 also states that "care must be taken to avoid striking anything lying on or across the rail". The Claimant's own statements as to what occurred on the day in question make it clear that he was in violation of Rule 814.

Once this Board has determined that there is sufficient

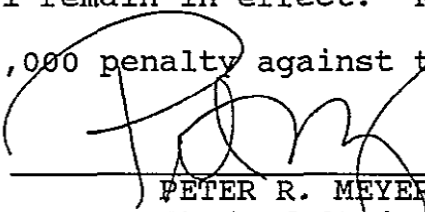
evidence in the record to support the guilty finding, we next turn our attention to the type discipline imposed. This Board will not set aside a Carrier's imposition of discipline unless we find its actions to have been unreasonable, arbitrary or capricious.

In the case at hand, the Claimant was issued a 60-day suspension and he was disqualified as a machine operator. Although this Board finds that the disqualification was an appropriate response to the wrongdoing in this case, this Board finds that the 60-day suspension was excessive and unreasonable. Consequently, we hereby order that the 60-day suspension be reduced to a 30-day suspension and the Claimant be made whole for any lost pay over 30 days.

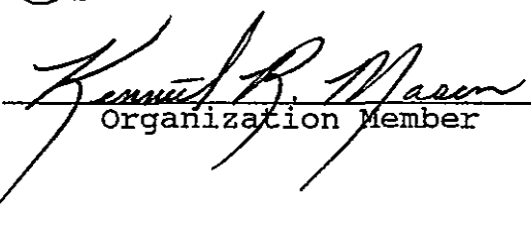
Finally, this Board finds that there was no discriminatory motivation behind the Carrier's action in this case. Although we have found that the suspension was excessive, we do not find that it was discriminatory and we find no causal nexus between the Claimant's complaints with the Federal Railroad Administration and other governmental agencies and the discipline that was issued to the Claimant in this case. Consequently, the Organization has not met its burden of proof that the discipline issued to the Claimant was the result of his exercising of his rights in making complaints about working conditions. Consequently, there is no basis to award the Claimant a \$20,000 penalty against the Carrier for a violation of Rule 22(e) of the Agreement.

AWARD

Claim sustained in part. The 60-day suspension is hereby reduced to a 30-day suspension and the Claimant is to be made whole for the lost pay after 30 days. The disqualification of the Claimant shall remain in effect. Finally, the Claimant's request for a \$20,000 penalty against the Carrier is denied.



PETER R. MEYERS
Neutral Member

Carrier Member

Organization MemberDate: Nov. 26, 1991