

PUBLIC LAW BOARD No. 3530

Case No. 17
Award No. 17

PARTIES TO DISPUTE:

Norfolk and Western Railway Company

And

Brotherhood of Maintenance of Way Employees

STATEMENT OF CLAIM:

Discipline of fifteen (15) days actual suspension assessed Auther Lee Dean as a result of investigation held on April 30, 1982.

FINDINGS:

Claimant entered Carrier's service on August 1, 1972, and at the time of the incident in question, was employed as an Assistant Foreman at Petersburg, Virginia.

On April 6, 1982, Claimant was involved in an accident on Ballast Equalizer 30853 which resulted in damage to the machine. As a result of the accident, Claimant was assessed a 15 day suspension by Carrier, effective April 19, 1982.

The issue to be decided in this dispute is whether the disciplined imposed on Claimant by Carrier was justified under the Agreement.

The position of the Carrier is that Claimant was justifiably disciplined for his responsibility in damaging the Carrier's equipment. The Carrier contends that Claimant's use of

excessive speed on the date in question was the primary cause of the accident.

To support its position, the Carrier cites the testimony of Roadmaster S.K. Tribble. Tribble testified that Claimant told him that he had the machine "... going as fast as the machine would go." Tribble further testified that "after checks on the machine, it seemed that the top speed on the machine was approximately 14 or 15 miles an hour." The Carrier notes that the speed limit in the yard, the site of the collision, was five miles per hour. The Carrier contends that the above testimony shows Claimant was impermissibly speeding on the date in question, thereby causing the accident.

The Carrier further contends that there was no mechanical problem with the braking system as alleged by the Organization. The Carrier cites the testimony of the Claimant, who testified that he had no problems with the brakes up to the time of the accident. Carrier also notes that the Claimant admitted that he was going over the regular authorized speed immediately preceding the accident. The Carrier contends that the accident would not have happened had Claimant obeyed the yard speed limit.

Finally, Carrier denies that the charge brought against Claimant was vague and imprecise as alleged by the Organization. The Carrier cites Third Division Award 17998 which states, "A notice is sufficient if it meets the traditional criteria of reasonably apprising an employee of what set of facts or

circumstances are under inquiry so that he will not be suprised and can prepare a defense." The Carrier contends that its notice to the Claimant concerning the charges proffered was sufficient. The Carrier further cites the Claimant's testimony to substantiate its contention. The Claimant stated at the investigation that "I have knowledge of the charge and the reason that it was cited on me." The Carrier argues that the above-cited testimony establishes beyond doubt that the Claimant was adequately informed by the notice.

The position of the Organization is that the Carrier failed to prove "conclusively" and "without a doubt" that Claimant was guilty of the offense charged. The Organization first notes that the Carrier failed to charge Claimant with a specific act of misconduct or negligence, and that therefore the charge is invalid. The Organization notes that Claimant was charged with "improper handling of the Ballest Equalizer Machine." The Organization maintains that no specific violation has been cited by the Carrier, and that therefore no disciplinary action may legitimately follow.

The Organization further contends that the charge is without merit. The Organization cites the testimony of Tribble to illustrate that the Claimant was not operating at top speed prior to the accident. Tribble stated, "... I don't think he (Claimant) could have obtained full speed by the time he reached 27."

The Organization also contends that the accident in question was due to defective brakes and transmission on the machine, and cites the testimony of Tribble to substantiate its position. Tribble stated that in his opinion the braking system and transmission were not in proper condition on the machine. He further stated in reference to the Claimant that, "I think he probably did all or everything within his power at that time to stop it" The Organization maintains that Tribble's testimony creates sufficient doubt as to the accident's causation to render the Carrier's decision invalid.

It is not the purpose of this Board to rehear an investigation that the Carrier held but only to decide if the discipline imposed was arbitrary, capricious or an abuse of discretion.

The Board agrees with Carrier's position concerning the alleged procedural defect. The Claimant's testimony indicated that he was aware of the specific offense he was being charged with and knew why the charges were brought. Our inquiry goes no further once we determine that the Claimant was cognizant of the charges and thereby able to establish a defense.

The Board is further in agreement with the Carrier's position that Claimant was at fault concerning the incident in question. However, we are not persuaded that the Carrier

has established by substantial evidence that the Claimant's actions were the primary or major cause of the accident. As stated above, we do not stand to rehear the Carrier's investigation. However, the evidence of record indicates that the Carrier was also at fault.

The evidence of record indicates that the machine operated by the Claimant was defective at the time of use. The Claimant testified that he tried all the available braking devices and that none of them responded. The testimony of Tribble indicated that the braking system and transmission on the machine were not normal. Tribble also testified that the Claimant probably was not doing "top speed" because he was going uphill with the machine. Assistant Engineer G.F. Hadley testified that "if the brakes were working properly, it would stop the machine ... I don't believe it would have stopped the machine, moving at ... fourteen to fifteen miles" The Carrier has failed to establish a reasonably definitive speed at which the Claimant was travelling. The testimony indicates that it was something more than five miles per hour and something less than 14 miles per hour. Further, while testimony given indicated the brakes were working properly during Claimant's trip, that is not dispositive with regard to whether the brakes malfunctioned during the conclusion of Claimant's trip. In light of all the evidence, we feel that the Carrier failed to establish that the Claimant was solely responsible for the accident.

Despite the above, the Board finds that Claimant did use excessive speed in operating the machine. We therefore agree with the Carrier that disciplinary action was warranted under the circumstances. However, in light of the circumstances, a 15 day suspension was excessive, and that the discipline imposed should be reduced to a five day suspension.

AWARD:

Claim disposed of per Findings herein.

Nicholas Rumer
Neutral Member

J. A. Whitely, Jr.
Carrier Member

Royce L. Hall
Organization Member

Date: 8/7/85