

Public Law Board No. 4161

Parties to Dispute

Brotherhood of Maintenance of)	
Way Employees)	Case No. 28
)	
vs)	
)	Award No. 21
Burlington Northern Railroad)	

STATEMENT OF CLAIM

1. The discipline (disqualified from operation of Groups 2, 3 and 4 machines with loss of Groups 2, 3 and 4 seniority, and suspended from the service of the Burlington Northern Railroad Company for a period of 30 days) imposed upon Machine Operator J.A. Eyer for alleged violation of Safety Rules 285, 336 and 364 was arbitrary and capricious.
2. The Claimant's seniority as a Group 2, 3 and 4 Machine Operator shall be restored and unimpaired, his record cleared of the charge leveled against him and he shall be compensated for all wage loss suffered.

FINDINGS

On October 20, 1982 the Claimant was advised to attend an investigation on October 27, 1982 to determine facts and place responsibility, if any, in connection with damage he allegedly caused to a private automobile while operating front-end loader BNX24-0015 near West Duluth about 8:20 AM on October 20, 1982. After the investigation was held as scheduled the Claimant was notified on November 8, 1982 that he had been found guilty as charged and he was suspended for thirty days and stripped of machine operator seniority for the Groups at bar. After the discipline was appealed on property by the Organization up to and including the highest Carrier officer designated to hear such this case was docketed before this Public Law Board for final adjudication.

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The accident in question occurred when the Claimant backed over a car on a West Duluth, Minnesota public street on the morning of October 20, 1982. According to Report F-27 filed by the Claimant after the accident occurred he was going south on Central Avenue when he missed a turn to Main Street. He then stopped the machine, "...looked to see if any traffic was coming, saw none, and (then) started to back up". While backing up, he ran over the automobile of a certain Susan Jackson and completely destroyed that vehicle. According to a photo presented in evidence by the Carrier from the newspaper, the driver of the automobile was not injured because the machine driven by the Claimant, which was a very large front-end loader, backed over the right side of the car thus allowing Ms. Jackson, as driver, to avoid injury. According to testimony by the Claimant at the hearing, however, the driver of the car was not able to exit the car until the door was pried open with a crow bar and the steering wheel was lifted off of her legs by means of specialized tools.

The issue at bar is whether the Claimant was in violation of various Carrier safety rules when he backed over the car.

During the investigation the Claimant admitted that the front-end loader had a blind spot "directly behind the machine" because of the cowlings which covers the motor. He admitted that this blind spot was big enough to obscure an automobile from his vision and that he backed over the auto in question precisely because of this problem.

A complete review of the record warrants the conclusion that the Claimant was negligent while driving the front-end loader on the morning of October 20, 1982 on two counts. First of all, machines of this size permit low margins of error and the Claimant apparently missed his turn, for lack of evidence in the record to the contrary, because he was distracted. This lack of attentiveness, in turn,

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created the situation whereby he was obligated to exercise reasonable judgement when forced to back up the large piece of equipment he was operating, on a public thoroughfare. Negligence because of lack of attentiveness was then compounded when he backed up the machine, upon his own admission, when it had a blind spot big enough to conceal an automobile. Unfortunately the blind spot did exactly that. Evidence of record warrants no other reasonable conclusion than that the Claimant was guilty as charged. Rule 336 states the following:

(d) drivers must exercise care to prevent accidents and injury to driver and others by observing all conditions.

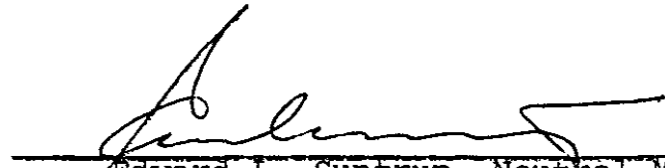
On merits the instant claim cannot be sustained.

There remains only the issue of whether the Carrier exercised just judgment when it assessed the discipline which it did when it both suspended the Claimant for thirty (30) days and disqualified him from operating equipment of the type in question. Numerous arbitral forums in the railroad industry have precedentially held that an employee's past disciplinary record may serve as guide when assessing the reasonableness of the quantum of discipline (Second Division 6632, 8022, 8527; Third Division 21043, 22320; PLB 4161, Award 20). The Board notes that five years prior to this accident the Claimant was involved in another one with a different piece of equipment and that he had received a censure for that. In view of documented problems which the Claimant has had when operating heavy equipment the Board cannot conclude that the disqualification levied by the Carrier was unreasonable and that disqualification shall not be lifted. The Claimant had also received a five (5) day suspension by the Carrier just a few months prior to the November, 1982 suspension. The five (5) day suspension had been received for having vandalized one of Carrier's vehicles. On the record taken as a whole, therefore, the application of the principle of progressive discipline suggests that the thirty (30) day suspension levied by the Carrier for violation of Carrier's Rules on October 20, 1982 was not unreasonable.

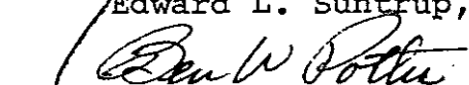
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AWARD

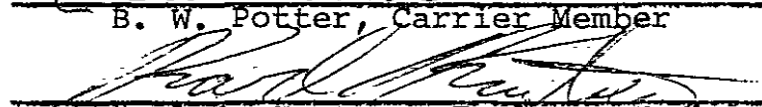
Claim denied.



Edward L. Suntrup, Neutral Member



B. W. Potter, Carrier Member



Karl P. Knutsen, Employee Member

Date: March 9, 1987