SPECIAL BOARD OF ADJUSTMENT NO. 1016

AWARD NOS. 131
CASE NO. 131

PARTIES TO
THE DISPUTE: Brotherhood of Maintenance of Way Employes

vs.

Consolidated Rail Corporation

ARBITRATOR: Gerald E. Wallin

DECISIONS: Claim sustained

DATE: April 30, 2000

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The dismissal of employe R. L. Leach for his alleged violation of Rules 60.2 and 60.5 was without just and sufficient cause and on the basis of unproven charges (System File CRA-MW-99-13).

2. As a consequence of the violation referred to in Part (1) above, 'The Organization maintains that any discipline imposed on Mr. Leach as a result of this Hearing (and Appeal) should be removed from his record, or at the least, be lessened in its severity. The Union also contends that Mr. Leach should be allowed all back pay from the date of this imposed discipline (on March 31, 1999) until Mr. Leach is reinstated and working on the property.' "

FINDINGS OF THE BOARD:

The Board, upon the whole record and on the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties; that the Board has jurisdiction over the dispute, and that the parties were given due notice of the hearing.

Claimant was dismissed from all service for unsafe operation of a backhoe/loader and for failing to timely report a work-related injury. At the time of Carrier's action, Claimant had some 33 years of service. The record contains no evidence of any prior injuries nor does it

reveal the specifics of any prior discipline other than one reference to unspecified prior "reprimands." It was undisputed that Claimant had no "out-of-service" matters on his record. For our purposes, therefore, we must conclude that Claimant had 33 years of service free of any significant discipline.

The applicable rules read as follows:

> **60.2 Attending to Duties**
> *Follow these precautions to prevent injury to yourself and others:*
> 1. Be alert and attentive at all times when performing your duties.
> 2. Plan your work to avoid injury. Look for hazards before you start work and either avoid hazards or protect against them.
>
> * * *
>
> 4. If at all possible, do not rely on the watchfulness of others. Protect your own safety.

> **60.5 Responding to Injuries**
> Follow these precautions to prepare for and respond to injuries:
> 1. If you are injured, respond as follows:
> a. Obtain first aid or medical attention if necessary.
> b. Inform your immediate supervisor. If your immediate supervisor is not available, inform him or her as soon as possible, but not later than quitting time on the day you were injured.

On February 19, 1999, Claimant was clearing a salt and mud mixture from a stretch of little used track to enable the storage of cars. While working alone at approximately 8:30 a.m., the backhoe/loader rolled over onto its right side. Although he was worked up by the incident, Claimant believed he was not hurt. The machine kept running until another employee arriving later on the scene shut it off. No other employees witnessed the incident. Claimant thought concealed soft ground gave way and caused the rollover. A Pettibone crane later brought to the site to right the backhoe/loader also became stuck for some time. Interestingly, it does not appear that Carrier initiated any disciplinary action against Claimant for this incident until the occurrence

of other events on March 8-11, 1999.

Claimant did not think he was injured on February 19th. He continued to work thereafter until March 8th when back pain began shooting down into his leg. On that day and the day prior, Claimant worked clearing snow from switches. He asked for vacation time off to seek medical treatment. He did not know the cause of his pain and wanted it checked out.

After seeing a chiropractor and his own physician, on March 9th Claimant informed a Carrier official of the possibility that his problem may be related to the backhoe/loader rollover. Upon threat of being insubordinate if he refused, Claimant agreed to be examined by Carrier's doctor on March 10th. According to Claimant, Dr. Robinson confirmed that the back pain was job-related. The Carrier official testified that Dr. Robinson gave him a different opinion that the pain may have been due to the snow shoveling on March 7-8th. Dr. Robinson was not called to testify at the investigation hearing.

On March 11th, Claimant had a discussion with Carrier Safety official Lovrich regarding the cost of a bone scan test to determine if his back pain may have been influenced by the metastasis of prostate cancer cells. Apparently the scan would either confirm or rule out the cancer as a contributing factor. Although Lovrich did not testify, the record contains hearsay references that Claimant was pressed to either claim the problem was related to the rollover or sign a waiver releasing the Carrier from any liability. According to Claimant, he relied on the medical advice he had been given regarding the relationship between the back pain and the rollover incident. Interestingly, the Carrier's injury report form credits Claimant with having reported the injury at 12:30 p.m. on March 9th.

In cases of discipline, it is well settled that the Carrier has the burden of proof to show a rule violation. As a minimum, this requires probative evidence that persuasively demonstrates how Claimant's actions violated the rule. Regarding the alleged unsafe operation of backhoe/loader, this requires substantial evidence of the actual accident mechanism. It is not sufficient to merely speculate upon possible causes. It is also well-settled that the fact of an accident, by itself, is not proof of misconduct.

On this record, we do not find any explanation based on a proper evidentiary foundation to contradict Claimant's version of the rollover. No Carrier official saw the incident. Moreover, there is no sufficient evidence of a detailed post-accident investigation to establish that the

position of the front bucket was due to operator error before the rollover or due to inadvertent activation of the controller joystick by the operator's body as the machine rolled over. It is undisputed that the weight of the operator's body would have been directed toward the joystick during the rollover. We must find, therefore, that this safety charge has not been proven by substantial evidence in the record.

Regarding the late reporting of the injury, it must again be remembered that the Carrier has the burden of proof to show a violation of Rule 60.5. This requires, as a minimum, establishing when Claimant knew or should have known that his pain stemmed from the rollover incident. Such a determination ordinarily calls for medical expertise to render an opinion to a reasonable degree of medical certainty. The only admissible medical evidence in the record is the content of the remarks attributed to Dr. Robinson by Claimant. Those remarks show that the connection was made no earlier than the date of the March 10 examination. The statements in the record that are attributed to other medical professionals are clearly hearsay and are entitled to no weight. In addition, there is no evidence that Claimant possessed the requisite medical expertise to have made the determination earlier than March 10th. It appears further that Claimant made his determination only upon being forced to make such a decision by Mr. Lovrich on March 11th.

Upon reviewing Carrier's rule, it is apparent that the rule does not explain what should be done when an employee genuinely does not realize there has been a reportable injury until after the day of the causative event. The rule is silent about such situations in that it assumes an injury will always be known on the day it occurs. Given the delayed injury recognition present here and the justifiable reasons underlying it, Claimant literally could not have complied with the reporting requirements of the rule on the unique facts of this record. He did, however, report the injury within a reasonable time after hearing Dr. Robinson's opinion on March 10th. In view of the text of Rule 60.5, we find no substantial evidence in this record to establish the violation charged.

Given the fact that our review of the record fails to disclose substantial probative evidence in support of either charge, the Claim must be sustained.

AWARD:

Claim sustained.

Gerald E. Wallin, Chairman
and Neutral Member

Mark Schappaugh,
Organization Member

Lawrence J. Finnegan,
Carrier Member

Dissenting

5-24-00