

BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 924

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

**UNION PACIFIC RAILROAD COMPANY
(former Chicago & North Western Transportation Company)**

Case No. 241

Award No. 218

STATEMENT OF CLAIM:

- (1) The dismissal of Crane Operator A. N. Scavo for his alleged violation of Rules 1.1 and 1.6 when the crane he was operating struck a Company vehicle at Mile Post 117.4 on July 2, 1997, was without just and sufficient cause and wholly unsupported. (Organization File No. 2WJ-7164D; Carrier File No. 1114079D.)
- (2) Crane Operator A. N. Scavo shall now be allowed the remedy prescribed in Rule 19(d) of the Agreement.

FINDINGS:

Claimant A. N. Scavo was employed by the Carrier as a machine operator at the time of this claim.

On July 7, 1997, the Carrier issued a notice of investigation to the Claimant instructing him to appear for a formal hearing to determine his responsibility, if any, into the charges that while working as a crane operator at or about 2 p.m. on July 2, 1997, at or near MP 117.4 on the Boone Subdivision, Track 1, the Y71 crane he operated allegedly struck Carrier vehicle 95600, a welder's truck working at that site. The Carrier alleged that the Claimant violated Rules 1.1 and 1.6 of the parties' agreement. The Claimant was to be held out of service pending the outcome of the investigation.

After several postponements, the hearing took place on September 5, 1997. On

September 15, 1997, the Carrier notified the Claimant that a substantial degree of evidence was presented at the hearing to warrant sustaining all charges brought against him and, as a result, he was being assessed an UPGRADE Level 5 discipline and dismissal from the service of the Carrier.

The Organization filed a claim on behalf of the Claimant challenging the dismissal. The Organization contends that the Claimant's sleep apnea syndrome disability was the cause of the incident in question. The Organization argues that the Claimant's disability causes episodes of sleep and that the Claimant had been under treatment for the condition since September 24, 1996. The Organization contends that the Claimant, since he was under treatment, believed that he had been successfully treated for his condition and that it was under control. The Organization contends that the Carrier was aware of this fact and that the Claimant advised his day-to-day supervisor that he did have this disability. In addition, since the incident, the Claimant has further brought his condition under control with the use of a nasal CPAP. The Organization argues that the Claimant functioned in his capacity as system crane operator for nearly one full year after the diagnosis of sleep apnea syndrome without incident and followed the prescribed treatment for his condition. The Organization argues that the Carrier failed to support the charge that the Claimant was careless of the safety of himself and others. The Organization argues that the Claimant never exhibited wanton disregard for the safety of himself, others, or for Carrier property and that the incident was accidental and not premeditated. The Organization contends that the Carrier discriminated against the Claimant when it violated the Americans With Disabilities Act (ADA) by not recognizing the Claimant's legitimate disability which led to the incident in question. Finally, the Organization argues that the Carrier failed to timely reply to its

appeal, and therefore the claim should be allowed.

The Carrier denied the claim, contending that the Claimant did not bring to the attention of the Carrier that he had sleep apnea prior to the accident. The Carrier argues that the Claimant's failure to notify the Carrier of his condition was careless. The Carrier argues that had the Claimant properly reported his medical condition, the Carrier would most likely have medically disqualified the Claimant from operating heavy equipment until his condition was further addressed and the Carrier's medical review officer was convinced of his fitness for duty. The Carrier contends that the Claimant failed to take the safe course in subjecting his fellow employees, the general public, and himself to the potential dangers associated with his condition. The Carrier also argues that the Claimant's discipline history is not exemplary and illustrates his carelessness with the rules governing the safety of himself and others. The Carrier contends that the discipline issued was progressive and proper. The Carrier argues that the Organization's claim that the Carrier violated the ADA is not a subject matter of the parties' collective bargaining agreement and therefore cannot be considered. Finally, the Carrier refuted the Organization's contention that it failed to timely reply to the Organization's appeal.

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

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 fell asleep while operating a crane causing the accident in question. The Claimant was operating the equipment and admits that he was at fault because he fell asleep while transporting his diesel crane.

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 of discipline imposed. This Board will

not set aside a Carrier's imposition of discipline unless we find its action to have been unreasonable, arbitrary, or capricious.

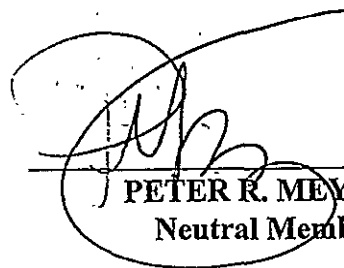
In the case at hand, it is clear that the Claimant has proven that he suffers from a disability which causes him to be fatigued and fall asleep. The Claimant has shown that his sleep apnea was related to his falling asleep while he was operating the crane. However, it is also clear that the Claimant did not bring this disability to the attention of the Carrier prior to the accident. Consequently, this Board finds that the Claimant was deserving of discipline, but we also find that the termination of the Claimant was an unreasonable, arbitrary, and capricious penalty for a man in his situation. In addition, the Claimant had worked for the Carrier for twenty-four years prior to this incident.

Given the facts of this particular case, this Board orders that the Claimant be reinstated without back pay. The Claimant should also be permanently disqualified as a machine operator. The Claimant's discipline history contains numerous accidents and safety rule violations. His accidents led to injury and substantial economic damage as a result of his inability to operate machinery. Consequently, when the Claimant returns to work, the Carrier must find a position for him that does not allow him to operate machines.

Award:

The claim is sustained in part and denied in part. The Claimant shall be reinstated to service, but without back pay and he shall be disqualified from his position as a machine

operator.


PETER R. MEYERS
Neutral Member


ORGANIZATION MEMBER

DATED: 4-26-2000


CARRIER MEMBER

DATED: 4-26-2000