

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. 261

Award No. **237**

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

1. The Level 2 discipline assessed Laborer S.A. Clark for his allegedly not operating his machine properly on September 19, 2003 which resulted in an injury to another employee was without just and sufficient cause and based on an unproven charge (System File 4RM-9482D/1387360D).
2. Laborer S.A. Clark shall now have the charges against him '... must be overturned and the level 2 discipline removed from his record. Furthermore, Claimant must not be required to serve the five (5) day suspension.'"

FINDINGS:

At the time of the events leading up to this claim, the Claimant regularly was assigned to work for the Carrier as a Laborer. On the date in question, however, the Claimant was operating an end-loader.

By letter dated September 22, 2003, the Claimant was notified to appear for a formal investigation and hearing to develop the facts and determine the Claimant's responsibility, if any, in connection with the Claimant's alleged failure to properly operate the machine, resulting in an injury to another employee. The hearing was conducted as

scheduled on September 26, 2003. By letter dated October 3, 2003, the Claimant was notified that as a result of the hearing, he had been found guilty as charged, and he was being assessed a Level 2 discipline. The Organization filed a claim challenging the Carrier's decision, and the Carrier denied the claim.

The Carrier initially contends that the Claimant was afforded all elements of due process in accordance with the Agreement. The Claimant received adequate notice of his investigation, was allowed ample representation, and was able to present his own witnesses, as well as cross-examine all of the Carrier's witnesses who were present at the investigation. The Carrier points out that the Organization failed to make any procedural objections throughout the on-property handling of this case, which operates as a valid waiver of any such challenge. The Carrier therefore asserts that this claim cannot be granted on any procedural basis.

The Carrier then argues that there is no basis for the Organization's assertion that its finding of guilt is unsupported by the testimony at the investigation. The Carrier asserts that the Organization is wrong in arguing that the Carrier's witnesses contradicted themselves, and the Carrier maintains that the testimony regarding what happened on the day in question is reasonably clear and consistent. The Carrier points out that the Claimant admitted that he did not check to ensure that other employees were in the clear before moving the bucket on his end-loader. The Claimant also failed to sound his horn or signal in any way before moving the loader bucket. The Claimant asserts that it is

settled policy on the property that admission of guilt is *per se* substantial evidence of a rule violation.

The Carrier contends that the Claimant was disciplined for his part in the accident, and not for the actions of any other person. The Carrier asserts that this situation is no different from others involving an accident in that more than one employee was involved and was investigated. The Carrier insists that each employee is investigated and disciplined separately, in accordance with his or her culpability in the accident. The Carrier maintains that the Claimant was assessed a Level 2 discipline for his negligence in moving his loader bucket without ensuring that no one was in his red zone.

The Carrier goes on to contend that once an arbitral panel verifies that substantial evidence supports a finding of guilty, the panel lacks authority to overturn the level of discipline assessed, even if the discipline may seem harsh, unless there is a sufficient demonstration that the discipline was arbitrary, capricious, or an abuse of Carrier discretion. The Carrier insists that the discipline at issue was not arbitrary, capricious, or an abuse of Carrier discretion. The Carrier emphasizes that the Level 2 discipline assessed in the Grievant's case was correct and in accordance with the Carrier's UPGRADE Policy. There is no evidence of arbitrariness or capriciousness in connection with the assessment of this discipline, so there is no reason for this discipline to be overturned.

The Carrier ultimately contends that the instant claim should be denied in its

entirety.

The Organization initially contends that the testimony of the Carrier's witnesses was unreliable and contradictory. The Carrier's witnesses appeared not to know what happened on the day in question. The Organization insists that only the Claimant's testimony was constant throughout the investigation. The Claimant testified that when he left the front of the cat, everyone was in the clear. The Organization further asserts that it is the responsibility of all employees to notify the operator of any piece of machinery when they are going to enter the red zone or work zone of that equipment.

The Organization points out that if all employees are known to be in the clear of the equipment that an operator is using, then the operator has the right to operate that equipment as intended. If an employee intends to enter the red zone, then it is that employee's responsibility to notify the operator of his intent. The machine operator cannot be held accountable for another employee's error in judgment or failure to notify the operator. In this case, the other employee violated the rules by failing to notify the Claimant that he planned to enter the red zone.

The Organization maintains that there is nothing in the record to support the Carrier's charge against the Claimant. Instead, the evidence shows that the other employee involved, and not the Claimant, violated the Carrier's rules.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The parties being unable to resolve their dispute, 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 was guilty of failing to ensure that the bucket on the end-loader that he was operating was in the clear before he moved it. The Claimant's action violated Carrier Rule 43.2, which states:

Before moving their machines, operators must warn employees and ensure that they are in the clear.

The Claimant admitted that he only checked the red zone before he climbed back into the loader and he admitted that he did not sound the horn.

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 actions to have been unreasonable, arbitrary, or capricious.

The Claimant in this case received a Level 2 discipline, which consisted of a five-day suspension. Given the seriousness of the violation plus the fact that the Claimant had reached Level 2 in the Carrier's discipline system, this Board cannot find that the Carrier acted unreasonably, arbitrarily, or capriciously when it assessed the Claimant a Level 2 discipline. Therefore, the claim must be denied.

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AWARD:

The claim is denied.



PETER R. MEYERS
Neutral Member

ORGANIZATION MEMBER

DATED: 11-9-05



CARRIER MEMBER

DATED: November 9, 2005