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NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 25415

Docket No. 44984

03-1-00-1-U-2200

The First Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

(S. R. Murray (D. E. Thompson)

PARTIES TO DISPUTE: (

(Union Pacific Railroad Company

STATEMENT OF CLAIM:

"The employees respectfully request the discipline letter of December 23, 1999, be expunged from the personal record of Engineer S. R. Murray and that he be paid for all time lost, including vacation credits and pay, resulting from the investigation and suspension."

FINDINGS:

The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

By letter dated November 19, 1999, the Petitioner was directed to appear for a formal Hearing and Investigation in connection with an incident that occurred on November 11, 1999, in which he allegedly dismounted a locomotive in an improper manner and sustained an injury when he slipped on an oily walkway and fell to the ground. After a postponement, the Investigation was conducted on December 14, 1999. As a result of the Investigation, the Petitioner was found guilty of violating Carrier Safety Rule 81.4.1; by letter dated December 23, 1999, the Carrier assessed him a Level

2. The Petitioner thereafter filed a claim challenging the assessed discipline, and the Carrier denied the claim.

The Carrier contends that there were no procedural errors in the Carrier's handling of this matter that would justify voiding the discipline. The Carrier maintains that there is no merit to or support for the Petitioner's contention that the Carrier committed a procedural error by failing to call his Foreman and Helper as witnesses during the Investigation. The Carrier points out that neither of these employees witnessed the Petitioner as he dismounted the unit, so they had no knowledge of the incident. As for any testimony they might have offered regarding the condition of the unit, the Carrier points out that it was established during the Hearing that there were oil spots on the engine platform and that the unit needed to be serviced. The Carrier maintains, however, that this does not relieve the Petitioner of his responsibility to take all necessary safety precautions, particularly in light of his admission that he was aware of the oil spots. Moreover, the Petitioner failed to raise this issue during the investigation. The Carrier asserts that the Petitioner was afforded all procedural rights guaranteed by the agreement, and he received a fair and impartial hearing.

The Carrier also contends that it proved by substantial evidence that the Petitioner was guilty as charged in the Notice of Discipline. The Carrier emphasizes that he acknowledged that he was well aware of the oil spots on the platform walkway. The Carrier points out that under Cardinal Safety Rule 81.4.1, the Petitioner was required to take the necessary precautions to keep from slipping down the unit steps, but he failed to follow this Rule. Moreover, two Carrier witnesses, Manager of Yard Operations L.J. Makovec and Manager of Operating Practices R.L. Steiner, testified that during their interviews of the Petitioner, he admitted that he had a broom and cleaning solvent in one hand while he held onto the unit's grab iron with his other hand as he attempted to dismount the unit. The Carrier points out that during the investigation, thirty-four days later, the Petitioner denied having anything in his hands while dismounting from the unit, apparently after thinking about his earlier statements to these managers. The Carrier emphasizes prior First Division decisions that have found that the Board shall not interfere with a Carrier's disciplinary actions when there appears to be a conflict in testimony where the facts and evidence adduced during the Investigation provide substantial evidence of guilt. The Carrier asserts that it has met the substantial evidence requirement in this case. The Carrier maintains that the Petitioner's attempts to deny his earlier statements to the managers does not relieve him of his responsibility to take the safe course when he had full knowledge of the oil spots on the engine platform. The Carrier argues that it is clear that the Petitioner

performed his duties in a lackadaisical manner and failed to comply with the Carrier's Operating and Safety Rules.

The Carrier goes on to argue that the Petitioner violated an important Safety Rule, and the Carrier never has taken its Operating and Safety Rules lightly. The Carrier asserts that because of the seriousness of the offense, and in light of the Petitioner's 36-month record, he was at a Level Zero under the Carrier's UPGRADE discipline policy. The Petitioner was assessed a Level 2 in the instant case, which requires up to one day or one round trip with pay to develop a Corrective Action Plan and modify behavior. The Carrier contends that the Petitioner's discipline was not unjust, unfair, or excessive. The magnitude of the Petitioner's violation fully justifies the progressive discipline assessed in this case. The Carrier ultimately contends that the claim should be denied in its entirety.

The Petitioner asserts that he was not in violation of Rule 81.4.1 in connection with the incident at issue. He maintains that he has 30 years of incident-free service, and he is a dedicated employee who went well beyond what is required in the performance of his duties on the date in question. The Petitioner maintains that he found the unit to be filthy and unsafe, after the Carrier's Mechanical Department had okayed it for service. The Petitioner points out that he could have refused to take the unit or bad-ordered it, given the defects. He further emphasizes that he was unable to get any help from the Carrier's Officers in correcting the unsafe conditions. The Petitioner argues that he made an attempt to clean the unit, and he slipped and fell while attempting to dismount the unit. He maintains that because the evidence shows that he slipped and fell while he was attempting to turn and face the equipment to go down the steps, there is no evidence that he was in violation of Rule 81.4.1. He argues that when turning to face the equipment, it is not possible to have both hands on the grab irons.

The Petitioner emphasizes that the two Carrier Officers who testified did not see the accident, and they were unable to provide any direct testimony of a violation of Rule 81.4.1 by him. He further argues that although there is some dispute about whether he had the broom and cleaner in his hand as he attempted to dismount the unit, he points out that he was very adamant in his testimony. Moreover, if he did have the broom and cleaner in his hand, then these items would have been on the ground, and not on the unit, after the incident.

The Petitioner goes on to assert that in this industry, accidents occur to the most vigilant employees. He maintains that a number of Board Awards have sustained claims where the Carrier has failed to produce evidence that clearly and convincingly demonstrates the culpability of the charged employee. The Petitioner argues that in this case, the evidentiary record does not show that he acted in a careless or reckless manner. In fact, if the Carrier had provided a unit that complied with federal regulations and its own Rules, then the accident at issue would not have occurred. The Petitioner emphasizes that the Carrier is responsible for the oily running boards, grab irons, and steps; the Carrier is responsible for this accident. He maintains that the mere fact of an accident does not establish that he acted carelessly or committed a violation of Carrier Rules. He argues that the Carrier did not satisfy its burden of proof, and he contends that the instant claim should be sustained.

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

The Board has reviewed the procedural arguments raised by the Petitioner, and we find them to be without merit.

The Board has reviewed the evidence and testimony in this case, and we find that the Carrier has failed to meet its burden of proof that the Petitioner acted in violation of Cardinal Safety Rule 81.4.1 and failed to take the necessary precautions to prevent himself from slipping down the steps. Therefore, the claim must be sustained.

It is fundamental that in these types of safety cases just because an accident occurs, it does not mean that the Petitioner was guilty of a violation. In this case, the Carrier has simply failed to produce sufficient evidence that the Petitioner acted in violation of the Rules. It was apparent from the record that the conditions on the property were very oily and unsafe. There was no direct observation of the accident itself so there really was no proof that the Petitioner did anything in violation of the Rules.

The Carrier bears the burden of proof in cases of this kind. In order for discipline to be sustained, it is necessary that the Carrier present sufficient proof of wrongdoing on the part of the Petitioner. In this case, the Carrier has not produced sufficient evidence to support its case. Therefore, the claim must be sustained.

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AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Petitioner(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division

Dated at Chicago, Illinois, this 30th day of April 2003.