NATIONAL RAILROAD ADJUSTMENT BOARD
Form 1 FIRST DIVISION Award No. 24269
Docket No. 43893
93-1-92-1-C-4586

The First Division consisted of the regular members and in addition Referee Dana Edward Eischen when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Locomotive Engineers
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(Chicago and North Western Transportation
(Company

STATEMENT OF CLAIM:

"Your responsibility in connection with damages/side swipe to Unit CNWA 4414 and your failure to properly report the same prior to your end of duty on March 20, 1991 which was discovered by MIC at 2200 hours on March 20, 1991 in the Chicago area while your were employed as crew members of Job 68."

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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 waived right of appearance at hearing thereon.

The issue to be decided in this case is whether the Carrier properly suspended Claimant M. C. Rice for his alleged involvement in connection with "damages/side swipe to Unit CNWA 4414."

On March 20, 1991, Claimant was working as an Engineer on Job 68, an industry assignment at North Avenue Yard in Chicago. The normal duties of this position are to "pull and spot" the Chicago Tribune and the Chicago Sun-Times Paper Companies. Claimant's working time slip for that date indicated that he commenced work at 7:30 a.m. and tied up at 3:30 p.m., placing his unit on the oil track in the North Avenue Yard.

At approximately 8:30 p.m., some five hours later, the Mechanic In Charge (MIC) inspected the Claimant's unit and found "damage to the hand railings and grab irons on Unit 4414." When the MIC did not find any reports pertaining to the damage in the locomotive he contacted the main diesel facility to see if anyone had reported the incident. The response was negative. The MIC stated that at that time he informed the General Foreman that he would "get a 751 inspection and tag the locomotive out of service if necessary."

According to the MIC, he then saw Claimant and asked if he had worked on the locomotive that day. When Claimant replied affirmatively, the MIC asked him if he had observed the damage. Claimant again replied affirmatively stating that, "The damage wasn't bad and I don't even know when it happened." Claimant further stated that he had not reported the incident that afternoon because "the Yardmaster wasn't in and that is who I am supposed to report things like this to." However, Claimant pointed out that he had referenced the damage on his daily Work Report, and noted that he intended to report the damage the next morning. Further, the MIC testified that at that time Claimant assured him that he intended to "report the damage to the Yardmaster first thing in the morning." At the MIC's request, Claimant made out an "Engine Exception Report" upon which Claimant also indicated that he intended to "tell the Yardmaster in the morning."

The incident was subsequently investigated, and Claimant received a five day suspension for:

> "Your responsibility in connection with damages/side swipe to Unit CNWA 4414 and your failure to properly report the same prior to your end of duty on March 20, 1991 which was discovered by MIC at 2200 hours on March 20, 1991 in the Chicago area while you were employed as crew members of Job 68."

The Carrier has asserted that the Claimant "checked his unit over prior to leaving the yard and did not make note of any damage to the unit at that time." Carrier argued that, "The damage was sustained while the Claimant was on duty and he must be held accountable for the damages and his failure to report the incident in a timely manner."

Claimant admitted that he had checked Unit 4414 prior to leaving the Yard on March 20 and did not "notice any damage" at that time. However, Claimant further maintained that he may not have noticed "because of where the damage was located." In addition to the Claimant's testimony, neither train crewman was

able to offer an explanation as to when the damages may have occurred, although both indicated that "it could have been at one of the loading docks."

It was incumbent upon the Carrier to prove the conclusions upon which it premised its discipline of Claimant: 1) Responsibility for the damage to Unit 4414; (2) Failure to report the damage. With regard to the damage itself, the MIC noted that the crew would have exited the unit on the side opposite to where the damage had occurred. Further, the MIC's testimony established that "it was difficult to see." While it is conceivable that the damage did occur sometime when Claimant was operating the unit, Carrier was not successful in proving that material fact. Speculation and conjecture are no substitute for persuasive evidence. The damage was not discovered until approximately five hours after the crew tied up, so it was equally probable that the mishap may have occurred during in that interval.

With regard to Claimant's failure to report the incident, Claimant stated that he did not report the incident on March 20 "because there was no one to tell." Further, Claimant indicated both verbally and in writing, that he intended to report the incident to the Yardmaster the very next morning. There is nothing in the record which indicates that the Claimant would have done otherwise.

Carrier failed to produce probative evidence to substantiate persuasively the two charges placed against the Claimant. Therefore, this claim must be sustained.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division

Attest: Catherine Loughrin
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 8th day of November 1993.