Award No. 5663
Docket No. 5455
2-AT&SF-CM-'69

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee George S. Ives when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 97, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L.-C. I. O. (Carmen)

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY—WESTERN LINES

DISPUTE: CLAIM OF EMPLOYES:

1 - That under the current agreement, Carman Helper Bernabel (20) demerit marks from the personal record of Carman Helper Bernabel A. Tapia.

2 - That accordingly the Carrier be ordered to remove the twenty (20) demerit marks from the personal record of Carman Helper of Carman Helper Bernabel A. Tapia.

EMPLOYES' STATEMENT OF FACTS: Carman Helper A. Tapia, hereinafter referred to as the Claimant, is employed by the Atchison, Topeka and Santa Fe Railway Company, hereinafter referred to as the Carrier, at Albuquerque, New Mexico, with working hours of 7:30 A. M. to 4 P. M., work week of Monday through Friday, rest days of Saturday and Sunday, in the Centralized Work Equipment Shop.

On June 16, 1965 the Claimant was given notice to appear for formal investigation at 9:30 A. M., Tuesday, June 22, 1965, in the office of Superintendent of Shops, in connection with his alleged unsafe and careless acts when moving push car in to the Centralized Equipment Shop No. 1 at approximately 9 A. M., April 6, 1965; seemingly in violation of Rules 11 and 20 of Form 2626 Standard, General Rules for the Guidance of Employes, 1959 Edition.

As a result of the investigation which was held June 22, 1965, the Claimant was advised on July 13, 1965 (Employes' Exhibit "A"), that his personal record was being assessed with twenty (20) demerit marks for his violation of Rules 11 and 20, Form 2626 Standard, General Rules for the Guidance of Employes, 1959 Edition.

This dispute has been handled with the Carrier up to and including the highest officer so designated by the Carrier, who all have declined to make satisfactory settlement.

investigation that such formal investigation was not a fair and impartial one. The Claimant did state that the investigation was impartial but that is not what he intended to say in taking the context of his sentence as a whole. Your Honorable Board, upon reveiwing the minutes of the investigation as recorded in Carrier's Exhibit "A", will note that such allegations are far from the truth. Local Chairman Maez, the representative of the Claimant, was given every opportunity to examine and cross-examine all of the witnesses at the examination. **Mr. Maez himself admitted that his protest was based on the fact that the investigation was not held promptly,** and as shown heretofore the investigation was held as quickly as possible taking into consideration the circumstances involved and allowing the claimant the time necessary to prepare himself for the investigation. The record speaks for itself that the investigation was fair and impartial.

Rules 11 and 20 of Form 2626 Standard "Rules for the Guidance of Employes" (1959 Edition) are not ambiguous as alleged by the Employes' representative in his letter of appeal to Assistant to Vice President Ramsey dated February 28, 1966 (Carrier's Exhibit "H", page 2, first full paragraph). These rules clearly state than an employe must exercise care to avoid injury to himself and others, that he must observe the condition of equipment and the tools used in performing his duties, that he must not be careless of the safety of himself or others, etc. In the minutes of the formal investigation (Carrier's Exhibit "A", page 10) it was clearly established that Mr. Tapia was familiar with both Rules 11 and 20 of Form 2626 Standard. It was also apparent that Mr. Tapia was in violation of these rules when he deliberately placed himself in a precarious position to push the push car, without watching where he was going, at the same time being fully aware that all the grates had not been replaced on the pit. He also knew that to walk on the plates inside the rail, rather than maintaining a position on the outside of the rail, was to court danger if he did not watch to see where the plate ended. It is apparent that he did not take the proper precaution to prevent injury to himself. It is also apparent that he did not properly observe the condition of the equipment (i.e., the fact that he could step off into the pit since the grates were not in place and he knew he could walk no further without stepping into the pit under the conditions). Therefore, as can be ascertained by the reading of the minutes of the investigation, it was developed that he was careless of his safety and could have prevented injury to himself by merely observing where he was stepping and by placing himself in a safe position outside the rail to walk; yet he failed to take proper precaution to insure his own safety.

In conclusion, the respondent Carrier respectfully reasserts that the Employes' claim in the instant dispute is wholly without merit or support and should be either dismissed or denied in its entirety for the reasons advanced herein.

The Carrier is uninformed as to the arguments the Employes will advance in their ex parte submission and accordingly reserves the right to submit such additional facts, evidence and argument as it may conclude necessary in reply to the Organization's ex parte submission in this dispute.

(Exhibits not reproduced.)

FINDINGS: The Second 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 Adjutment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

Petitioner contends that claimant was improperly disciplined by Carrier for alleged unsafe and careless acts in violation of Rules 11 and 20 of Carmen's Form Standard, "General Rules for the Guidance of Employes." Claimant was given twenty (20) demerits by Carrier following his personal injury on April 6, 1965, when he stepped into a pit in Paint Shop No. 1 while pushing a push car loaded with run-off rails into the Paint Shop.

Carrier initially contends that the claim is "moot" because the twenty (20) demerits in dispute have been cancelled. We cannot agree that cancellation of the disputed demerits under the Brown System of "Discipline by Record" eliminates the basic charge against the claimant upon which the demerits originally were placed. Therefore, we find that the fundamental questions at issue are properly before us.

In the first instance Petitioner urges that the claimant was denied a fair and impartial hearing. The gravamen of the Petitioner's charge is that the hearing was not held promptly as required by Rule 33½ (a) of the applicable Agreement, and that Carrier failed to confront the claimant with an eye witness to the accident, thus denying claimant an opportunity to establish his innocence.

Although charges were not filed against the claimant until after his return to work on June 7, 1965 following a period of convalescence, there is no evidence to support a finding that the delay prejudiced the rights of the Claimant herein. Under these peculiar circumstances, the investigation must be considered as "promptly held" under Rule 33½ (a) soon after claimant was physically available for such an investigation.

As to the Carrier's failure to call an eye witness to the accident, there was no obligation to do so unless claimant had requested his presence at the hearing for the purpose of examination by claimant.

The Carrier contends that claimant failed to exercise necessary care to avoid injury to himself and others in violation of Rules 11 and 20 of Form 2626 Standard, "General Rules for the Guidance of Employes" (1959 Edition) on the morning of April 6, 1965 by deliberately placing himself in a precarious position to push a push car with full knowledge that all the grates had not been replaced on the pit over which the push car was being moved. The Carrier asserts that Claimant is accident prone, and that disciplinary action was imposed in this instance to make him cognizant of his unsafe practices.

Petitioner avers that Carrier has failed to establish through probative evidence that claimant's careless conduct was directly responsible for the accident. Moreover, the claimant testified that his immediate supervisor had advised him not to replace the grates on the pit prior to the accident, and that this same employe, who did not testify at the hearing, assisted the claimant in the pushing of the push cart over the pit when the accident occurred.

Thus, we are confronted with the direct testimony of the claimant that he exercised necessary care while pushing the push car, and the assertion of the Carrier that Claimant's careless conduct was directly responsible for the accident. The only eye witness to the accident did not appear at the investigation either to refute or corroborate the direct testimony of the claimant.

It is well established in such disciplinary cases, that the Carrier has the burden of establishing through at least clear and convincing evidence that an employe is guilty of charges filed against him. In this dispute, the Carrier has offered no probative evidence to refute Claimant's denial of misconduct. The matter of claimant's prior propensity for accidents would be germane only in assessing the discipline imposed and not in establishing guilt in the present situation. Accordingly, the instant claim will be sustained.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 18th day of April 1969.

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