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Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 6547
Docket No. 6289
2-PATH-EW-'73

The Second Division consisted of the regular members and in addition Referee Irving T. Bergman when award was rendered.

Parties to Dispute: (Railway Employees' Department
(A. F. of L. - C. I. O.
((Electrical Workers)
(
(Port Authority Trans Hudson Corporation

Dispute: Claim of Employees:

1. That under the current agreement, Communication Repairman Electrician II A. R. Fortunato was arbitrarily and otherwise improperly assessed discipline consisting of a suspension from the service of the Carrier for an actual period of thirty days following a hearing.
2. That prior to having been accorded a hearing, A. R. Fortunato was arbitrarily and otherwise improperly removed from the service of the Carrier.
3. That the Carrier willfully, negligently, needlessly, arbitrarily, and otherwise improperly and in complete disregard for his personal safety and for that of other employes working with him, exposed A. R. Fortunato to a dangerous hazard to his life and limb during the performance of his duties on January 13, 1971, by refusing his request to deenergize a live electrical power rail (third rail) over which the Carrier ordered him to work.
4. That accordingly, the Carrier be ordered to rescind the discipline assessed, and to restore to the aforesaid employe all seniority rights and all pay due him since he was suspended up to the date he was returned to service at the applicable Communication Repairman Electrician II's rate for each working day he was improperly held from service; and all benefits due him under the group hospital and life insurance policies for the above mentioned period; and all railroad retirement benefits due him including unemployment insurance and sickness benefits for the above described period; and all vacation and holiday benefits due him under the current vacation and holiday agreements for the above described period; and all other benefits that would normally accrue to him had he been working in the above described period in order to make him whole.

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 Adjustment Board has jurisdiction over the dispute involved herein.

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

Anthony Fortunato, the claimant, was employed as a Communications Repairman - Electrician (Leadman) by the Port Authority Trans-Hudson Corporation, called PATH, when the alleged acts took place. PATH is an electric railway operating between New York State and New Jersey in what is generally considered as the New York metropolitan area.

He was assessed a 30 day actual suspension from service following a discipline hearing held pursuant to the Agreement Article X,A. He was taken out of service prior to the hearing pursuant to the Agreement Article X,C. A hearing on appeal from the penalty was held pursuant to the Agreement Article X,B.

By registered mail letter dated January 13, 1971, claimant was notified that he was being held out of service without pay effective that day pending a hearing to be held to investigate the charges, on January 27, 1971. The charges set forth in the letter stated, in substance, that claimant was insubordinate on January 13, 1971 when he refused to obey orders of his foreman to direct employes under his supervision as leadman to install cable; that he encouraged other employes to leave the work site without authorization to do so.

The parties are in agreement as to the preliminary facts, namely: Claimant was the leadman of a group of eight men on January 13, 1971, working the tour from 12 midnight to 8 A.M. Claimant's foreman instructed claimant to run telephone cable from Hoboken to a point known as caisson two. The group of men proceeded on a flat to a signal beyond which they had no authority to go. This left approximately 25-40 feet in which they could not work from the flat. For this distance the cable was to be hung on the bench wall about 5 to 6 feet high by working from the track bed and on the bench wall which had steps leading up to it. The third rail ran along the tracks with a cover board about 6 inches above it. At the time, the third rail was energized carrying 600 volts. After hanging the cable along the bench wall from a manhole junction box back to the flat, the men would continue to pull out the cable and hang it, working from the flat as it would be backed to caisson two. The claimant and the men would not perform the work unless the third rail was deenergized.

Claimant and the men disagreed with the foreman about the conditions at the work location, how the men would have to maneuver to hang the cable along the 25-40 feet where they could not work from the flat, and the sequence of events which led to the men leaving the work along with the claimant, leadman. There is also a sharp difference of opinion concerning the safety factor.

At the oral hearing at the Board, the carrier's representative argued that in the case of an electrically operated system energized by a third rail running parallel and close to the tracks that it is customary and safe to work while the third rail is alive unless there is an unusual present and foreseeable danger to the safety of the employes. He insisted that with a cover board over the third rail and working with insulated cable that there was double protection. In any event, the leadman should not have acted to deter the rest of the men from performing the work and in effect to incite them to refuse to do the work along with him. It was contended that the thirty day suspension for action which merited dismissal, was a concession only to the reason given for not doing the work as directed.

The Organization's representative argued that in the area where the men could not use the flat they would have to work in an awkward position in such close proximity to the live rail that the slightest slip could cause contact with the third rail and lead to serious injury and perhaps, death. It is contended that if the men were in fear of their lives that it would have been a simple matter to cut off the current for the short time required and that at 3 A.M. in the morning the train schedule was such that service would not have been disrupted.

During the panel discussion, fourteen prior Second Division Awards were submitted to support the carrier's action. No. 1547, concerned an electrician who elected to speak for himself and three others in declining to perform work unless it would be considered premium time. No unsafe condition was alleged. A warning notice in the employe's record was upheld on the theory that the work should be performed and the grievance filed later. In No. 2685, a craneman refused to perform work because of the presence of excessive exhaust gas and smoke from Diesel engines in the Diesel shop. The craneman who had a previous record of insubordination was dismissed. The claim was denied because the condition was not unusual in the Diesel shop and other craneman had worked in the same or worse conditions without adverse effects to their health. In No. 3001, a car cleaner insisted on mopping instead of scrubbing a tile floor around the hopper in the men's smoking room as he was directed to do, because of the foul condition. He was held out of service pending a hearing and later given a 20 day suspension. In No. 4293, claimant refused to blow off an engine while it was raining and insisted that it be brought into the round house first, because he was ill. An "inclement weather rule" was relied on. Claimant was held out of service and a 15 day suspension was assessed after the hearing. The finding was that although claimant's request may have been reasonable, his refusal to the point of altercation with his supervisor was improper. The work should have been performed and grieved later. No. 4672, involved refusal to approve a boat fastened on a car facing in the wrong direction from the train's movement unless the supervisor provided a written release to the car inspectors. By dictionary definition this was found to be insubordination which justified the 10 day suspension. In No. 4782, 20 day suspensions were upheld when car welders were arrogant and defiant in refusing to work when directed to do so. It was found that whether or not orders were proper or reasonable was not for employes to judge because the system would break down if each employe had discretion to decide whether or not to carry out an order. Unsafe conditions were not involved. In No. 5167, carmen were suspended for 30 days although there was conflicting evidence as to whether they were or were not given direct orders. It was found that no hazard to the men was involved and that they were insubordinate in not doing the work and grieving later.

In No. 5931, a machinist was suspended for 10 days for questioning the extent of his duties although he was qualified to do the work assigned. No unsafe condition was alleged. In No. 5972, no unsafe condition was involved. The employe refused to do the work assigned unless he received a written order to do so. Because of his previous record, dismissal was held to be justified. No. 6027, did not involve a hazardous condition. The employe refused to start an assignment because he could not complete it by his normal quitting time. A 30 day suspension was sustained. It was found that, "--- the circumstance that someone else may have imposed a lighter penalty, ---, is not a sufficient reason to overturn or modify Management's determination of appropriate punishment." In No. 6050, the employe with a prior record of a dispute with his foreman was dismissed when he insisted on doing work in the order that he wanted to and not as directed. No unsafe condition was involved. In No. 6188, an electrician was suspended for 30 days and had been suspended pending the investigation. He refused to obey an order and was disrespectful. No unsafe condition was involved. In No. 6216, the employe refused an assignment, first saying that it was not his work and then claiming that he was sick and going home. On a question of credibility, an 8 day suspension was upheld. No hazardous condition was alleged. In No. 6229, a carman refused to hi-ball a train claiming a penalty defect in one car, even though his foreman stated that he would assume the responsibility. No danger to any person was present from this allegedly hazardous condition. The 30 day suspension was sustained.

The Organization submitted prior Second Division Awards in support of its position. No. 5861, involved the refusal of carmen to work at a poorly lighted junction point where on the previous night one employe of the Terminal Railroad had been killed and another wounded by a sniper. The refusal continued despite the foreman's assurance that he would go with them. A 30 day suspension was assessed. The claim was sustained and the 30 day suspension set aside. The evidence showed that the men would work if given armed protection which was refused. The Board disagreed with the Carrier's position that any refusal to comply with instructions is tantamount to insubordination unless there is a "visible present danger to loss of life or limb or greater bodily injury." The Board found that the employes were justified in refusing to work at a place where shooting occurred the night before and the sniper was still at large. In 6033, Carrier's supervisors had agreed with the local chairman that it was unsafe for carmen to work cars on certain tracks on which work was being done. Carmen later refused to work cars on one of these tracks, as hazardous. Insubordination was charged a 10 day suspension assessed after hearing. Claim was sustained because decision and penalty were arbitrary where hazardous condition had been conceded. No. 6329, is concerned with due process and insubordination. Hazardous working conditions were not involved. The claim was sustained because of an improper hearing. No. 6439, is concerned with the same principles as No. 6329 and the claim was sustained for the same reason.

Each prior Award submitted for our consideration and the facts and arguments of the parties have been carefully studied and considered. The conclusions to be drawn from these Awards are familiar ones. It is well established that the hearing officer's decision will be upheld if it is supported by substantial evidence. The hearing must be fairly conducted so that due process is afforded the petitioner. The petitioner has the burden to overcome the decision. It is not the function

of this Board to resolve conflicts in testimony. Claimant must be charged specifically so as to prepare his case and must have an opportunity to be represented and to present witnesses. The hearing must be held as provided in the contract. No employe may be held out of service pending the hearing unless the contract provides for it and the violation is serious enough to justify such action. Insubordination is a serious offense, and encouraging or inciting others to be insubordinate is more serious, leading to anarchy, as stated in one of the Awards cited. The penalty will not be interfered with by the Board unless it is arbitrary and capricious. No employe shall be required to work where it is unsafe and harm could come to him or in working as directed, he could cause harm to others.

None of the Awards submitted defines an unsafe condition which would be general enough to be applied to all cases. Each case of an alleged unsafe condition relies on the particular facts of that case to determine whether or not the employe's refusal to carry out orders amounts to insubordination or is justifiable. For example, in one case the employe's refusal was held to be unjustified because the foreman was willing to go with him to the dangerous location. In another case, the refusal was held to be justified because it had been agreed that the track conditions were unsafe to work on.

None of the prior Awards involve an all electrified railroad operation nor work to be performed on the tracks close to live high voltage third rails. It is logical to assume and we take notice of the easily to be observed fact that employes constantly work close to, around and over live third rails insubway and other electrified train operations. If there was a foreseeable or an existing present danger to the workers in the facts of this case sufficient to present a defense for their actions, it would be explained only from the testimony taken at the hearing and at the appeal from the hearing.

On page 10 of the hearing testimony, the foreman stated that in his present position as foreman, cable had been installed under similar conditions without deenergizing the third rail; page 8, that it had been done this way for years and on page 20 that he knew this to be so from other foremen. On page 14, the foreman testified that the employes said they would do the work if the power was cut off. As to the second charge, on page 11, the foreman testified that claimant was suspended and then turned to the other men of the group of which he was leadman, to ask "Who else is going home?" On page 14, the foreman testified that the men said they wanted the power cut off because it was unsafe.

The PATH Book of Rules was introduced as an exhibit, regarding safety rules. On page 15, of the testimony, the general notice in the rules was stated as, "Safety is of the first importance in the discharge of duty. In case of doubt, take the safe side." The material part of Rule 10 as quoted states, "The safety of employes is at all times to be considered of first importance. All employes are required to exercise constant care to prevent injury to persons ---, and in all cases of doubt they must take the safe side." Rule 27 as quoted states in part, "Every employe is responsible for using reasonable care to avoid injury to himself and others ---." On page 16 of the testimony, Rule 28 states in part, "Employes must take every precaution to protect themselves and others from electric shocks ---,

using properly insulated tools where they are liable to come in contact with electric currents. They must decline to use tools with defective insulation, ---." Rule 35 states in part, "The power rail is to be considered alive at all times and employees must avoid coming in contact with it. All employees must know that metal tools, or wooden tools when wet, coming in contact with the Power Rail may --- injure them or others." Rule 37 as quoted, "The Company does not desire employees to take risks from which they can protect themselves by personal care and by the use of good judgment." Under Electrical Foreman Rules, Rule 422 in part states, testimony page 17, "They must see that work is handled so as to avoid men being endangered by --- electric shocks. They must see that their men are properly provided with, and instructed in the use of, customary insulations, such as --- mats etc. Under no circumstances shall men be permitted to work on live 11,000 volt circuits. The Foreman will be held responsible for seeing that current is off such circuits, ---." Also quoted is, "Electrician Rules, Rule 427. Each electrician must perform his duties in such manner as his Foreman may direct and must exercise good judgment to see that he is in no way endangering himself, or others in the execution of his work."

In the testimony on pages 21-23, the Organization maintains that, one man would have to stand on the sloping part of the tunnel, hang down with one hand while working with the other and one man would be required to stand adjacent to the third rail to support the man hanging in mid air, thereby making it easy the man on the track to step into the third rail. The foreman testified that the man could work on the bench wall without support. The Hearing Officer concluded this was speculation saying, page 23, "Since this operation was not completed at this time, we cannot establish whether it would have been necessary or not necessary to support him."

The testimony on pages 29 and 30, relates to the second charge. The foreman testified that he told the leadman, claimant, what was to be done and left it up to him to accomplish it. The leadman answered, "I am not going to do this job. If the other men want to, they can." After being asked two or three times by the foreman, claimant stated, "That's right, I am not going to do it." The foreman replied, "All right, you are taken out of service." Claimant turned to the other men and said, "--- who else is going with him, and they all went with him." The foreman testified further that the area was not damp or wet and that tunnel conditions were normal.

On page 32, the foreman testified that the cable being used was insulated and would not transmit electricity if it touched the third rail. On page 34, the hearing officer pointed out that claimant was penalized and not the others because as a repairman II, he is the leader of the group, but stipulated that this was not said as a witness in the hearing.

The claimant's material testimony on pages 38, 39, in summary, states that one of the men in the group designated as a safety officer asked him if the third rail would be killed. Claimant told the foreman that the men, "think it's unsafe working off the bench wall hanging on one hand trying to tie cable on the messenger." The foreman told claimant he was "clocked off" if he didn't want to do the job. Claimant answered that he has to listen to his safety officer who thought it was

dangerous to work at the spot, "over the rail plus leakage running down over the rail, plus exposed cables, plus ties and a wide part that the men could fall in, plus there's all grease over in that area,". He asked, "Are you going to kill the rail?". The foreman refused and while claimant headed back to the flat, he heard the foreman, "scream out Anybody else?, and I heard answers Yes, Yes, and I don't know who was saying Yes but the next thing I knew, all the men were coming in the flat, and I asked what happened and he told me they all refused to work over the rail, he's clocking them also." On page 40, claimant denied that he asked the men, "Who else is going home?"

The hearing officer stated for the record that claimant was in error when he referred to one of the employes as the safety officer. It was pointed out that the safety officer is appointed by the carrier. Claimant stated that they were instructed to elect their own. The hearing officer ruled out of order any further discussion regarding the identity of the safety officer, known as safety coordinator, and ruled that the next witness would testify as an employe, not as the safety coordinator, testimony pages 42-45.

On page 47, of the testimony the next witness testified that he had been told by the foreman that he was the safety coordinator. The men asked him about "knocking off" the third rail and he asked the claimant about it. This witness was one of the group working under the claimant as leadman, at the time of the incident. This witness testified that they refused to do the job under the conditions there at the time, worn high tension cables in an exposed uncovered manhole grating with water coming down over the power cables onto the third rail, "and no protection of good footing"; that it was the foreman who asked who else was leaving, pages 48-52. This witness testified that to stand up on that wall, "we would have to like bend out to do the work."; and on page 53, "the rails were greasy, the like spikes in the track came up real high. The lighting was poor and I think the main factor that had me so alarmed was just the water was running all over everything." The witness telephoned a supervisor who told him to do, "exactly what the foreman told us to do and he would have to investigate it in the morning when he comes in." When questioned on this by the Organization's representative, the hearing officer stated, "that it is the foreman's responsibility to assure that the safety conditions are enforced and since the foreman was on the job we rely upon him.", page 54.

An employe, Communications Electrician I, was the next witness. He testified that on a different occasion he refused to splice cable on a wall working from a ladder leaning on the wall over a third rail. The foreman did the work while this employe held the ladder and handed up the tools. He was not disciplined, pages 57-59. The hearing officer stated that he did not consider this testimony to be relevant.

The next witness testified, pages 61-64, that he was a Communications Repairman, Electrician I, and a safety coordinator on the A.M. shift. On one previous occasion, when they were putting up cable, he requested the third rail to be killed and it was done. A supervisor who came out to look over the job said it was unsafe to work with the live third rail. On another prior occasion, the witness refused

to go up on a ladder over a live third rail to put up a bracket. He refused to let the men do it. The foreman would not kill the third rail but did the job himself, saying that the witness was "chicken". There was no disciplinary action taken.

The next witness was the PATH safety supervisor who is a qualified safety engineer. He testified on pages 67-71, that the safest way is to kill the third rail. However, many jobs are done over a live third rail. He investigated this incident and concluded that the job could be done without cutting off the power and that it would have been safe. He also testified that meetings had been held with IBEW representatives to discuss cable installation. The conclusion reached was, "that the exposure involved in handling the rail was minimal and that it could be done safely,". The word "rail" was corrected to mean the "cable". This witness also testified that it was not the function of the safety coordinator to decide when it is or is not safe to do a job. The safety coordinator program, the witness testified on p. 70, is a Port Authority - wide program to appoint certain employes to assist in promoting their safety program by familiarizing them with safety procedures, through the use of films and lectures. Outside of a feeling of their own, they are not technically qualified to conclude that something is safe or unsafe. On page 71, the witness testified that if the safety coordinator feels strongly about the safety of an operation, he is to consult his foreman who has the responsibility for the action to be taken. "The safety coordinator is not empowered to stop a job that is under way because of an opinion that he may have."

On page 76, the safety engineer testified that the employes are provided with a high tension safety shoe with a metatarsal guard. On page 77, he repeated that he had looked at the operation in question and felt that it was safe.

The final witness was the PATH Supervisor of Electrical Maintenance. On pages 80-83, he testified that outside contractors would do the same job the same way over live third rails; that it has been done by PATH the same way without any problem and that it would be normal procedure. He conceded that if the contractor asked to kill the third rail, it would be done. On page 84, it was stated that a deenergized third rail could be inadvertently gapped so that a job is organized to provide maximum safety following a general rule that a third rail should always be regarded as being alive.

The Agreement, Article X, provides for the right of appeal when discipline is assessed. On page 29, of the appeal hearing a statement was read into the record which was signed by the employes involved. They stated on page 30, that the claimant said he would not work over a live third rail but that, "If the men want to work its up to them." The statement concluded by saying that they witnessed the whole thing and that it was a "falsehood" to accuse claimant of saying, "Who else is going home?" The statement was signed by seven men. Two of the men also testified to the same effect.

We believe that two issues of paramount importance are involved. One is the safety factor, the second is the carrier's right to operate the road without interference. The testimony has been carefully examined in order to determine whether or not, in this case, safety was involved to the extent that it was of sufficient

importance to overcome management's directions. The testimony of qualified safety experts favors the presumption that the job could have been safely performed with a minimum of risk. The testimony has also pointed out that all of the employees involved felt strongly about the danger to themselves if the third rail remained alive.

There are many occupations in which great risks are involved. Underwater operations in diving and in tunnel construction are carried out with great risk to the lives of men who voluntarily assume these risks, asking only that safety procedures normal to that type of work be observed. Work on high scaffolds, outside window cleaning on skyscrapers, construction steelwork accomplished at great heights also involve great risks. Workers who voluntarily accept employment on high tension operations and on electrically operated railroad systems are aware of the risks despite the numerous safety procedures and laws requiring safety equipment and methods. Work which appears harmless often results in injury and death.

This case must be resolved within the framework of the particular facts involved. We find that claimant did not have the authority to make the decision that the job could not be done unless the third rail was deenergized. We are mindful that if a slip occurred it would be too late to say, "I told you so." But that is one of the occupational hazards. In our finding in favor of the carrier on this point, we are guided by the testimony which is sufficient to support the decision that it is the foreman's responsibility to make the decision. Having accepted an occupation which carried with it an element of danger, claimant's concern was limited to the need for proper tools and equipment and reliance upon customary safeguards. The testimony does not support a finding that a present danger existed. Prior Awards have demonstrated and testimony of action taken on this railroad in previous instances have indicated that the foreman may have taken other action in these circumstances. But prior Awards have also established that it is not our function to upset the decision reached although some one else may have a different opinion. The decision was not arbitrary or capricious but was reached after the facts were fully developed and argued in ninety three pages of transcript of the hearing.

We find that the suspension pending the hearing was provided for in the agreement and that at the time there appeared to be sufficient reason for that action.

Prior Awards have made it clear that it is not our function to resolve conflicts in testimony. The testimony and the signed statement of a number of witnesses contradicted the foreman as to the claimant inciting the men to refuse to work. On this point, we find that it was arbitrary to ignore the overwhelming testimony in favor of the claimant. We are aware that the words and acts of the claimant may have influenced the group of which he was the leadman. Nevertheless, they testified that they individually considered the conditions to be unsafe. It would be speculation and capricious to decide that without prior discussion with each other they unanimously reached the same conclusion.

The penalty assessed for insubordination in the prior Awards where unsafe conditions were not a factor makes the penalty in this case appear to be excessive. The record supports the fact that claimant has worked for more than thirteen years without a blemish on his work performance. He was promoted to leadman. The record on the appeal page 18, contains testimony that for two years claimant directed operations from a flat without the presence of a foreman, exercised discretion and judgment and carried out his orders capably. Fear of safety is a motivating factor strong enough to be given great weight in assessing a penalty. We have found that claimant had no authority or discretion to refuse to perform the work over and above his foreman's direction, in the particular facts of this case. In the Organization's Exhibit C, letter of decision, it was stated that the insubordination, "may not have been intentional", and that, "At the time of the incident, it is possible that it appeared unsafe to you ---." For the reasons set forth with regard to the penalty, we shall exercise our discretion to reduce the penalty to a warning notice to be placed in the claimant's record.

A W A R D

Item 1, is sustained.

Item 2, is denied.

Item 3, is denied.

Item 4, is sustained except that a warning notice be placed in claimant's record.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: E. Q. Killeen RB
Executive Secretary

Dated at Chicago, Illinois, this 29th day of June, 1973.