Award No. 4977
Docket No. 4764
2-LV-CM-'66

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Howard A. Johnson when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 96, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Carmen)

LEHIGH VALLEY RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That the discipline assessed against Anthony J. Kirchner, carman helper, November 1, 1963, was improperly arrived at and represents unjust treatment within the meaning of Rule 37 of the controlling agreement.

2. That the Carrier accordingly be ordered to rescind the discipline imposed and remove same from his service record.

EMPLOYES' STATEMENT OF FACTS: On September 10, 1963, the claimant received personal injury while sandblasting on roof of 52002 covered hopper car.

Under date October 11, 1963, the claimant received the following notification:

"Arrange to report to my office at 10 A.M. (D.S.T.) Friday October 11, 1963, for hearing and investigation to determine your responsibility in connection with your alleged injury September 10, 1963.

/s/ R. J. Remaley
General Foreman"

On October 11, 1963, a question and answer statement was taken from the claimant in connection with the above notification.

In letter dated November 1, 1963, the claimant received the following notification from Mr. W. E. Lehr, chief mechanical officer:

"I have read your statement of hearing and investigation conducted on October 11, 1963 in connection with your personal injury sustained on September 10, 1963.

It is for these reasons a clear and admitted failure to comply with safety rules as developed in a hearing and investigation, conducted as required by the current agreement, the resultant discipline which must be viewed as neither unjust nor harsh but which was actually lenient under the circumstances that the carrier respectfully requests that this claim be denied.

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.

A hearing was held pursuant to a notice to Claimant to report "for hearing and investigation to determine your responsibility in connection with your alleged injury September 10, 1963". About three weeks later the Chief Mechanical Officer, after reviewing the investigation record, wrote the Claimant as follows:

> "In reviewing your service record it is noted that you were previously reprimanded on three occasions for personal injuries. It is also noted in your statement that you had two other personal injuries reported in May and June of 1961. This is indeed a very poor safety record, indicating a careless workman.
>
> There is also evidence in your statement that you violated Safety Rules 4002, 4003 and 4010.
>
> This is to advise you that I am placing a further reprimand on your service card to this effect."

The Employes' position is that the notice did not apprise claimant of the precise charge, as required by Rule 37 of the Controlling Agreement, and that he was found guilty of having a poor prior safety record and of violating Safety Rules 4002, 4003, and 4010, which were not mentioned in the charge.

Prior record is not a charge, but is properly considered in assessing discipline if the charge is sustained; for the reasons hereinafter stated we need not consider it further.

Safety Rules 4002 and 4003 require the prompt report of all injuries, however trivial, and the immediate procurement of first aid and if necessary medical attention for all injuries, neither of which can be considered as included within a charge of responsibility for an injury. Furthermore, there is no proof in the hearing record that those rules were violated, and for both reasons the finding of violation of those rules cannot be sustained.

Safety Rule 4010 requires that the employe "look before making a step in any direction, and avoid losing balance or slipping, tripping, or stumbling

over fixed or movable parts, material or tools", which can, perhaps, be considered as a caution against carelessness, and thus to be within the charge of responsibility for an injury, or for an accident, which the parties have apparently treated as synonymous, since there is no showing of actual injury.

There is no evidence in the hearing record that Claimant failed to look before making a step in any direction, or that his losing balance or slipping, tripping or stumbling was due to negligence.

At the hearing, the Claimant replied "yes" to the question, "when you walk backward, if you had looked first you would have seen the hole". But there is no evidence that he walked backwards or that the hole caused him to fall. His testimony was that "my foot caught * * *, I tried to get my foot out and I went backward and fell in the hatch, I caught myself and pulled myself out". If there was negligence, it was in getting his foot caught, for which neither a backward step nor the hole was responsible. He also answered "yes" to the leading question, "If you would have closed this lid, you would not have fallen in the hatch; therefore you neglected the safety part of your job". However, when asked "Did you fall through the hatch and down in the car", he replied "No. I did not fall in the car. I caught myself on top of the hatch". Thus his assumed or admitted carelessness in not closing the hatch had nothing to do, either with his falling or with any injury it might have caused.

While the charge of responsibility for his injury was precise enough, and may perhaps be considered sufficient to include the violation of Rule 4010, there is no proof in the record that he was careless or that he failed to "look before making a step in any direction", or that carelessness caused his "losing balance or slipping, tripping or stumbling". The claim must therefore 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 11th day of November, 1966.

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