

The Second Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: (International Brotherhood of Electrical Workers
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(Consolidated Rail Corporation

STATEMENT OF CLAIM:

1. Appeal of discipline of thirty (30) day suspension imposed upon Selkirk, NY Electrician George Sterling as outlined in the Notice of Discipline dated May 29, 1986.

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 employes 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.

As a result of charges dated October 30, 1985 (which also held Claimant out of service), the Investigation was held on April 28 and 29, 1986 and by letter dated May 29, 1986, Claimant, an Electrician at the Carrier's Selkirk, New York Diesel Terminal with a service date of May 5, 1977, received a thirty day suspension (deferred for six months) for a "flagrant violation of Safety Rule 4383 (u)...,which resulted in a personal injury to yourself on October 7, 1985."

On October 7, 1985, at approximately 7:50 p.m. while in the process of inspecting traction motor brushes, Claimant descended a three step frame ladder in a track pit, tripped over an air hose on the pit floor, fell against a track support and sustained an injury to his spine. According to the Shop Superintendent, whose information came from the accident report filed by Claimant, "The air hose constituted a hazard as it was placed by him and having knowledge of the location of that air hose when descending the ladder it should have been avoided."

The Shop Superintendent described the pit as a "confined space." With respect to lighting, he testified that "There are no lights directly in the pit." He further testified:

"Q. Upon descending from this wooden A frame ladder, could you state that you definitely could see the bottom step while you were descending from the top step of the ladder?

A. No. I don't believe you could."

A Sheetmetal Worker described the pit as "more or less confined between 2 rails. As far as lighting there is none whatsoever in there." An Electrician described the lighting condition as "the only lighting when you're on the ladder working inside a traction motor is a hand held flashlight." Further, according to the Electrician, the distance between the pit floor and the bottom of a traction motor is "4 1/2 feet." The Electrician also testified that while standing on the ladder, the bottom step could not be seen.

Claimant testified that he could not see the floor of the pit while standing on the ladder or during the performance of his duties. According to Claimant:

"Q. Mr. Sterling, when you are using this step ladder and descending from same, what is your body position in relationship to the motor?

A. Facing the ladder in a bent over position because there is no height in the work area. You can climb up the ladder and squeeze through a small area to get to your work area. When you descend the ladder again you're through the tight area, arms have to be up over my head and you cannot see the last step on the ladder while descending. When you do descend and you reach the floor again you're bent over."

Further, according to Claimant, other employees were working in the area at the time and "other workers do use the tools and they may have walked through the pit area at the time I was up on the ladder kicking the hose or moving it out of their way. Before I climbed the ladder the hose was not at the base of it."

As shown in the record, no prior discipline against Claimant has been exhibited.

Claimant was cited for a "flagrant" rule violation. The relevant rule states:

"4383. When coming out of, from or to any elevated part of train, self-propelled or other equipment, machinery or vehicle or from scaffold or platform or other elevated place, face it and in ascending or descending by use of ladder observe the applicable portions of the following:

(u) When getting off ladder, step or stirrup observe the ground, floor or pavement condition and avoid obstruction, hole, slipping or other hazard."

The burden on the Carrier in this case is to support its charge by substantial evidence in the record. The charge is quite specific. Claimant is not just accused of a safety rule violation. He is charged with a "flagrant" rule violation. Therefore, the Carrier must show substantial evidence of such "flagrant" action. Upon review of the record, we find that the Carrier has not met that burden.

"Flagrant" is defined as "shockingly noticeable or evidence; obvious; glaring;... egregious;...suggesting extreme offensiveness;...so evidence that it cannot be ignored or overlooked." Random House Dictionary of the English Language (2nd ed). Thus, the Carrier's chosen burden in this case by nature of the language of its charge is to show by substantial evidence that Claimant's action not only violated Rule 4383(u), but that in so doing, Claimant's actions fell within the above quoted definition of "flagrant." The Carrier has shown that Claimant tripped over a safety hose while descending the ladder. It has not shown, however, that the action was flagrant. We find the testimony of the Superintendent particularly relevant. His testimony (corroborated by Claimant and others) described the pit as a confined area without direct lighting to the extent that the bottom step of the ladder and ultimately the floor could not be seen. The rule requires that Claimant "observe the ground, floor...and avoid obstruction...slipping or other hazard." which, under the circumstances of this case, may not have been possible because of the confined nature of the area, the lighting situation and the position that Claimant was in so that he could access the work area. Therefore, we cannot say that the Carrier has shown by substantial evidence that Claimant's action was flagrant.

We have reviewed the Awards cited by the Carrier (Second Division Awards 11321, 10817; Third Division Awards 26352, 26183, 26161, 25872) and find them inapplicable. Those awards do not address the issue of an alleged flagrant violation of a safety rule.


We shall therefore sustain the Claim. Claimant shall be compensated for time lost as a result of the suspension, if any. In light of the above, we do not address the Organization's contention that Claimant was deprived of a fair and impartial Hearing.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 31st day of August 1988.