Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 12802
Docket No. 12607
95-2-92-2-146

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

PARTIES TO DISPUTE: (Sheet Metal Workers International
(Association
(
(CSX Transportation, Inc. (former
(Baltimore & Ohio Chicago Terminal Railroad
(Company)

STATEMENT OF CLAIM:

"1. The Carrier violated the provisions of the current and controlling agreement, when on January 24, 1992 they improperly suspended Sheet Metal Worker Roger Barry for five days following an investigation that was held on January 13, 1992. The five day suspension would be served upon Mr. Barry's return to work following an injury.

2. That accordingly, the Carrier be directed to compensate Sheet Metal Worker Barry for five days pay at the pro rata rate and further, compensate Mr. Barry for any overtime or Holiday Pay he may have been deprived of due to his improper and unjust suspension."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employees 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 were given due notice of hearing thereon.

On December 23, 1991, Claimant was notified of an Investigation, to be held January 13, 1992, concerning Claimant's "... responsibility, if any, in connection with your personal injury at Milepost 27.0, Chicago Division, McCook Subdivision, Argo, Illinois, at or about 1515 hours, CSX Standard Time on December 10, 1991." The Investigation was held as scheduled, and on January 24, 1992, Claimant was notified that he would be suspended for five days.

The Organization contends that Claimant was denied a fair hearing. The Organization argues that Carrier did not charge Claimant with any specific Rule violation and characterizes the Investigation as a "fishing expedition."

The Organization also contends that Carrier failed to carry its burden of proving Claimant's guilt of the charges against him. The Organization contends that there was no set procedure for performing the work Claimant was doing at the time of the accident. The Organization further argues that Carrier could only speculate as to how Claimant could have performed the task in question more safely. The Organization cites several Awards involving this Carrier in which claims arising out of discipline for alleged safety violations in connection with personal injuries were sustained in whole or in part.

Carrier contends that the Notice of Investigation gave Claimant proper notice of the precise charge. Carrier maintains that the Agreement does not require that the Notice of Investigation cite a specific Rule. Carrier further argues that it proved that Claimant's carelessness led to his injury. Carrier contends that Claimant admitted that he failed to give sufficient thought to how to accomplish the task in question and failed to ask for help.

The Board reviewed the Notice of the Investigation, which is quoted in relevant part above. Rule 26 of the Agreement does not expressly require that a Notice of Investigation specify the Rule allegedly violated. Rather, it requires that Claimant ". . . be apprised of the precise charge. . . ." The notice in the instant case apprised Claimant of the date, time, location and specifics of the incident under Investigation. It further apprised Claimant that the Investigation was to determine his responsibility in connection with the specified incident. The notice was sufficient to enable Claimant to prepare for the Investigation and present a defense. We find no violation of Rule 26.

We reviewed the record and, based on that review, find that substantial evidence supports the conclusion that Carrier proved the charge against Claimant. Recognizing that each case of this type must be evaluated on its specific facts and record, we reviewed the Awards cited by the Organization and find them not to be controlling.

In Second Division Award 12413, Carrier alleged that Claimant injured himself by jumping from a locomotive roof. Claimant testified that he stepped from the roof and did not jump. There was no evidence that Claimant jumped, and the Board sustained the claim because of the lack of such evidence. Similarly, in Second Division Award 12147, there was evidence only of an injury and no evidence of any misconduct by Claimant causing that injury. As developed below, there is no question in the instant case as to what Claimant's conduct was; the only issue is whether that conduct was sufficiently careless to warrant the discipline imposed.

In Second Division Award 12325, Claimant requested the equipment necessary to perform the job safely and the equipment was not available. In Second Division Award 12309, Claimant was found negligent, but his five day suspension was reduced to one day because Carrier contributed to Claimant's injury by failing to warn him of a potential safety hazard and because a second employee's action also contributed to the injury.

In the case at hand, there is no dispute over what happened. Claimant was operating a backhoe in connection with the installation of gas lines. Toward the end of the day, Claimant had to move a two foot trenching bucket to a secure location. The bucket weighed 200 to 300 pounds.

Usually, to accomplish this task, one would use the six foot scoop bucket attached to the backhoe to scoop up the smaller bucket and move it. On the date in question, however, the two foot bucket was on a raised concrete and steel platform, precluding the Claimant from scooping it up with the larger bucket. Consequently, Claimant lowered the six foot bucket down by the two foot bucket, got off the backhoe and, using his hands, tried to slide the smaller bucket into the larger one. In the process, Claimant's finger got caught between the two buckets and was broken.

Two Foremen testified. The Foreman who gave Claimant the assignment testified that he did not believe that the Claimant would need help in performing the task because he expected Claimant to use the machine to move the bucket. However, he told the Claimant to return and get another employee if he needed help. Claimant did not return for help.

The second Foreman testified that Claimant could have used the backhoe to shove the smaller bucket off the cement and then he could have scooped it up with the larger bucket. Claimant testified that he chose to move the smaller bucket with his hand because that seemed to him to be the easiest way to do it.

Although there is no dispute over what happened on December 10, 1991, the parties do dispute whether Claimant's actions can be characterized as careless or unsafe. Claimant was experienced in operating a backhoe. He knew that the small bucket weighed over 200 pounds and could cause injury. The method he chose to move the bucket may have been the easiest way, but it clearly was not the safest. Claimant should have paid more attention to safety and to minimizing the odds of injury. In light of the uncontradicted evidence in the record, we cannot say that Claimant's suspension was arbitrary, capricious or excessive.

AWARD

Claim denied.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 26th day of January 1995.