

Award No. 14339
Docket No. MW-15536

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Bernard E. Parelson, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

**NORFOLK AND WESTERN RAILWAY COMPANY
(LAKE REGION)**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The suspension of Carpenter Charles Benkovich for 21 days for alleged violation of "Safety Rule No. 1073-U" was without just and sufficient cause and on the basis of unproven charges. (Carrier's File 30-5-104)

(2) The charge "shall be stricken from the record" and "payment allowed for the assigned working hours actually lost while out of the service of the Railroad," as per Rule 19 (f) of the controlling Agreement. (The Employees will file, as a part of our ex parte submission, a verbatim copy of the transcript taken of the investigation held in connection with the aforesaid suspension).

OPINION OF BOARD: This is a discipline case.

On December 21, 1963, Claimant was working as a Second Class Carpenter with B&B Gang No. 4. He had been in the employ of the Carrier for approximately 17 years.

On the date in question, B&B Gang No. 4 was relocating and repairing a sand storage building at Brewster, Ohio. Crane 0029 was used in connection with this work. In the course of his work, Claimant was struck and injured by a foundation timber that was being handled by the crane.

Under date of December 24, 1963, a letter in the form of a notice was forwarded to the Claimant, advising him that he was being charged with a violation of Safety Rule No. 1073, with reference to the incident of December 21, 1963, and that an investigation would be held in the Division Engineer's office at Brewster, Ohio at 8:30 A.M. E.S.T. on December 31, 1963. He was requested to attend and advised that he could be represented at the hearing.

The investigation was held, as scheduled, before Mr. C. F. Nigh, the Division Engineer.

Under date of January 14, 1964, Mr. Nigh, by letter, advised the Claimant that he was guilty of a violation of the Safety Rule and that he would be suspended for 21 calendar days.

On January 23, 1964 an appeal was directed to Assistant Chief Engineer Mr. D. J. White from the decision of Mr. Nigh. This appeal was denied, by Mr. White on March 18, 1964.

On March 24, 1964, a further appeal was directed to Mr. R. L. Mays, Chief Engineer from decision of Mr. White. This appeal was denied by Mr. Mays on May 5, 1964.

On May 20, 1964, a further appeal was directed to Mr. E. B. Hunter, Personnel Director from the decision of Mr. White. This appeal was denied by Mr. Hunter on July 9, 1964.

Under date of April 2, 1965, this Board received from the Organization a letter, dated the same day, in which it advised that it intended to file, within the time prescribed, an Ex Parte Submission with reference to this dispute.

The Ex Parte Submission of both the Organization and Carrier were received by this Board on the 2nd day of July, 1965.

On November 17, 1965, the reply and rebuttal of the Organization to the Carrier's initial submission was received by this Board and on the same day the Carrier's reply and rebuttal to the Organization's submission was also received.

We note that in its reply submission the Carrier for the first time contends that "the claim has never been considered in conference." This is evidently in reply to the Organization's categorical statement of having the claim "properly presented and handled at all stages up to and including the Carrier's highest appellate officer."

Against the present state of the record, best characterized as one of counter-assertions, unsupported by any evidentiary matters, we find and hold that this Board does have jurisdiction.

We examine and consider this claim on the merits.

A full and complete transcript of the testimony adduced at the hearing held in this matter is set forth in the Record.

The Carrier charges a violation of Rule 1073 (u) which reads as follows:

1073... The following PRACTICES ARE FORBIDDEN:

"(u) STANDING UNDER OR UNSAFELY NEAR EQUIPMENT or other heavy material which is being lifted or pulled by rope, chain or cable."

The Claimant bases his claim on Rule 19 (f) which reads as follows:

"If the charge against the employee is not sustained, it shall be stricken from the record. If by reason of such unsustained charge the employee has been removed from position held, reinstatement will be made and payment allowed for the assigned working hours actually lost while out of the service of the Railroad, at not less than the rate

of pay for position formerly held or for the difference in rate of pay earned, if in or out of the service."

This Board has held that in a discipline case it is not its function to determine the credibility or weight of the evidence nor substitute its judgment for that of Management as to the degree of the discipline. We have held, however, that in view of the nature of the proceeding, that 'It was incumbent upon the Carrier to establish the findings on which it assessed discipline by positive evidence. Failure to do that, or when the case is brought here for review on charges of impropriety and unfairness, failure to produce a record disclosing testimony of that character, is fatal and precludes the sustaining of its action.' See Award 2813.

The Carrier to support its findings of a violation of the rule states:

"It is the position of the Carrier that the claimant failed to observe a fundamental safety rule and was responsible for the accident which resulted in an injury to himself, and that such responsibility when considered in the light of HIS PAST HISTORY OF CARELESSNESS JUSTIFIED the amount of discipline assessed against him."
(Emphasis ours)

It also states the following in support of its findings:

"The crane operator is charged with responsibility for the safety of the crane, however the positioning of the men working on the project is the responsibility of the signaler, IN THIS CASE THE CLAIMANT."
(Emphasis ours)

A careful reading of the transcript of the testimony adduced at the hearing fails to disclose any positive evidence to sustain the above statements.

The charge against the Claimant was the alleged violation of Rule 1073 (u) of the Agreement. There was no charge of a "past history of carelessness" on the part of the Claimant that he was obligated to meet at the hearing, and any testimony to that effect cannot be considered or entertained.

With reference to the claim by the Carrier that the Claimant was the "signaler" is contrary to the evidence in the record. In the transcript, we find the following testimony by Paul Geis, 2/C Carpenter on B&B Gang No. 4:

"(60) Q. Who gave the crane operator the signal to shift?

A. I expect I did.

(61) Q. You gave the signal to lift?

A. I expect I did."

This is the only positive testimony in the record as to who gave the signal to the crane operator to lift.

As to the position of the Claimant at the time of the accident we find the following testimony given by the crane operator, Mr. H. S. Emmons:

"(89) Q. Do you recall where Mr. Benkovitch was at the time you made this particular lift?

A. Yes, he was standing in front of me at, I would say approximately the far rail from the timbers. I would judge that would be about 20 ft. (Page 13 of transcript—page 16 of Record)

(107) Q. Mr. Emmons, did you feel that Mr. Benkovitch was in a safe and proper position at the time he was hit by the timber?

A. Yes, I do, because if I had not thought he was in a proper position, I would not have picked up the load.

(108) Q. Did you in any way, after moving your boom toward the left, signal him or make any attempt to tell him to get away from that one spot?

A. No, I didn't.

In Award 891 (Garrison) we held:

"Our function in this case is not to substitute our judgment for that of the carrier or to determine what we might or might not have done had the matter been ours to handle. We are entitled to set aside the carrier's action only upon a finding that it was so clearly wrong as to constitute an abuse of the discretion vested in the carrier."

Based on the record in this case we find that the Carrier's action was clearly wrong and against the positive evidence adduced at the hearing.

We find that there is no positive evidence in this record that Carpenter Charles Benkovitch violated the rule, he is charged with violating.

We find and hold in this case that the Carrier's action was arbitrary, unjust and without any foundation in law and fact, and that

(1) The discipline imposed by the Carrier was arbitrary, unjust and without foundation in law and fact.

(2) That the record of Carpenter Charles Benkovitch be cleared and he be compensated for the assigned working hours actually lost while out of the service of the Railroad in accordance with and pursuant to the provisions of Rule 19(f) of the controlling agreement.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Carrier violated the Agreement.

AWARD

Claim sustained in accordance with Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 22nd day of April 1966.