NATIONALRAIIROADADJDSTMENT BOARD

Award Number 20270

THIRD DIVISION Docket Number CL-20238

Frederick R. Blackwell, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes

(George P. Baker, Richard C. Bond, and Jervis Langdon, Jr., Trustees of the Property of Penn Central Transportation Company, Debtor

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7311) that:

(a) The Carrier violated the Rules Agreement, effective February 1, 1968, particularly Rule 6-A-1, when it assessed discipline of five days suspension on M. J. Tursi, Stores Assigned Laborer, Heavy Repair Shops, Altoona Works, Altoona, Pa.

(b) Claimant M. J. Turzi's record be cleared of the charges brought against him on February 23, 1972.

(c) Claimant M. J. Tursi be compensated for wage loss sustained during the period out of service.

OPINION OF BOARD: This is a discipline case which arose when the Claimant sustained an on-the-job injury while sorting and loading scrap metal in a bin on February 9, 1972. After hearing and findings of guilt, the Carrier assessed discipline of five days suspension against the Claimant in connection with the following charge:

> "Violation of Safety Rule 5165 on February 9, 1972, resulting in personal injury: to wit: 'Keep hand or foot in position where material, transfer plate or other object being handled cannot fall or shift onto or against it, or be caught between object being handled and another object.
>
> 'If impossible to do this, use suitable object as a skid, support or stop at side, at end, on top or under object being handled to provide protection."'

The Petitioner raises two procedural points, one concerning the denial of the Claimant's due process rights and the other concerning the meaning of Safety Rule 5165. The Carrier's objection to consideration of the due process point as not having been raised on the property is well taken and, accordingly, we shall not consider this issue. Award Nos. 16348 and 19590. The Petitioner's second point is that the herein incident is not covered by Safety Rule 5165 because the Claimant's injury did not occur as a result of the Claimant's improper handling of an "object" as contemplated by the rule, but rather as a result of such "object" being placed in a defective steel container, which, in turn, dropped on the Claimant's foot causing injury. Essentially, Safety Rule 5165 tells an employee how to position his hands and feet so as to move an object safely and, if read literally, the rule would not cover the steel container since, in strict technical terms, the container was not the "object being handled" by the Claimant. However, such a construction would be unduly technical in light of the safety purpose inherent in the rule; 'the steel container was an essential item in, and an integral part of, the task involving the "object being handled" and, hence, by reasonable and necessary implication, the container is also covered by the rule. We come now to the Petitioner's remaining contention that the Carrier's evidence does not support its finding that the Claimant violated Safety Rule 5165.

The only hearing testimony on the facts of the incident was given by the Claimant. He testified that he and a fellow worker had the task of moving a brake cylinder, from a pallet over a distance of some twenty feet to a steel container having dimensions of four feet square by 21 inches high. The brake cylinder weighed about 150 pounds. They moved the cylinder from the pallet to a two-wheel cart and thence to the steel container without any difficulty. However, the container had a defect. Three of its four legs rested flat on the floor, but the fourth leg, because of being bent or twisted, stood 3 1/4 inches above the floor. Consequently, when the weight of the cylinder was placed in the container, the suspended leg of the container dropped down on the instep of the Claimant's left foot, resulting in injury. When asked about the appearance of the container, the Claimant testified as follows:

"Q. Did you notice anything unusual about this container prior to placing the cylinder in it? (Underline added)
A. No.
Q. Do you agree that the container was bent and twisted?
A. Yes.
Q. Do you usually use a container that is bent and twisted?
A. No. We get rid of them or send them over to be fixed.

"Q. At any time, did Mr. Pensyl fail to provide you with a proper box or container?
A. No. We usually have enough to work with. This one already had material in it and we were trying to finish loading it. "

The Claimant also stated that the light in the area "wasn't too good."

Before making our findings on the foregoing, and the whole record, we note that the Claimant's knowledge of the defect on the container is a condition precedent to establishing that he violated Safety Rule 5165. We note further that the Carrier's case is predicated on such knowledge having been established, as shown by the following extract from the Carrier's Submission statement:

> "There can be no question that Claimant was aware that the steel container, which was used as a bin for scrap storage, was bent and twisted and could easily shift when he attempted to place scrap material into it by hand."

In another instance the Carrier's Submission states that "Claimant . ..was aware that the steel container was 'twisted' and 'bent' and that containers in that condition were usually sent to the shop to be repaired." The Carrier's conclusion that Claimant was "aware" of the defect, though essential to its case, is simply not supported by the evidence. The unchallenged testimony of the Claimant showed that the light in the area was not good. His testimony also showed that the steel container had been used prior to the herein incident, apparently without mishap, and that he did not notice anything unusual about the container prior to placing the brake cylinder in it. He freely admitted that the container was bent or twisted, but this knowledge came to him by reason of the accident. Thus, the record contains no evidence at all tending to show that the Claimant had any forewarning or prior knowledge that the container had a defective leg which made its use hazardous; consequently, we can but conclude that the record does not contain substantial evidence to support the Carrier's findings of guilt and assessment of discipline. We shall therefore sustain the claim.

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 Employes involved in this dispute are respectively Carrier and Employes 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

The Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 14th day of June 1974.