

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21286
Docket Number SG-21309

Dana C. Eischen, Referee

(Brotherhood of Railroad Signalmen

PARTIES TO DISPUTE: (

(The Long Island Rail Road Company

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Long Island Rail Road;

Appeal from the discipline imposed upon **Mr. W. R. Saar**, assistant signalman, as a result of the **trial** held on Tuesday, May 14, 1974.

OPINION OF BOARD: Claimant, an assistant signalman, **was assigned** on January 19, 1974 to work of splicing cable at Willis Avenue, **Minneapolis**. Part of the work involved cutting insulation from a cable (stripping) with a knife. **While** performing this work Mr. **Saar** sustained a severe cut on the inside of his left wrist which required nine stitches to close. On January 29, 1974 the Medical Department filed a written accident report reading as follows: 'While holding cable with Left hand and knife in right hand, knife slipped off cable and cut Left wrist.' Under date of February 6, 1974 Carrier's Engineer - Signal Maintenance notified Claimant to appear for an investigation on **March 6**, 1974. Following the investigation, the same Carrier official charged Claimant with violation of Safety Rule No. 3124 which reads as follows:

"3124. When using sharp or pointed tool turn the edge or point away from the body, if practicable."

The trial was held, following postponements, on May 14, 1974 with the Engineer - Signal Maintenance serving as hearing officer. Claimant was the only witness at the hearing and he categorically denied violating the safety rule. His only other testimony was that he was wearing Leather gloves when the accident occurred and he verified the accuracy of the written accident report. The hearing transcript then records the following exchange among Claimant, his representative and the hearing officer; beginning with the latter's question:

"Q. Can you explain how, if you complied with this rule, you sustained a cut on the inner right side of your wrist?

Mr. Sottile

As Mr. **Saar's** representative, I must caution **him** in answering that question in the extent that the carrier has yet to present witnesses....

"Mr. Dirr

Mr. **Sottile**, you will have your chance to cross-examine.

Mr. Sottile

Mr. Saar, as the General Chairman I **must** advise you because the **carrier** has not presented witnesses and or evidence to give credence on their charges and that the burden of proof rests with the carrier to prove **its** charges therefore it is my intent in **informing** you of your right that you do not **have** to speak or testify **against yourself**. It **is** the organization's content that the carrier **has** to prove **that** you, in fact, did violate Safety Rule **No. 3124**.

Mr. Dirr to Mr. Saar

Q. **Mr. Saar** do you choose to **stand** mute in **answering my** last Quest Ion?

A. I **will testify in my** defense when and if carrier presents witnesses **and or** evidence to prove its charger **as set forth** in the trial **notice**."

Thereafter the hearing concluded without further evidence being taken. Subsequently, on June **6, 1974** a **Notice of Discipline (G-32)** **was sent** to Claimant assessing a written **reprimand** for violating Safety Rule **No. 3124**. **The G-32 was signed** by the ubiquitous **Engineer - Signal Maintenance**. **Appeal** for reversal of the discipline were **unavailing** on the property and the matter comes to us for **deposition**.

The Organization advanced on the property certain Constitutional arguments relative to the lack of witnesses for Carrier and alleged attempts to **make** Claimant incriminate himself. In **our** judgment these propositions are **not** well-founded on this record. We think it is manifest that **an employe** need **not** testify against his wisher in a **disciplinary** hearing but he **refuses** to do so at his peril. **This is** not to say that refusal to reply to unsupported accusations is **tantamount** to an admission of guilt **and awards** which **seem** to so hold clearly **are wrong**. **Cf Award 20771**. The accused employe &es not have the burden of going **forward** or the ultimate burden of persuasion to prove himself innocent of charges. In discipline matters the principle is too well established to require citation that Carrier has the **evidentiary** burden to present **substantial** evidence in testimonial or documentary **form** to support **its** charges. **This** case thus presents a Constitutional problem but must be **resolved** simply on the basis of burden of proof.

In refusing to offer a defense, Claimant, on the advice of his representative, expressly contended that he was under no **evidentiary** burden to do so since Carrier had not presented sufficient evidence to shift the burden to him.. This is a calculated risk in adversary proceedings and the **employee assumes** the risk attendant on such a posture. In this particular **case**, however, we **must** conclude that **Claimant** and his Organization were correct in their assertion. There is not an iota of probative evidence from which a disinterested reviewer could conclude that Claimant violated the rule. He asserts that he **did not** and Carrier's hearing officer says, in effect, that he must have or else the accident could not have occurred. The able advocate for Carrier at the panel hearing attempted to embellish that **simplistic** assumption with a sophisticated res ipsa loquitur **argument**. But the basic fallacy of Carrier's assertions is not altered by translating it into Latin. The basic **assumption** that the accident could not have happened **unless** Claimant **was** negligent or violated the **safety rule** doer not obtain given the facts of record before us. Carrier has failed to present substantial record evidence to support its charge and the claim accordingly must be sustained. The G-32 Notice of Discipline shall be repealed. Certain other allegations raised by the Organization were not handled on the property and will not be afforded our attention herein.

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 Agreement was violated.

A W A R D

Claim sustained. **The** Notice of Discipline (G-32) of June 6, 1974 hereby is repealed.

NATIONAL RAILROAD ADJUSTMENT BOARD

By Order of Third Division

ATTEST:


Executive Secretary

Dated at Chicago, **Illinois**, this 12th day of November 1976.