NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 25146

THIRD DIVISION

Docket Number MW-24009

Wesley A. Wildman, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes

(The Denver and Rio Grande Western Railroad Company

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

(1) The discipline (sixty demerits) imposed upon B&B Painter D. L. Pisarcsyk for alleged "use of improper tool" on December 18, 1979 was arbitrary, unwarranted, without just and sufficient cause and on the basis of unproven charges (System File D-4-80/MW-19-80).

(2) The claimant's record shall be cleared of the charge leveled against him.

OPINION OF BOARD: Claimant in this case is a B and B Painter with sixty demerits assessed against his record by Carrier for alleged use of improper tool on the job.

On the day of the charged transgression, a group of four employes, two from the B and B crew (including Claimant) and two from a Section crew, were engaged in pulling lag screws and rolling planks to clear a crossing in Pueblo, Colorado. Claimant alleges that while attempting on this day to remove a lag screw with a claw bar, a sudden slip of the end of the bar out from under the head of the screw resulted in a fall which caused an injury to Claimant's back.

The tools available to, and primarily employed by, this group for pulling the lag screws on the shift in question consisted of claw bars and track wrenches. These tools had been brought to the job site and provided by the Section crew members, rather than by the B and B crew team who were part of the work group. The record discloses that somewhat more sophisticated (and, under certain circumstances, safer) equipment exists for the pulling of lag screws, namely, ratchet wrenches and drift jacks used in conjunction with claw bars.

The record makes it clear that ratchet wrenches and drift jacks are in the possession of, and normally available only to, B and B crews. When Section crews pull lag screws, they typically employ only the equipment which was being used on the day in question, i.e., claw bars and track wrenches.

There is conflicting testimony on the record as to whether the two B and B men (including Claimant) were instructed by supervision to take their own (optimum) B and B equipment for pulling lag screws, or whether they were told that adequate equipment would be available on the job site. Also, the record is unclear concerning the availability of properly operating lag screw pulling equipment at the B and B garage at the time the B and B team left for the crossing site.

In any event, whether the B and B team could have or should have taken their own equipment for pulling lag screws to the job site is not, in the opinion of this board, a critical issue in this case. It seems unarguable to us from the record that the utilization of the Section crew's equipment by this entire work group on this shift clearly constituted at least minimally normal and acceptable (although not necessarily best) practice and procedure in terms of both safety and efficiency for the pulling of lag screws. Perhaps when B and B crews do lag screw pulling with their own more sophisticated equipment they do it more efficiently and safely. However, apparently Section crews routinely do lag screw pulling in a manner we must infer is acceptable to the Carrier, utilizing precisely the same equipment which was available and employed on the shift in question. Certainly, that threshold with respect to safety at which a refusal by Claimant to perform would have been legitimate or countenanced by Carrier was not reached.

Carrier has made much of the fact (and justifiably so) that Claimant made a de facto admission against interest with regard to the safety issue when he was quick to state on his accident report that the cause of his alleged injury was an improper tool. Moreover, Carrier points out, wholly aside from what was evidently the initial and larger concern as to whether the appropriate type of equipment had been employed by Claimant, Claimant asserted at the hearing on the property that excessive wear on the claw bar had caused the slip, implying that his accident report reference to "improper tool" was meant to designate the defective (worn) claw bar he was using on the shift in question. Carrier asserts that, in that event, Claimant had an obligation, per applicable safety rules, to inspect his claw bar before use and not to proceed if he found. it worn to the point where it might present a safety hazard.

Given the entire record in this case one might speculate, somewhat uncharitably, that Claimant's easy assertions of "improper tool" as a cause of injury were meant to assure that his back condition would be accepted without question as having been the result of the alleged accident and thus job related. Be that as it may, however, we have just found that with regard to type of equipment employed on the day in question, in fact no obvious or palpable safety hazard existed which should have cautioned an employe against proceeding, despite any inferences one might try to draw from Claimant's mildly self-incriminating statements on his accident report. Similarly, despite Claimant's testimony regarding "wear" on the claw bar discovered after the fact of the slip, there is no substantial evidence on this record of any defect in the claw bar obvious to warn the average employe against its use.

Much evidence on the record as to when it first became apparent that Claimant was injured, or whether Claimant officially notified Carrier of his injury in timely fashion, indicates that Carrier was obviously dubious (possibly with good reason) as to whether any mishap with the claw bar actually occurred which could have been the cause of Claimant's subsequent back condition. However, the question of job relatedness of Claimant's back condition (i.e., whether any accident actually occurred as alleged/, whether Claimant timely and properly reported the alleged accident, etc., are issues clearly not before the Board in this case. The only question we have is, has Carrier established that Claimant, whether as a result of mis- or mal-feasance (carelessness or willful, conscious error), departed from at least minimally acceptable safe practices with regard to the use of tools on the day in question. The answer of the Board is no. Accordingly the claim must be sustained.

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

That the Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois this 9th day of November 1984.