Award No. 15582
Docket No. TE-14470

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Daniel House, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION (Formerly The Order of Railroad Telegraphers)

THE PENNSYLVANIA RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on The Pennsylvania Railroad Company, that:

1. Carrier erred when it found Mr. J. M. Hersh guilty of charges made as a result of occurrence on November 17, 1961, while on duty as Block Operator at Lamokin Block Station.

2. The discipline of ten (10) days, reduced to three (3) days, is harsh and severe and unsupported by any evidence or testimony produced at investigation, trial, or appeal; and Carrier shall clear Mr. Hersh's service record of the charges.

3. Carrier shall compensate appellant, J. M. Hersh, for all time lost from his assignment as a result of these charges and eight (8) hours pro rata rate for attending both the trial and the appeal.

OPINION OF BOARD: On November 17, 1961, Claimant, a Block Operator, had an accident during the course of his work and hurt his back. On December 29, 1961, Carrier's Assistant Supervising Operator, Mr. F. J. Edzwald, held a hearing to investigate the "alleged personal injury"; on January 25, 1962, Mr. Edzwald conducted a trial of Claimant on charges that on the date of the accident Claimant had been in violation of Rule "M" of the Book of Rules for Conducting Transportation. Following the trial Claimant was notified that he would be suspended for 10 days as discipline for his violation of Rule "M"; the suspension was subsequently reduced, "as a matter of leniency," to 3 days.

As described by Claimant during Carrier's hearing on the injury, and uncontroverted at both that hearing and at the trial, this is what occurred:

". . . On or about 8:00 A. M., I was given a train movement out of Highland Avenue by the Yardmaster, W. A. Diggins. This movement necessitated reaching the farthest end northward on the interlocking machine, No. 25 lever. In doing so, I leaned back, pulled

No. 25 lever, and as I did, the chair tipped over, my feet going up and my back going down and my falling backward in the chair. The man I relieved, Mr. R. C. Douglas, that morning loosened the tension spring and this loosening of the tension spring caused the chair to tip over. The movement which I described and my movements in this chair have been made by me safely, with no accident such as this occurring, for the past three years . . ."

There is no evidence that Claimant was ever notified precisely what part of Rule "M" he was charged with violating; but early in the trial Mr. Edzwald, who questioned Claimant, called his attention to that part of the Rule which states: "Employes must exercise care to avoid injury to themselves and others," and Carrier in its correspondence and in its Ex Parte Submission indicated that it was this part of Rule "M" which it found Claimant to have violated. In his letter dated March 21, 1962, announcing reduction of the penalty, Carrier's Superintendent, Personnel, more precisely identified the carelessness of which Carrier found Claimant guilty:

". . . the trial record has developed you did not exercise care to avoid injury when you leaned back in your chair, causing the chair to tip over and you to fall to the floor, whereas you could very readily have turned around in the chair and thrown the lever, which would have been the safe manner of performing this work . . ."

Thus Carrier did not find Claimant guilty of carelessness for failing more promptly to report the accident so that more prompt treatment might have reduced the extent of his injury, nor did Carrier find him guilty of carelessness for not sooner discovering, by checking or otherwise, that the tension spring was loose, both of which charges Carrier's questioning at the hearing and trial indicated Carrier had in mind; Carrier found him guilty of carelessness only because, instead of turning around in the chair and leaning forward to throw the lever, he leaned back in the chair and reached back to perform the task.

THE ISSUES BEFORE THE BOARD

In the Joint Submission appealing the decision of the Superintendent, Personnel, to the Manager, Labor Relations, the Organization contended in part "that the charge is neither specific nor correct," arguing:

"While it is customary for charges to be specific, here we have an employe who has been tried and found guilty, yet the Carrier in 16 pages of written testimony has failed to specify exactly what the defendant is guilty of."

But this contention was not pursued by the Organization in subsequent appeal steps, nor taken as a position in the Organization's Ex Parte Submission to us. There the Organization only took the position "that the discipline assessed was unduly harsh and severe and unmerited under the facts and circumstances set forth in the transcripts."

Thus there is no contention before us that the trial was not fair or impartial or that there was any procedural defect in the handling of the matter. We are left with the issues of whether Carrier's acts in this case were adequately justified: first, in finding Claimant guilty, and then, if so, whether the discipline was reasonable.

ADEQUACY OF PROOF

According to Carrier's argument in its Ex Parte Submission, we should not upset its decision that Claimant was guilty of the Rule violation unless we have conclusive proof that the decision was arbitrary, capricious or unreasonable. This is not a correct statement of the situation. In discipline cases the burden is on Carrier to prove that the guilty verdict is adequately supported by evidence: unless Carrier's determination of Claimant's guilt is supported by a preponderance of weighty evidence, we will not support a guilty verdict. It is the penalty which we would be reluctant to alter without proof that it is arbitrary, capricious, unreasonable or unjust — in discipline cases it is in the area of penalty that we are reluctant to substitute our judgment for Carrier's.

WAS CLAIMANT PROVED GUILTY?

Does the evidence in the transcripts adequately support Carrier's conclusion that Claimant was not exercising care to avoid injury to himself within the meaning of Rule "M" when he leaned back to pull lever No. 25 instead of turning his chair around and facing the lever? According to the transcripts, Claimant repeatedly insisted that it was safer for him to pull the lever by leaning back. In the course of the December 29th hearing:

"Q. (by Mr. Edzwald) Why would you not face north to throw this lever, therefore not necessitating your leaning back?

A. I find it more comfortable for me and safer."

and

"Q. Do you have an opinion as to how this accident could have been prevented?

A. If Mr. Douglas had not loosened the tension springs in the chair this would never have occurred. I set [SIC] in the same type chair for nineteen and a half years, eight hours each day, and it never occurred before, so there is no reason for me to believe otherwise."

And in the course of the January 25th trial:

"Q. (By Mr. Edzwald.) Then from your position at the desk with your back to the machine could you have swiveled the chair, therefore, turning your body to the left resulting in your facing north or swinging around a little farther facing the machine?

A. Yes.

Q. Then in this position it would not have been necessary for you to lean back in the chair but instead you would have actually been sitting up straight or leaning slightly forward?

A. I would have to lean slightly forward. Not only would I have to lean slightly forward but raise my body from the chair.

Q. Would not then this have been a safer procedure to follow, that is turning to the left and either leaning forward or raising

from the chair to throw the lever as compared to facing the opposite direction necessitating leaning back in the chair and throwing the lever?

A. Not necessarily . . . Procedure which I use and which I dscribed, I find adequately safe enough, not being instructed to do otherwise. 19½ years of service I feel the position I assumed at the time of the accident was done safely."

There is no positive evidence in the transcripts to support the implication in Mr. Edzwald's questions that swinging around in the chair to pull the lever was a safer procedure than leaning back in the chair; the implication is supported only by inference drawn from the question itself. To accept this as evidence of any substantive weight not only would we have to be convinced that leaning back in a swivel chair fitted with a tension sprung reclining back is inherently more hazardous than swivelling around in it, but we would also have to be convinced that such a differential in hazard is so self-evident as to require no proving. We find no basis to adopt either of these convictions.

Thus we conclude that Carrier did not have adequate evidence before it to conclude that Claimant was guilty of the carelessness charged against him. Carrier's repetition of the implication in Mr. Edzwald's question as a fact on the basis of which it found Claimant guilty is simply not reasonable.

Since we find that Carrier's decision that Claimant was guilty was not based on adequate evidence, it is not necessary for us to consider whether the penalty was reasonable. We will modify the remedy claimed in Item 3. of the Claim by requiring that Carrier compensate Claimant for all time lost from his assignment as a result of the suspension and trial; there was no showing that Carrier is responsible to pay for time spent by Claimant at appeal hearings.

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 Carrier violated the Agreement.

AWARD

Claim sustained as modified above.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 26th day of May 1967.

CARRIER MEMBERS DISSENT TO AWARD 15582, DOCKET TE-14470

The majority seriously misstates the basis upon which this Board should consider the trial record in disciplinary matters. It has been repeatedly established by prior awards that the only proper function of the Board in discipline matters is to determine whether there is some substantial evidence to sustain the Carrier's action. This Board has repeatedly stated the proper tests. The following quotations are only a few of the many decisions which have been made which indicate that the tests adopted by the majority in this case are erroneous.

AWARD 5032 (Referee Jay S. Parker)

"Our function in discipline cases is not to substitute our judgment for the company or decide the matter in accord with what we might or might not have done had it been ours to determine but to pass upon the question whether, without weighing it, there is some substantial evidence to sustain a finding of guilty. Once that question is decided in the affirmative the penalty imposed for the violation is a matter which rests in the sound discretion of the Company and we are not warranted in disturbing it unless we can say it clearly appears from the record that its action with respect thereto was so unjust, unreasonable or arbitrary as to constitute an abuse of that discretion."

AWARD 9449 (Referee Johnson)

"Organization's contention that Carrier discharged ticket seller 'without conclusive proof' that she was involved in irregularities overruled because '* * * the rule is well established that in disciplinary cases it is not the province of the Board to weigh conflicting evidence or substitute its judgment for that of the Carrier (Awards 7020, 6866, 5427 and many others), and that even though evidence is denied or disputed the Board will not interfere with disciplinary action based on substantial competent evidence (Awards 9178, 9046, 9036, 8888, 8832, 8808 and others). Thus we are not in a position to consider whether the evidence is conclusive, or even to decide whether the weight of the evidence sustains the action appealed from. Our authority in that respect is limited to the question whether there is such a lack of any substantial evidence as to justify the conclusion that the Carrier's action was arbitrary, capricious, without just cause, or based on doubt or speculation.'"

AWARD 10571 (Referee LaBelle)

"The Board has followed the rule of this Division that we do not resolve questions as to the credibility of the witnesses nor the weight to be given their testimony; that is the function of the trier of facts. This does not mean we were or are precluded from carefully reviewing all of the evidence of record to determine whether it supports the action taken. Our appellate function is necessarily limited and we should refrain from substituting our judgment for that of the Carrier in disciplinary cases unless there is an abuse of discretion or substantial error."

"In discipline cases, the Board sits as an appellate forum. As such, our function is confined to determining whether: (1) Claimant was afforded a fair and impartial hearing; (2) the finding of guilty as charged is supported by substantial evidence; and (3) the discipline imposed is reasonable.

We do not weigh the evidence de novo. If there is material and relevant evidence, which if believed by the trier of the facts, supports the finding of guilt, we must affirm the finding."

The majority's discussion of the adequacy of proof is contrary to these awards and constitutes an unjustified assumption of authority.

C. H. Manoogian
R. A. DeRossett
W. B. Jones
J. R. Mathieu
W. M. Roberts

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