NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21286
Docket Number SG-21309

Dana C. Eischen, Referee

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(
(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, Mineola. 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 question?

A. I will testify in my defense when and if carrier presents witnesses and or evidence to prove its charges 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. Appeals 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 wishes 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 does 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 no Constitutional problems 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 employe 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 does 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 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. The Notice of Discipline (G-32) of June 6, 1974 hereby is repealed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

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