

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26089

Docket Number MW-25999

Lamont E. Stallworth, Referee

PARTIES TO DISPUTE: ((Brotherhood of Maintenance of Way Employees
(Grand Trunk Western Railroad Company

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

1. The discipline (reprimand) imposed upon Mr. R. M. Rose for alleged violation of 'Rule 3113' on February 10, 1983 was arbitrary, capricious, unwarranted and on the basis of unproven charges (System File D-D-1623).

2. The claimant's record shall be cleared of the charge leveled against him and said reprimand removed from his record."

OPINION OF BOARD: The instant case involves a dispute over discipline the Claimant received for alleged responsibility for sustaining an injury above his left eye in a work accident.

Claimant is employed as a utility man at Lang Yard, Toledo, Ohio. He was engaged in the removal of ceiling molding under the supervision of B & B Foreman C. E. Billmaier when the accident occurred. Claimant has a clean discipline record.

Carrier contends Claimant failed to comply with Safety Rule 3113 provisions for proper and safe procedures to follow when using a bar or lever which resulted in personal injury to himself on February 10, 1983.

A Hearing was postponed and held on February 23, 1983. Claimant was found guilty and discipline administered was a letter of reprimand.

Carrier contends that Claimant's admitted knowledge that molding may suddenly loosen from a concrete wall confirms that he should have used extra caution and clearly indicates that he did not fully comply with Rule 3113.

The Organization asserts that a review of the Transcript firmly establishes that Claimant clearly complied with the safety provision of said Rule.

The Organization further asserts that B & B Foreman Billmaier's testimony, for all intent and purposes, corroborates the Claimant's testimony that he had been working safely in compliance with the Safety Rules, although he did not actually see the accident.

The Organization directs us to a series of Awards involving Rules and circumstances identical to that in the instant case:

Second Division Award 6277:

"We have carefully reviewed the evidence of record in this case, and being ever mindful of the original charge, ... we are unable to conclude that Carrier has sustained its burden of proof in this case. In essence, Carrier is requesting this Board to adopt their conclusion that Claimant is guilty as charged without presenting a scintilla of direct, positive evidence to support their position. A mere recitation of the factual situation absent corroborative evidence, does not lead us to the same conclusion as Carrier's."

The record in the instant case consists almost entirely of Claimant's testimony. In the Board's Opinion, his testimony does not establish necessary facts to support allegations of carelessness or negligent conduct. (See Third Division Award No. 1235 and Awards 27 - S.B.A. No. 54).

Claimant repeatedly stated throughout the Transcript that he felt that he had complied with Safety Rule 3113.

The fact that Claimant sustained an injury, does not, in and of itself represent evidence of Safety Rule violation. "The fact that he had an injury is not controlling." (Second Division Award 6306).

The facts in the instant case are sufficiently similar to Third Division Award 12535 to warrant the same conclusion that Carrier did not establish that Claimant committed an act contributory to the accident.

"This kind of negligence is within the minimal area of human fallibility and does not deserve to be regarded as having the dimensions of a culpable act of significant carelessness which the penalty presumes."

The Organization argues that Claimant was singled out for a Hearing. It was undisputed that six (6) other employees who sustained injuries were not subject to an Investigative Hearing.

The Organization argues further that Claimant was not accorded due process when the Hearing decision was rendered by a Carrier Officer who was not present at said Hearing. The Board held in Third Division Award 13240 that, "It is offensive to the concepts of fairness and impartiality that credibility was determined and decision made by Superintendent Brewer who . . . was not present at the hearing." In the foregoing Award, the charge was not sustained.

Finally, Carrier contends the reprimand is appropriate because the injury could have been more serious; and, it was designed to eliminate personal injuries.

Here, as in the case decided by Award 22008:

"This Board does not accept such contention as valid. The reprimand in question is based upon alleged failure to comply with operating rules, and the Carrier has failed to prove by clear and convincing evidence that a violation occurred. Therefore, there is no basis for any disciplinary action -- even a reprimand."

In the Board's view, the record indicates excessive, improper and unwarranted application of the Rules and unfair treatment of Claimant. Accordingly, the Board concludes that the instant claim is meritorious.

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

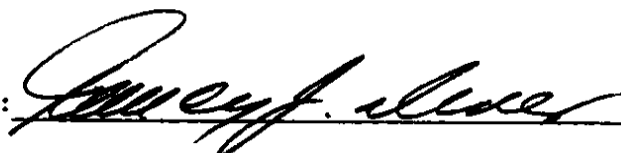
That the Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:



Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 31st day of July 1986.