

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISIONAward No. 28465  
Docket No. SG-28572  
90-3-88-3-395

The Third Division consisted of the regular members and in addition Referee M. David Vaughn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen  
(CSX Transportation, Inc.  
(Baltimore and Ohio Railroad Company)

STATEMENT OF CLAIM: "Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Baltimore and Ohio Railroad (B&O):

Claim on behalf of Brother W. A. Emahiser, that his record be cleared of a five-day suspension (overhead) deferred, account of the Carrier violated the current Signalmen's Agreement, as amended, particularly Rules 50 and 51, when it failed to find him guilty as charged during hearing of July 17, 1987. Carrier file: 15-50 (87-55)."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

The Claimant is employed as a Signal Helper. He has nine years of service. Claimant's responsibilities includes the construction and maintenance of signal equipment within an assigned territory.

Claimant testified that, on Wednesday, June 16, 1987, at 3:00 P.M., he had completed work on a hot box detector and was driving away from the work site in a Company truck, along an access right of way, when he noticed that a pair of pliers had fallen off his truck. He acknowledged that he had left the pliers unsecured. Claimant returned to the area where the pliers had fallen into a foot-deep, two by three foot hole in the right-of-way. He testified that, as he bent to reach the pliers, the ground at the edge of the embankment gave way and he slipped, twisting and injuring his back.

Claimant filled out a Personal Injury Report shortly after the accident stating that "while walking along lane to hot box det[ector] I slipped into a hole and injured my back." He obtained medical treatment from his personal doctor the next day. As a result of the apparent injury, Claimant was absent from his assignment three days.

The Carrier charged Claimant with violation of its Safety Rule (SF-32), H, #5, and 44 and convened an Investigation to determine his responsibility in the incident giving rise to his injury. Rule H states:

"It is the duty of every employee to use personal judgment and exercise care to avoid injury to themselves or others. No job is so urgent that sufficient time cannot be allowed to perform all work safely."

Rule 5 states:

"Employees must use normally accepted and designated paths, walkways or routes in going to, from and within yards, shops, stations, buildings and other places of employment. Short cuts are prohibited."

Rule 44 states:

"Employees on or about tracks must always be alert to keep out of danger, exercising care to avoid injury to themselves and others. Nothing in these rules are to be construed as relieving any employee from performing his full duty in this respect."

As a result of the Investigation, the Carrier found Claimant at fault and assessed him with 5 days of overhead suspension with a probationary period of 3 months, effective July 22, 1987.

The Carrier contends that Claimant was in violation of Safety Rules H, 5, and 44 because he failed to properly secure his pliers and then failed to exert reasonable caution around a known danger in retrieving the pliers, since Claimant had testified he had known about the hole. The Carrier argues that, in light of Claimant's two previous on-duty injuries, the five day overhead suspension and three month probation period was justified and there is no basis for removing that disciplinary action from his record.

The Organization argues that the Carrier failed to prove that Claimant failed to exercise a proper degree of care when the injury occurred on June 16, 1987. It urges that the evidence indicates that Claimant did not voluntarily injure his back, but was involved in an unforeseeable event which took place despite his exercise of due care. It urges that the accident would not have taken place if the Carrier had filled in the hole, consistent with its obligation to provide a safe working place. The Organization urges that the discipline be rescinded and that Claimant's personal record be cleared.

It is well-established that the obligation to work safely is a primary responsibility of employees and that the failure to do so constitutes a basis for discipline.

As in any discipline case, it was the burden of the Carrier to prove that the Claimant failed to use proper judgment and due care to avoid injury to himself (Rule H), failed to use an accepted and designated route (Rule 5), and failed to be alert and use care to avoid injury (Rule 44).

The record does not support a finding that Claimant failed to use established and designated paths or that he used a shortcut. Indeed, the record indicates that the roadway was regularly used by Company vehicles, with the Carrier's knowledge, to reach the hot box detector on which Claimant had been working. The Claim is sustained with respect to the violation of Rule 5.

Lack of care, poor judgment, or lack of alertness may be inferred from the circumstances of an employee's injury. However, injuries may also be caused by many factors other than employee fault. In the instant case, the Carrier points to the Claimant's failure to secure his pliers as demonstrating his lack of care. That failure might well support discipline; indeed, failure to secure tools is, itself, a safety violation, but one with which Claimant was not charged. Although the Claimant's failure to secure his pliers set in motion a sequence of events which - several steps along the chain - that failure was not the proximate cause of Claimant's injury and is not sufficient to establish Claimant's violation of the Rules.

What remains in the record is Claimant's description in his report and his testimony as to the size and depth of the hole, the rough terrain, and the apparent softness of the ground, and that when he placed his foot on the edge of the hole, it gave way unexpectedly, causing his weight to shift abruptly and causing the injury. The Board is not persuaded that the Carrier's obligation to provide a safe work place extends to filling the ruts in access ways occasionally used by vehicles and declines to find that the Carrier violated that obligation.

The size of the hole and the manner in which the Claimant approached it supports the charge. Claimant saw the hole before he stepped up to it. The hole was sufficiently large that it should have alerted him that it constituted a danger; and he knew, or reasonably should have known, that the sides of such holes are prone to give way; and, in the exercise of judgment and care, he should have taken precautions to avoid the injury. He failed to do so.

Claimant's two previous on-job injuries, including a sprained knee when he fell into a hole, support the Carrier's contention that he had difficulty exercising due care.

The Board is persuaded that Claimant's conduct was in violation of Rules H and 44, but not Rule 5. The penalty of a five day overhead suspension, with three months probation for the violations, was not arbitrary or excessive.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:   
Nancy J. Dever- Executive Secretary

Dated at Chicago, Illinois, this 19th day of July 1990.