PUBLIC LAW BOARD NO. 2535

Joseph Lazar, Referee

AWARD NO. 8
CASE NO. 8

PARTIES TO DISPUTE) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
and
BURLINGTON NORTHERN (Former Joint Texas Division)

STATEMENT OF CLAIM:

1. That the Carrier violated applicable Agreement when on June 11, 1982 they dismissed B&B Carpenter J. R. Collier from the service, said dismissal based on frivolous and unsustained charges and without according Claimant due process.

2. That Claimant J. R. Collier be reinstated to the service with seniority, vacation and all rights unimpaired, and that he be compensated for loss of earnings suffered account the Carrier's improper action.

FINDINGS: By reason of the Memorandum of Agreement signed November 16, 1979, and upon the whole record and all the evidence, the Board finds that the parties herein are employe and carrier within the meaning of the Railway Labor Act, as amended, and that it has jurisdiction.

B&B Carpentar J. R. Collier, on June 11, 1982, was dismissed from the services of the Carrier for "violation of Rules 1, 2, 564 and 567(c), of the Burlington Northern Safety Rules, for your responsibility in inflicting personal injury on fellow employee, Bryan Elliott, on April 29, 1982; and for violation of Rules 564 and 567 for your responsibility in inflicting personal injury on fellow employee, G. R. McDonald, on May 5, 1982, as evidenced by formal investigation afforded you on May 17 and May 24, 1982."

The Organization contends that the Carrier's denial of postponement of investigation after May 24, 1982, following initial postponement of investigation from May 17 until May 24 in order to enable Claimant to obtain representation, constituted a due process violation. On May 17, 1982, the Claimant wrote to the Trainmaster: "In regard to my investigations scheduled for Monday, May 24, 1982, at 9:30 a.m. and 1:30 p.m., I request that they be postponed until I am able to get Mr. J. W. Keefer, who is out of state under doctor's care, is able to be present and represent me." In response, the Carrier wrote Claimant: "...You were informed Monday, May 17, 1982 that it was your responsibility, as stated in the notice, and you were given the telephone number of Mr. Lewis Peoples, Local Chairman, BMWE, with advice to contact him for representation. Further, you have Mr. Ben Ochoa, General Chairman, BMWE, and others who are qualified to represent you under the agreement. Again, your request for postponement of the investigations is denied. Investigations will be held as scheduled."

Rule 26 (a) of the Parties' Agreement provides in part: "...may be represented by his duly authorized representative of the Organization party to this Agreement." The choice of "his duly authorized representative of the Organization party to this Agreement" does not contemplate selection by the Carrier. In the Board's opinion, the naming of the Local Chairman of the Organization, and the naming of the General Chairman of the Organization, in the Carrier's response to Claimant, was intended solely to be of possible assistance to Claimant in obtaining representation, and was not at all intended to determine or to influence determination of Claimant's "duly authorized representation of the Organization party to this Agreement." The Carrier did not violate the language or the spirit of Rule 26(a).

The facts are not in dispute that Claimant sought hearing postponement in order to have representation of Mr. J. W. Keefer, who was "out of state under doctor's care". It is the duty of an accused employee to secure an available representative or to agree upon a certain date for the holding of an investigation; he does not have the right to insist upon an indefinite delay for the securing of a representative. In the circumstances, there was no violation of due process by denial of further hearing postponement.

Burlington Northern Safety Rules 1, 2, 564 and 567(c) read:

"Rule 1 - Safety is of the first importance in discharge of duty. In case of doubt or uncertainty, the safe course must be taken. Employees who persist in unsafe practice to the jeopardy of themselves and others will be subject to discipline even though the act or acts do not violate a rule."

"Rule 2 - Knowledge of and obedience to the rules is essential to safety. The fact that an employee may not have been examined on certain rules or regulations will not be accepted as cause for failure to be familiar with them. The railroad reserves the right to examine its employees on any portion or all of the rules at any time. If in doubt as to the meaning of these rules, employees must apply to the proper authority of the railroad for an explanation. Any violation of the rules must be reported promptly to the proper authority."

"Rule 564 - Employees will not be retained in the service who are careless of the safety of themselves or others, disloyal, insubordinate, dishonest, immoral, quarrelsome or otherwise vicious, or who conduct themselves in such a manner that the railroad will be subjected to criticism and loss of good will."

"Rule 567(c) - Employees must .... (c) exercise care to prevent injury to themselves and others."

On April 29, 1982, while adzing shims, Claimant struck a fellow employe on the head on a downward stroke of the foot adze. The fellow employee was wearing a safety helmet at the time, but he received a wound requiring three stitches to close. The incident is described by Claimant: (Tr., p. 20)

"Q. Would you, for the record, describe the incident as it happened?
A. There were three of us adzing the shims. I was on the middle one and we had been working about half way, we started at one end and we were about half way to the other and Bryan was about half way on his and I turned sideways. I was watching the chalk line when I brought the adze up then when I brought it down I actually struck Bryan Elliott because I was concentrating on the line.

Q. Was the direction of the movement of the adze at the time you struck Mr. Elliott in a downward movement or upward movement?
A. Downward.

Q. What distance from you was Mr. Elliott working?
A. Approximately four feet."

The injured fellow worker described the incident: (Tr., p. 16)

"Q. For the record, in your own words, would you describe that incident?
A. Okay. It was about ten after nine, and we had three shims adzing down, to be shims, parallel to each other. Benjamin Gore was on the outside of the track, Rodney Collier was working on the center one and I was on the one adjacent to the track next to it, and I was facing south adzing along with the grain of the shim and the next thing I knew I was hit in the back of the head. I didn't see it coming or anything like that.

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Q. You were working back to back on adjacent shims?
A. They are all laying in rows parallel to each other, and I was facing this way and Rodney was facing this way, and some how I got hit in the back of the head, and we measured and they were five feet apart."

There is no contention in the record by anyone, including the injured fellow worker, that Claimant intentionally struck his fellow worker with the foot adze. The adze, as is commonly known, is an extremely dangerous tool. "The Devil himself fears the adze" is an apt saying with a sharp impact. Obviously, in wielding such a possibly deadly tool, one must exercise a heightened caution and care. The Claimant was, admittedly, "concentrating on the line" when he struck his fellow employee on the head. Further, he was "approximately four feet" from his fellow worker when this happened. Claimant reasonably should have been in position to have foreseen the consequences to his fellow employee when "concentrating on the line" without conscious and alert attention to jeopardy to his fellow worker. The Claimant failed to exercise the degree of care and safety called for in the circumstances, and the Carrier's finding of violation of Rules 1, 2, 564, and 567(c) is fully warranted.

On May 5, 1982, Claimant was involved in another incident of injury to a fellow worker. He was charged with violating Rules 564 and 567 of the Burlington Northern Safety rules, reading:

> Rule 564: "Employees will not be retained in the service who are careless of the safety of themselves or others, disloyal, insubordinate, dishonest, immoral, quarrelsome or otherwise vicious, or who conduct themselves in such a manner that the railroad will be subjected to criticism and loss of good will."
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> Rule 567: "Employees must: a. Not incur risk which can be avoided by exercise of care and judgment. b. Take time to work safely. c. Exercise care to prevent injury to themselves and others."

On May 5, 1982, a fellow worker incurred a personal injury when a bridge stringer, which was being handled by Claimant as operator of a crab crane, dropped on the fellow worker's foot. The transcript of Claimant's testimony states:

> "Q. When you went to set the stringer down prior to releasing the brake, did you tell Mr. McDonald and Mr. Owen that you were releasing the brake?
> A. (Claimant): Not then.
>
> Q. Why not?
> A. Because you want to get the stringer to swing out as far as possible and there is going to be a sudden change from the time it comes off the crab. It just takes a very few seconds.
>
> Q. Prior to the release was there any communication that the release was to be made?
> A. No there wasn't time. I said all the way, and I made sure they were ready, which was to my knowledge a safe operation of the crab as possible.
>
> Q. Isn't it standard procedure when you release the brake to allow a piece of timber to fall you advise those around you?
> A. It is normal procedure to say, to make sure, the guys are in the clear or else that is when it would knock somebody down
>
> ...
>
> Q. You stated that you did not communicate to Mr. McDonald that you were preparing to release the

brake to let the stringer go. In view of that fact, how do you account for the fact he was struck on the foot?

A. He had his foot under the stringer when it fell, and pulled it back into him from swinging out.

Q. Had Mr. McDonald been properly warned of your intention to release the brake would he have been in the same position?

A. I don't know." (Tr. pp. 46-47).

The evidence is clear, from Claimant's testimony as well as from the record as a whole, that Claimant failed to follow the standard procedure of warning fellow employees when releasing timber. As a result of such failure to give warning, a fellow employee was injured. The Claimant, if he had exercised reasonable care and concern for the safety of his fellow employees, was in position reasonably to foresee the consequences of his failure to give proper warning. In the circumstances, the Carrier's finding of violation by Claimant of Rules 564 and 567 is fully warranted.

A W A R D

1. The Carrier in not in violation of the Agreement.

2. The claim is denied.

Joseph Lazar

JOSEPH LAZAR, CHAIRMAN AND NEUTRAL MEMBER

S. E. Fleming

S. E. FLEMING, EMPLOYE MEMBER

B. J. Mason

B. J. MASON, CARRIER MEMBER

DATED: 5-23-83