

PUBLIC LAW BOARD NUMBER 3530

Award Number: 40
Case Number: 40

PARTIES TO DISPUTE:

NORFOLK AND WESTERN RAILWAY COMPANY

AND

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

Statement of Claim

Claim of J.P. Hadley for pay for 15 days with seniority and vacation rights unimpaired.

Findings

This dispute involves the conduct of the Claimant, a Machine Operator, on August 2, 1983 at approximately 1:15 PM in the Durham Yard. On August 11, the Carrier notified the Claimant that he was suspended 15 days for his "neglect and carelessness in allowing the wing of Jordan Spreader 514726 to strike and tear down a flood light pole". The Organization requested a hearing, which was held on September 23, 1983.

At the hearing, Mr. Clayton, an Assistant Foreman, testified that he was standing on the spreader when the accident occurred. He testified that the Claimant, who was operating the spreader, stopped the machine and that the top of the blade was touching the pole approximately five feet above the ground.

According to Mr. Clayton, when the Claimant pulled the wing in, so that the spreader could pass the pole, the pole fell down. It was broken at a point several feet above the ground. A small stump remained.

Mr. Berry, an Engineer, was operating the engine that was pushing the Jordan Spreader forward. He stated that he could see the blade and that he did not think it touched the pole. He believed that "the mound of dirt that the spreader was pushing, hit the pole and knocked it over". Mr. Berry added that it was normal procedure to push dirt up to the pole.

The Claimant testified that he was following the normal procedure by pushing a mound of dirt three or four feet high and trying to get as close to the pole as possible. The Claimant stated that when the dirt was pushed up against the pole he noticed that the pole moved slightly, but it remained held up by a tension wire. He stated that when he pulled in the wing of the spreader, the pole fell over. The Claimant added that, given the size of the light pole, no spreader was capable of breaking it unless there was something wrong with the pole. He stated that when a pole is knocked over, the entire pole is usually uprooted.

The pole was examined by Mr. Angor, a Roadmaster, after the accident. He stated that it was approximately 20 feet long with a diameter of 14 inches. Mr. Berry claimed that the diameter was between 15 and 20 inches. The

Claimant stated that the pole was nearly 40 feet tall.

All witnesses agreed that the pole was rotted. Mr. Berry stated that the pole had an eight inch area that was rotted in the middle. Mr. Clayton and Mr. Angor stated that an area of about two or three inches was rotted. However, Mr. Clayton added that the pole's core was probably more rotted as one got closer to ground level.

On October 11, 1983, the Claimant was notified that his suspension had been sustained. On November 3, 1983, the Organization filed a claim on his behalf. After a series of appeals, Mr. Steele, Assistant Vice President - Labor Relations denied the claim on May 7, 1984.

The issue in this dispute is whether the Claimant's suspension was for just cause.

The position of the Organization is that the Carrier failed to meet its burden of proof of showing that the Claimant was negligent. The Organization points out that the pole had a rotted center and that the spreader never actually touched it.

The position of the Carrier is that the Claimant received a fair hearing during which it was shown that he was negligent in allowing the blade of the spreader to knock down the light pole. The Carrier argues that such negligence

which damaged property merits a suspension.

In a situation where the Carrier attempts to assess discipline, it has been widely held that the Carrier has the burden of proof of showing

that the discipline imposed was justified. The Carrier attempted to show the Claimant's responsibility for the incident through the testimony of Mr. Clayton, who said that he saw the blade of the Claimant's spreader touch the light pole and cause it to fall down.

However, the Claimant and another witness, Mr. Berry, testified that the blade never touched the pole. The Organization also offered a logical explanation for the accident. The Claimant presented evidence that the pole, due to its rotted core, broke when a three foot pile of dirt was pushed against it. The Carrier never sought to disprove this. In addition, the Claimant and Mr. Berry stated that pushing the dirt against the pole was standard procedure, a fact the Carrier and witnesses did not deny.

The Carrier's proof was based on the testimony of one witness. The Organization not only offered testimony contrary to that of the one witness, but also provides an explanation for the accident. The Carrier failed to meet the burden of proof of showing that the Claimant's negligence caused the pole to break. It is the opinion of this Board that the suspension was not justified.

AWARD

Claim sustained. Claimant is entitled to receive pay for time lost, and the 15-day suspension shall be stricken from his record.

Nicholas Rymas
Neutral Member

J. A. McBattle, Jr.
Carrier Member

Dwight L. Hall
Organization Member

Date: 1/13/86