

PUBLIC LAW BOARD NUMBER 3530

Award Number 56
Case Number 56

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

And

NORFOLK AND WESTERN RAILWAY COMPANY

STATEMENT OF CLAIM:

Extra Force Foreman, L.A. McGlone, 1540 Lawson, Wheelersburg, OH 45694, was suspended for 60 days on September 29, 1983, for alleged responsibility with collision of 471WP, 1311 Work Extra and Backhoe NW 10467 at Piketon, Ohio. Claim was handled on the property in accordance with Railway Labor Act and agreement provisions! Employees request pay for lost time and suspension removed from his record.

FINDINGS:

At the time of the incident in question, Claimant was employed by Carrier as an Extra Force Foreman at Piketon, Ohio. By letter dated October 4, 1983, Claimant was notified to attend an investigation concerning his responsibility for an accident occurring at Piketon on September 28, 1983. An investigation was held on October 19, 1983. By letter dated November 3, 1983, Carrier informed Claimant that he was being assessed a 60 day suspension for his responsibility regarding the above-cited accident.

The issue to be decided in this dispute is whether

Claimant was disciplined by Carrier for just cause under the Agreement.

The Organization's position is that Carrier failed to establish Claimant's fault for the incident in question and, therefore, the discipline imposed was unwarranted.

The Organization contends that testimony at the investigation established that Claimant was merely following the instructions of Roadmaster Keys, and further that responsibility for the accident rested with other employees, not Claimant. The Organization cites the testimony of Keys and Control Operator L.C. Lightfoot, and asserts that their testimony established that a mixup in communications between the work train crew and the Control Operator was the main cause of the accident. The Organization contends that the testimony of Engineer Leesburg indicated that he would have stopped short of the crossing if he had been given the correct information.

The Organization further alleges that the Dispatcher gave Claimant permission to place the machinery on the track. The Organization therefore maintains that the evidence of record does not support the discipline imposed, since Carrier has

failed to substantially prove Claimant's guilt concerning the accident.

The Carrier's position is that it established through substantial evidence that Claimant was responsible for the accident in question. Carrier alleges that the accident was serious, causing over \$14,000 in damage to Carrier's equipment. Carrier maintains that under the circumstances, the discipline imposed was clearly reasonable.

Carrier alleges that testimony at the investigation confirmed the fact that Claimant violated applicable Operating Rules, and that such violations are partially responsible for the accident itself. Carrier cites several excerpts from the transcript to substantiate its position. Carrier also cites a recorded telephone conversation between Claimant and the Dispatcher, where the Dispatcher advised Claimant of the need to ensure the safety of the work train. Carrier contends that the conversation establishes that Claimant assumed the work train would be able to stop before reaching the work site, and therefore neglected to place flag protection for his crew. Carrier maintains that this action constituted a clear violation of Rule 705, which states, "On-track equipment engaged in construction or maintenance work must be protected by flag in both directions, unless protection has been arranged by train order or bulletin..." Carrier alleges that testimony

established that the work train engineer received no such train order or bulletin, and that therefore Claimant was obligated, as Foreman, to provide flag protection.

Finally, Carrier admits that there may have been confusion on the part of other employees on the date in question. However, Carrier argues that such confusion illustrates precisely why it is essential for its employees to abide by the Operating Rules. Carrier concludes that the clear language of Rule 705 requires flag protection, and that the Claimant's violation of that rule and the subsequent accident resulting therefrom warranted the discipline imposed in this case.

After review of the record, the Board finds that the Claim must be denied.

It is not the purpose of this Board to rehear an investigation that Carrier held, but only to determine if the discipline imposed was arbitrary, capricious or an abuse of discretion.

We initially agree with the Organization that some conflicting evidence and evidence of confusion were present in this case. However, it is a well-established principle that

Carrier may weigh evidence and determine the credibility of witnesses so long as it does not abuse its discretion in so doing. It is also a well-established principle that Carrier need not prove charges against an employee "beyond a reasonable doubt"; it is sufficient for Carrier to establish guilt through "substantial evidence." In the present case, we find that Carrier did not abuse its discretion by disciplining Claimant for violation of Operating Rule 705.

The language of Rule 705 is explicit, and requires that equipment be "protected by flag in both directions unless protection has been arranged by train order or bulletin, or by the control operator..." The evidence of record indicates that none of the exceptions to Rule 705 were present, and that therefore Claimant was negligent in not protecting machinery by flag. It is not necessary for Carrier to establish that Claimant's violation itself caused the accident. That issue is more relevant to the level of discipline imposed. We agree with Carrier that even partial responsibility is serious, in that significant damage was done to Carrier's equipment, and potentially serious injuries could have resulted from the accident. Claimant's mere assumption that the flags would be unnecessary does not satisfy Rule 705. There is no dispute that it is Claimant's responsibility as Foreman to ensure that the flags are placed. Therefore, we find under the circumstances that Claimant violated Rule 705, contributing to

the accident in question, and was therefore disciplined for just cause by the Carrier. Accordingly, the claim must be denied.

AWARD

Claim denied.

Nicholas Rymes
Neutral Member

J. A. Abbott, Jr.
Carrier Member

Bruce L. Ball
Organization Member

Date: 1-21-87