

PUBLIC LAW BOARD NO. 6621

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

AND

UNION PACIFIC RAILROAD COMPANY

Case No. 1

Statement of Claim: Claim of the System Committee of the Brotherhood that:

- (1) The Union Pacific Railroad Company violated Rules 1 and 48 of the current Agreement when it found Mr. Ban Tabaha [Claimant] guilty of violating 7 safety related rules and assessed Claimant UPGRADE Level 2 discipline, one day off with pay to develop Corrective Action Plan.
- (2) As the Carrier violated the terms and provisions of the current Agreement, the Carrier shall be ordered to exonerate the Claimant and remove all record of this incident from the Claimant's personal record.

Background:

On August 24, 2001, Claimant was injured while working as a Track Laborer at Phoenix, Arizona. Claimant was helping three employees unload railroad switch ties with a backhoe from a gondola to a dump truck. Claimant was injured by an employee who was operating the backhoe. All of the crew members, including the foreman, were assessed Level 2 discipline. Claimant was offered a waiver, but he declined it, arguing that he was innocent of wrongdoing.

Claimant was found guilty of 8 operating and safety-related rule infractions as a

result of a hearing held on September 18, 2001. Specifically, it was determined that he violated Rule 1.13 (Reporting and Complying with Instructions), Rule 45.1 (Loading/Unloading Precautions), Rule 70.1 (Safety Responsibilities), Rule 70.3 (Job Briefing), Rule 70.4 (Safe Work Space), Rule 77.4 (Groundman), Rule 77.6 (Signals), and Rule 77.8 (Positions). He was assessed UPGRADE Level 2 discipline (a day off with pay to review rules and develop a Corrective Action Plan).

According to the Carrier, the incident occurred as follows. Claimant and co-worker George Curiel were inside the gondola chaining three ties at a time to a backhoe. Foreman Troy Catacachea operated the backhoe, which lifted ties out of the gondola and transferred them to the dump truck where two other workers unchained the ties.

At some point in the process, one of the ties became hung up between the top of the dump truck and the side rail of the gondola. According to the Carrier, after Catacachea said he would use the backhoe to move the hung-up tie, Claimant continued to work beneath that tie instead of waiting for it to be cleared. As the backhoe swung about, it bumped the tie which fell back into the gondola and hit Claimant.

Contentions of the Parties

The Carrier contends that once the tie became hung up, Claimant, as well as the other members of his crew, failed to properly assess the situation and discuss how to safely rectify the problem. Specifically, it was incumbent upon them to hold a job briefing and to stay in close communication with each other. Claimant also erred by staying in the gondola directly beneath the hung-up tie that needed to be moved.

The Organization contends that the Carrier has failed to produce any credible

evidence proving that Claimant violated any operating or safety rules. The Carrier's only witness was Manager of Track Maintenance M.J. Battista. His testimony, argues the Organization, was completely hearsay because he did not produce any direct evidence of Claimant's guilt, and he was not present at the time of the incident.

Opinion

As in all disciplinary cases, the Carrier has the burden to prove with substantial evidence that Claimant was guilty as charged and that the penalty imposed was appropriate. The Board has reviewed the Record below, and the testimony adduced as to the rule violations with which Claimant was charged. It finds that while Claimant's admissions established his guilt as to some of the charges, specifically Rules 45.1 and 70.1, the Carrier failed to prove a violation of the majority of the charges. Moreover, the evidence in the Record supports the conclusion that Claimant was less culpable for the incident than was the foreman, Troy Catacachea, and the groundman, George Curiel, both of whom were assessed the same penalty as Claimant.

The fundamental problem with the Carrier's case is that it rested entirely on the hearsay testimony of MTM M.J. Battista. Mr. Battista investigated the incident, interviewed Claimant's co-workers, and testified about what they allegedly told him. He stated that the other employees filled out incident reports, but none was produced at the hearing. Had those reports been available, at least a comparison could have been made between what the crew members reported and what Battista asserted that they reported.

At the hearing, the Carrier's representatives took the position that in light of Battista's investigation, "the other witnesses that were involved in the matter were not

necessary to be here.” (C. Ex. A-2, p. 15). The hearsay testimony of Mr. Battista, however, was not enough to establish Claimant’s guilt in the matter, largely because Claimant disputed some of the alleged facts presented by Battista. While the Carrier emphasizes that Claimant could have called witnesses to corroborate his version of what occurred, it is the Carrier that had the burden of proof, and Battista’s hearsay testimony was insufficient to meet that burden.

The Carrier notes that Claimant’s co-workers waived a hearing and accepted the discipline imposed. But that fact does not establish that Claimant bore the same degree of culpability for what occurred. In light of his claim that the accident was not his fault, the Carrier was required to prove its case with more than Battista’s testimony as to what he was allegedly told.

The Board is also troubled by the fact that Claimant’s account of the incident, specifically, which tie hit him, differs from that described by Battista. Without hearing from the crew involved, or at least reading their incident reports, the Board is unable to fully assess whose story is more credible. While hearsay testimony is often admitted in arbitration, it is not always entitled to substantial weight. In this case, where the facts are disputed, the Carrier was obligated to prove its case with more than hearsay testimony.

Concededly, Claimant acknowledged that he was working inside the gondola without fully communicating with groundman George Curiel. He also agreed that he could have asked for a job briefing to reassess the task when the tie became hung up. Battista acknowledged, however, that Troy Catacachea was the foreman on the job, and he was the individual in charge of giving job briefings. In fact, Battista stated, “When the task

changed, he [Troy] should've initiated another job briefing. Once the tie was hung up, he should've went ahead and stopped everything and discussed." (C. Ex. A-2, p, 25).

Claimant testified that after the tie was hung up, there was a pause of several minutes. He was bending over, putting a chain around a bundle, when he was hit. Significantly, Claimant gave un rebutted testimony that Troy Catacachea never signaled or gave notice that he was going to move the bucket. Moreover, George Curiel, as groundman, "was responsible for directing and safeguarding all machine movements." (Rule 77.4). However, Curiel did not provide any notice to Claimant so that he could have repositioned himself to avoid getting hit.

The Board recognizes that the crew had a collective responsibility to work in accordance with the Carrier's safety rules. As a member of the crew, Claimant should have taken precautions to position himself safely and to avoid working beneath a load being transferred. Based on the record below, however, the Board has concluded that Claimant did not bear the same degree of blame as did some of his co-workers. Given these findings, the Carrier's discipline should have been less stringent.

Award

The claim is sustained in part. The discipline is reduced to UPGRADE Level 1.


JOAN PARKER, Neutral Member


CARRIER MEMBER

DATED: 10-3-03


ORGANIZATION MEMBER

DATED: 10-3-03