

BEFORE PUBLIC LAW BOARD NO. 1837

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

And

NORFOLK & WESTERN RAILWAY COMPANY

Case No. 132

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The dismissal of M. S. Farmer for allegedly using improper lifting techniques and posture while carrying a 4 x 4 inch twelve (12) foot board on December 10, 1999, and for allegedly persisting in unsafe work practices is unjust, unwarranted, excessive, based on unproven charges and in violation of the Agreement. (Carrier's File No. MW-FTW-99-109-LM-509.)
2. Claimant M. S. Farmer shall be reinstated with no loss of seniority rights, vacation, and any and all other rights unimpaired and be paid for all monetary loss suffered by him beginning December 11, 1999, and continuing until he is reinstated and all reference to these proceedings removed from his personal files.

FINDINGS:

Claimant M. S. Farmer was employed by the Carrier as an extra gang truck driver at the time of this claim

On January 3, 2000, the Carrier notified the Claimant to appear for a formal investigation to determine his responsibility, if any, in connection with his using improper lifting techniques and posture while carrying a 4 x 4 inch 12-foot board on December 10, 1999. The Carrier also charged the Claimant with persisting in unsafe work practices in that, in addition to the incident of December 10, 1999, the Claimant subjected himself to potential injury on three other occasions during the course of eight months as follows: 1) On April 8, 1999, he failed to use the proper technique to throw a switch in Buffalo, New York; 2) On June 22, 1999, he was observed

hanging onto the ladder of a panel switch gon while giving directions to a locomotive crane; and

3) On July 16, 1999, he used a maul to strike an angle bar to attempt to close a gap in a joint while installing a panel switch in Buffalo, New York. The Carrier indicated that two of the occurrences resulted in an FRA reportable incident.

After one postponement, the hearing took place on February 15, 2000. On February 28, 2000, the Carrier notified the Claimant that he had been found guilty of all charges and was being assessed discipline of dismissal from all service with the Carrier.

The Organization filed a claim on behalf of the Claimant, arguing that the Carrier's letter of charge was vague and non-specific in nature and addressed four separate alleged incidents over a time period of nine months prior to charging the Claimant. The Organization argues that the Carrier attempts to support its discipline based on the supposition that the Claimant is accident-prone, which has been established as lacking sufficient merit for supporting discipline. The Organization maintains that the Carrier failed to offer sufficient evidence or testimony to support its position that the Claimant was guilty of any of the alleged violations included in its letter of charge.

In regards to the April 8 incident, the Organization argues that only the Claimant was present when the switch was thrown and that he used the proper technique; however, the switch plates were rusty. In addition, the Organization claims that the Carrier failed to take any disciplinary action at the time of the alleged offense. In regards to the June 22 incident, the Claimant was instructed to be on the ground before any movement of the switch panel was to be made by the crane operator, and the Claimant accepted the procedure. The Organization asserts that no safety violations were cited and no written report was made. In regards to the July 16,

incident, the Organization maintains that the conduct of the Claimant was consistent with the established past practice on the property for performing the task in question. Also, the Organization claims that the Claimant did not strike the angle bar with a maul, as the Carrier indicated, but rather with a sledge hammer. Further, the Carrier had taken no exception to the manner in which the Claimant nor apparently other employees performed this work prior to July 16. In addition, the Organization claims that, again, the Carrier failed to take any disciplinary action at the time of the alleged incident. In regards to the December 10 incident which involved the Claimant and a Mr. William Christian, the Organization maintains that the Claimant was surprised when Mr. Christian dropped his end of the board since the Claimant told Mr. Christian to let him know if that was going to happen. Therefore, the Organization argues that the Claimant was not responsible for the incident. The Organization also asserts that the Carrier's reference to FRA served no purpose other than to confuse the actual allegations in the letter of charge and to explain the Carrier's true purpose of holding the investigation in this case. The Organization contends that the Carrier has established a policy of harassing and punishing any employee who is unfortunate enough to be injured on the job. The Organization maintains that the Carrier failed to produce any violation of safety or operating rules pertaining to any of the four allegations mentioned in its letter of charge. The Organization asserts that the Carrier failed to afford the Claimant with a fair and impartial investigation and that the hearing officer predetermined that the Claimant was guilty by the manner in which he conducted the hearing. The Organization claims that the hearing officer continually attempted to control the outcome of the hearing by leading witnesses and serving the Carrier in the dual position of hearing officer and prosecutor. In addition, the Organization argues that should the Carrier have supported in

part or totally its allegations against the Claimant, the assessment of dismissal as punishment was excessive and an abuse of the Carrier's authority. The Organization contends that the Carrier dismissed a veteran employee who was guilty of nothing.

The Carrier denied the claim, contending that the Claimant was properly notified and afforded a fair and impartial investigation as provided for in the schedule agreement. The Carrier asserts that the hearing officer allowed the Claimant and the Organization every opportunity to question the witnesses and to present their defense and that the Claimant was less than truthful in his testimony. The Carrier contends that the fact that the hearing officer properly developed the facts that established the Claimant's guilt does not mean he prejudiced the Claimant's right to a fair and impartial investigation.

In regards to the April 8 incident, the Carrier argues that the Claimant failed to use good posture while throwing the switch, causing injury to himself, because, under normal conditions, the switch is quite easy to throw. In regards to the June 22 incident, the Carrier contends that there were several locations on the ground where the Claimant could have performed his duty in a safe and efficient manner without unnecessarily exposing himself to possibly falling off the crane. In regards to the July 16 incident, the Carrier argues that the Claimant improperly hit an angle bar on the thinnest and weakest part of the bar, thereby causing injury to himself. In regards to the December 10 incident, the Carrier asserts that the Claimant's cavalier and unsafe manner of carrying the board with one hand and a pinch bar in the other resulted in his injury. The Carrier argues that the Claimant was to have squatted down instead of bending over at the waist when picking up the board and should have used both hands to carry the board to avoid injury when the other employee carrying the board dropped it while placing it on the ground. The

Carrier maintains that the Claimant has no regard for his own safety or that of his co-workers and simply persists in performing his job in a negligent and unsafe manner despite the fact that the Claimant has been afforded extensive training and counseling in the proper method of working. The Carrier maintains that the evidence adduced at the investigation clearly established that the Claimant improperly lifted and carried a 4 x 4 board resulting in an alleged personal injury and that, in the eight months previous to that incident, engaged in unsafe work practices on at least three occasions, two of which resulted in alleged on-duty injuries. The Carrier argues that the discipline of dismissal was appropriate in this case in light of the seriousness of the offenses and the Claimant's poor past record, which includes injuries, warnings for absenteeism, and a previous dismissal for insubordination.

The parties being unable to resolve the issues, this matter comes before this Board.

This Board has reviewed the procedural arguments raised by the Organization, and we find them to be without merit.

This Board has reviewed the evidence and testimony in this case, and we find that there is sufficient evidence in the record to support the finding that the Claimant did not use the proper care while lifting a 12-foot board on December 10, 1999. The record reveals that the Claimant was guilty of engaging in a number of unsafe work practices which put him in a position where he could easily be injured while performing tasks for the Carrier.

Once this Board has determined that there is sufficient evidence in the record to support the guilty finding, we next turn our attention to the type of discipline imposed. This Board will not set aside a Carrier's imposition of discipline unless we find its action to have been unreasonable, arbitrary, or capricious.

Given the lengthy seniority of this Claimant, who has provided satisfactory service for the Carrier for more than two decades, this Board finds that the action taken by the Carrier in terminating the Claimant was unreasonable, arbitrary, and capricious. Therefore, we order that the Claimant shall be reinstated to service, but without back pay. The period that the Claimant was off shall be considered a lengthy disciplinary suspension.

AWARD:

The claim is sustained in part and denied in part. The Claimant shall be reinstated to service, but without back pay. The period that the Claimant was off shall be considered a lengthy disciplinary suspension.



PETER R. MEYERS
Neutral Member



CARRIER MEMBER

DATED: 5/18/01



ORGANIZATION MEMBER

DATED: 5-18-01