

PUBLIC LAW BOARD NO. 3530

Case No. 18
Award No. 18

PARTIES TO DISPUTE:

Norfolk & Western Railway Company

And

Brotherhood of Maintenance of Way Employees

STATEMENT OF CLAIM:

Grinder Operator, S.H. Kitts, Rt. 1, Box 160, Fort Gay, WV, 25514, was suspended for 10 days for alleged negligence while operating Brush Cutter. Employees request Mr. Kitts be paid for all time lost, vacation and seniority rights unimpaired.

FINDINGS:

Claimant entered Carrier's service on May 3, 1979, and on the date of the incident in question was employed as a Grinder Operator at Lenore, West Virginia.

On April 14, 1982, Claimant was operating a Brush Cutter in the vicinity of Dickson, West Virginia. On that date, the Claimant struck a large boulder, resulting in damage to the brush cutter.

As a result of the accident, Claimant was given a 10 day suspension by the Carrier.

The issue to be decided in this dispute is whether the Carrier's suspension of the Claimant was for just cause under the Agreement.

The position of the Carrier is that the discipline imposed on Claimant was based on sufficient and credible evidence, and was reasonable under the circumstances.

The Carrier refers to the testimony given at the hearing to support its position. Specifically, the Carrier points to the testimony of Roadmaster T.A. Keyes. Keyes testified that in his opinion the boulder in question was plainly visible to the Claimant and should have been seen and avoided. Keyes further testified that photographs offered by the Organization as proof of the lack of visibility of the boulder were "doctored". Keyes specifically stated in reference to the photographs that, "I feel somebody went up there and put brush on that rock." When asked whether the brush was there when he observed the boulder, he replied, "There was some, but there wasn't that much". The Carrier maintains that Keyes' testimony established that Claimant was negligent in his duties on the date in question, and that the discipline imposed was therefore justified.

The Carrier further contends that the discipline imposed was not excessive under the circumstances. The Carrier cites several Board Awards to support its position that it has wide discretion with regard to discipline.

The Organization contends that the Claimant was unjustly disciplined by the Carrier. The Organization's position is that Claimant could not have seen the boulder in question, and therefore was not negligent under the circumstances.

The Claimant testified that he was paying attention, but simply could not see the boulder due to it being hidden in a ditch. The Organization also notes that the Carrier was at fault by not having two men operate the machine, as it should have.

The Organization further contends that the Carrier failed to "demonstrate convincingly" that Claimant was guilty of the offense charged. The Organization maintains that Carrier's conclusions regarding the accident are mere "speculations" and "assumptions", and therefore do not meet the burden placed on the Carrier to prove the charges "convincingly".

A review of the entire record compels the conclusion that the Claim must be denied.

The Carrier has proven by substantial, credible evidence that the Claimant was guilty of negligence.

The Board cannot agree with the Organization's evaluation of the burden to be placed on the Carrier. The Correct burden is not to "demonstrate convincingly" but rather to show by a "preponderance" of the evidence that the charges were in fact justified. In the instant case, we find that the Carrier has met its burden. The testimony of Keyes indicated that the Claimant was negligent by not seeing the boulder. Issues of credibility are within the Carriers purview, and we cannot find that the Carrier's decision was arbitrary, capricious or an abuse of discretion. The Carrier has examined all of the evidence and determined Claimant's guilt concerning his negligence.

The Organization has provided no evidence to indicate that the Carrier abused its discretion in coming to its conclusion.

Finally, the Board does not find that the penalty imposed by the Carrier was excessive. The Carrier has discretion to determine an appropriate penalty, as long as it is not arbitrary or an abuse of discretion. In this case, given the negligence of the Claimant, we cannot find the Carrier abused its discretion by suspending the Claimant for ten days.

AWARD:

Claim denied.

Nicholas Fumar
Neutral Member

J. A. Whittle, Jr.
Carrier Member

Bryce L. Hall,
Organization Member

Date: 8/7/85