

PUBLIC LAW BOARD NUMBER 3530

Award Number: 33
Case Number: 33

PARTIES TO DISPUTE

NORFOLK AND WESTERN RAILWAY COMPANY

AND

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

STATEMENT OF CLAIM

Claim of M.V. Goggins for ten days pay with seniority and vacation rights unimpaired.

FINDINGS

This dispute involves the conduct of the Claimant, a Laborer, on March 31, 1983. On April 5, 1983, the Claimant was assessed a ten-day suspension. The Organization requested a hearing which was held on April 22, 1983. At the hearing, the following charge against the Claimant was discussed:

...being negligent in performing your duties as Crane Leader...in that you failed to communicate with your foreman, G.A. Obenchain and the Train Crew, Roadway Material Yard Shifter that you would be working in Truck No. 11 resulting in personal injury to Crane Operator T.O. Brown and yourself.

The testimony at the hearing revealed that the following information,

which was not contested by either the Carrier or the Organization. The Claimant and his Crane Crew were instructed by Mr. Obenchain to pick up several manganese frogs that were lying between Tracks No. 11 and 12. Mr. Martin of the Crane Crew threw the switch which allowed the crane to enter Track No. 11. Several minutes later, the Train Crew, led by Mr. Lugar, a Conductor, cut loose a car and "kicked" it onto Track No. 11. It struck the Claimant's crane and injured the operator, Mr. Brown.

However, the parties did not agree on the rest of the facts involved in this incident. Mr. Obenchain testified that he specifically ordered the Claimant to enter the area on Track No. 12. But, he also testified that he (the Claimant) could unload a scrap rail anywhere he wanted. The Claimant testified that Mr. Obenchain's instructions were vague and that he told the Claimant that he could decide which track to enter when he arrived there.

The Claimant testified that before he entered Track No. 11, he informed a Brakeman, Mr. Morris, that he was bringing his crane onto that track. He stated that the crane drove right past two foreman, Mr. Huff and Mr. Plunkett, thus making them aware of the crane's presence on Track No. 11. However, Mr. Murry testified that he could not remember if the Claimant informed him that the crane was going on Track No. 11. Mr. Plunkett and Mr. Huff testified that they did not know the crane was on the track.

The Claimant testified tht after the crane entered Track No. 11, he threw the switch back so that the track was not lined for Track No. 11. No members of the Crane Crew saw the Claimant do this because they were all facing in the other direction. But, Mr. Brown, the Crane Operator, stated that he did see the Claimant speaking with his nephew while the crane entered Track No. 11. The Claimant stated that he spoke with his nephew very briefly, only to give him a checkbook. No one in the yard saw if the Claimant or anyone else approached the switch after the Crane had entered.

The witnesses agreed that it was standard procedure to throw the switch back (as the Claimant testified he had done). The members of the Crane Crew, including the Claimant, testified that the Claimant was almost always the person who threw the switch back.

Mr. Lugar, who was a Conductor with the Train Crew, stated that the track was lined for Track No. 11 when he approached. He stated that after receiving permission from Mr. Huff, he "kicked" the car onto that track.

On May 6, 1983, the Carrier informed the Claimant that his suspension had been upheld. On May 26, 1983, the Organization filed a claim on his behalf. After a series of appeals, Mr. Steele, Assistant Vice President - Labor Relations, denied the claim.

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

The position of the Organization is that the Carrier failed to demonstrate that the Claimant was guilty of the charge.

The position of the Carrier is that the Claimant was negligent because: (a) he failed to follow the specific instructions of the Foreman, Mr. Obenchain, to enter Track No. 12, (b) abandoned his assignment at a critical time to speak with his nephew, and (c) failed to fix the switch after the Crane entered Track No. 11.

Both parties presented arguments on whether Mr. Obenchain's instructions were specific or vague, and whether the Claimant acted improperly by entering Track No. 11. However, it is the opinion of this Board that this particular factual issue is irrelevant.

The critical factual issue in his dispute is whether the Claimant threw the switch back so that the track would not be lined for Track No. 11. If the Claimant did throw the switch, he would have met his responsibility to keep the track and his Crane Crew safe. If the Claimant did not throw the switch, whether he was on Track No 11 or 12, he is negligent, because an accident like

the one that occurred would become possible. In other words, even if the Claimant had disobeyed specific instructions by entering Track No. 11, he would not be negligent unless he failed to throw the switch.

The entire Crane Crew, including the Claimant, testified that it was common practice to throw the switch back to prevent any cars from entering the track, thus protecting the crane and crew. The Claimant also stated that it was his responsibility to throw the switch back, and that he did so. However, the evidence revealed that the track was still lined for Track No. 11 when Mr. Lugar and his Train Crew approached. The only way this could have happened is if the Claimant failed to throw the switch back (which is possible, because he spent some time to speak with his nephew) or if someone else threw the switch after the Claimant had thrown it back. But, the evidence also reveals that no one else approached the switch after the Crane entered Track No. 11.

It is the opinion of this Board that in light of the facts that the Claimant was speaking with his nephew as the crane entered the track, the track was still lined for Track No. 11, and no one approached the switch after the crane entered, the Claimant did not throw the switch back. He was negligent for failing to do this because he made it possible for cars to enter the track where his crane and crew were located. Since this negligence led to an injury to Mr. Brown, the Carrier acted properly in disciplining the Claimant.

AWARD

Claim denied.

Nicholas Pumas
Neutral Member

J. A. Abbott, Jr.
Carrier Member

Bryce L. Hall,
Organization Member

DATE:

1/13/86