

PUBLIC LAW BOARD NUMBER 3530

Award Number: 47
Case Number: 47

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

And

NORFOLK AND WESTERN RAILWAY COMPANY

STATEMENT OF CLAIM:

Section Laborer, C. N. Norris, 1627 Grandview Avenue, Portsmouth, OH 45662, was dismissed from service on September 26, 1983, for alleged unsafe work practices. Claim was handled on the property in accordance with Railway Labor Act and agreement provisions. Employees request reinstatement with pay for all lost time with vacation and seniority rights unimpaired.

FINDINGS:

Claimant, at the time of the incident in question, was employed by Carrier as a Section Laborer at Portsmouth, Ohio. On October 7, 1983, Claimant was dismissed from service for alleged unsafe work practices. An investigation was held on November 17, 1983. By letter dated December 5, 1983, Carrier reaffirmed its dismissal of Claimant for his guilt concerning the above cited charge.

The issue to be decided in this dispute is whether

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

The Organization's position is that Carrier dismissed Claimant without any justification. The Organization contends that Claimant was injured on September 26, 1983, while on duty for Carrier, and subsequently filed an injury report as required by Safety Rule No. 1001. The Organization alleges that at no time on that date did Carrier indicate displeasure toward Claimant's work performance. The Organization further alleges that Carrier's later charge of negligence lacks any substantive proof.

The Organization maintains that Carrier's key witness, Charging Officer Keyes, was not even present when the alleged negligence occurred, and therefore lacks credibility with regard to proving the negligence charge. The Organization additionally cites the testimony of other employees working with Claimant, which it alleges establishes that Claimant was not negligent. The Organization therefore maintains that Carrier has failed to sustain its burden of proof, and contends that Carrier's introduction of Claimant's prior record at the investigation was an improper attempt to justify its disciplinary action. The Organization cites awards allegedly holding that prior record evidence should not be the basis for sustaining a present charge. The Organization concludes that

the only facts established at the investigation were that Claimant was injured, and that he filed an injury report as required.

The Carrier's position is that Claimant was justifiably dismissed for his negligence on the date in question and long-standing problems regarding unsafe work practices.

Carrier initially cites Claimant's prior injury record up to and including the injury on the date in question. Carrier contends that from June 1972 to September 1983, Claimant sustained 17 on-duty injuries, which it alleges stand as persuasive evidence of Claimant's overall negligent job performance. Carrier contends that the great majority of those injuries cited were caused by Claimant's insistence in operating in an unsafe fashion, creating danger for himself and his fellow employees. Carrier additionally contends that Claimant had on four separate occasions been counselled about his unsafe work habits. Carrier alleges that Claimant's man hour injury ratio was 319% above the average for its employees.

Carrier cites several awards holding that it may discipline employees who are accident-prone or who perform in an unsafe manner. Carrier maintains that those awards clearly authorize dismissal under the circumstances such as those in the present case. Carrier therefore concludes that it acted

reasonably in dismissing Claimant for his continuous record of negligence.

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.

Initially, we disagree with the Organization that Claimant's prior injury record was improperly introduced by Carrier. In a normal case, an employee's prior record cannot be used as the basis or integral part of the charge against him. However, in a case such as the present one, involving a chronic long-standing problem with an employee, such prior record is not only relevant, but essential to proving the charges. We agree with the Organization that the incident in question alone does not constitute grounds for dismissal, in that Claimant merely had an accident. However, Carrier has established through substantial evidence that Claimant's overall job performance lacked the care and safety to which Carrier is entitled. The record established that Claimant's incidence of injury was far above that of an average employee. While this fact alone does not conclusively establish

negligence, it does indicate that Claimant was "accident prone". More importantly, Claimant had been warned and counselled by Carrier on four separate occasions about his unsafe work practices. Therefore, it cannot be said that Claimant was unaware of the need to improve his safety record. A continuous record of accidents and unsafe work practices need not be tolerated by Carrier. Carrier has a responsibility to the affected employee, other employees, and the general public to ensure, to the best of its ability, overall safety. It therefore cannot be held to have acted beyond its discretion when it dismissed an employee who demonstrates an inability to operate in a safe and competent manner. We find that Carrier acted reasonably in dismissing Claimant under the circumstances surrounding this case. Accordingly, the claim must be denied.

AWARD:

Claim Denied.

Nicholas Pumas
Neutral Member

J. A. Abbatello Jr.
Carrier Member

Bryce L. Hall
Organization Member

Date:

1-21-87