

PUBLIC LAW BOARD NUMBER 3530

Award Number: 48
Case Number: 48

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
and
NORFOLK AND WESTERN RAILWAY COMPANY

STATEMENT OF CLAIM:

Section Laborer, S. K. Johnson, Bishop Trailer Park, Princeton, WV 24740, was dismissed from service on April 24, 1984, for alleged unsafe work practices. Claim was handled on the property in accordance with Railway Labor Act and agreement provisions. Employees request reinstatement with back pay for lost time with vacation and seniority rights unimpaired.

FINDINGS:

Claimant, at the time of his dismissal, was employed by Carrier as a Section Laborer at Princeton, West Virginia.

By letter dated March 20, 1984, Claimant was notified to attend an investigation concerning charges that his work habits were unsafe. An investigation was held on April 5, 1984. By letter dated April 24, 1984, Carrier informed Claimant of his dismissal.

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 failed to establish any safety violations on the part of Claimant, and that his dismissal was therefore improper.

The Organization first contends that Claimant did not violate any safety rule when he was injured on February 28, 1984, the injury precipitating Carrier's actions. The Organization alleges that the Charging Officer, Roadmaster Bailey, was not present at the time of the accident and therefore unqualified to judge Claimant's negligence. The Organization further alleges that none of Carrier's witnesses had firsthand knowledge with regard to the February 28 injury.

The Organization further contends that Carrier failed to show that Claimant was an unsafe employee generally. The Organization contends that although Roadmaster Bailey testified that the other accidents cited could have been avoided, he qualified such testimony by stating, "Let me emphasize I'm not charging [Claimant] with violation of these [safety] rules." The Organization further contends that with regard to five of the six other injuries, Claimant was never charged by Carrier with Safety violations. The Organization contends that the mere fact that Claimant sustained seven injuries during five

years of service does not establish negligence in any sense. The Organization cites awards holding that injuries do not per se establish safety rule violations.

The Carrier's position is that it established through substantial evidence that Claimant was guilty of violating safety rules and acting in a generally unsafe manner while under Carrier's employ. Carrier therefore maintains that the discipline imposed was reasonable under the circumstances.

Carrier first contends that Claimant's injury record of seven injuries in 21 months indicates the level of Claimant's lack of adherence to safe procedure. Carrier additionally cites the fact that on two previous occasions Claimant had been counselled concerning his unsafe work habits, and that on May 6, 1983, Claimant was warned by letter about a safety rule violation. Carrier alleges that Claimant's injury incidence was seven times greater than the average employee. Carrier argues that the sum of the evidence indicates that Claimant acted in a careless and dangerous manner on several occasions, a performance level which it cannot continue to tolerate in an employee. Carrier maintains that it has an obligation to protect the safety of the affected employee, other employees, and the general public. Carrier cites several awards holding

that persistent unsafe work practices committed by an employee constitutes legitimate grounds for dismissal.

After review of the record, the Board finds that Claimant should be reinstated to service, with seniority unimpaired, but with no back pay.

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.

This case presents the identical issue dealt with by this Board in Case No. 47. However, distinguishing facts in the present case lead us to a different conclusion than that rendered in Case No. 47.

In the present case, we find that Carrier has failed to establish persistent safety rule violations committed by Claimant. The evidence presented by Carrier indicated that Claimant injured himself on seven occasions in five years, a higher incidence than that of the average employee. However, we agree with those awards cited by the Organization that injury itself does not establish negligence or safety violation per se. Absent additional evidence, it cannot be assumed that injury was caused by negligence. To the contrary, the

presumption must be that the injury was not "negligent", since otherwise Carrier could dismiss any employee for a series of injuries, regardless of their cause.

Carrier does provide some evidence that Claimant acted in an unsafe manner. The May 16, 1983 letter concerning Claimant's unsafe work habits indicates prior concern on Carrier's part. However, as noted by the Organization, the investigation concerning the May 16, 1983 injury yielded no discipline. Carrier has failed to cite any other occasion wherein Claimant was charged, convicted and penalized for safety rule violations. We agree with the language of Second Division Award 9583: "The mere assertion by the Carrier that, had the Claimant been more careful and had he performed his duties in the safe manner expected of him, does not meet the burden of proof required of the Carrier."

While we find dismissal to be inappropriate in the present case, we do not find Claimant entitled to back pay for time lost. As stated above, Carrier has established some level of carelessness on Claimant's part, and may reasonably discipline an employee for failure to operate safely. Carrier had

counselled Claimant on two prior occasions concerning possible safety violations, and Claimant therefore cannot be said to have been unaware of the need to improve his work performance.

AWARD

Claim disposed of per Findings herein.

Nicholas Pinner
Neutral Member

J. A. Albaladejo Jr.
Carrier Member

Bryce L. Hall
Organization Member

Date: 1-21-87