

PUBLIC LAW BOARD NUMBER 3530

Award Number: 70

Case Number: 70

PARTIES TO DISPUTE

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

AND

NORFOLK AND WESTERN RAILWAY COMPANY

STATEMENT OF CLAIM

Section Laborer, G. W. Hilton, 1121 Rugby Road, N.W., Roanoke, VA 24017 and W. O. Freischlag, Jr., 3526 Wedgewood Rd., S. W., Roanoke, VA 24018, were assessed a 30 day suspension for personal injuries. Claim was handled in accordance with the Railway Labor Act and agreement provisions. Employees request pay for time lost and all other rights unimpaired.

FINDINGS

Claimants were employed as Section Laborers at Roanoke, Virginia. By letters dated May 9, 1984, Claimants were notified to attend an investigation concerning charges that they were responsible for personal injuries sustained on April 9, 1984. An investigation was held on June 13, 1984. On June 29, 1984, Claimants were informed of 30 day suspensions assessed against each of them on the grounds that they were responsible for injuring themselves on April 9, 1984.

The issue to be decided in this dispute is whether the Claimants were disciplined for 'just cause under the Agreement.

The Organization contends that a defective jack, and not the Claimants' negligence, was responsible for the injuries sustained. The Organization cites the testimony of Claimants that the jack they were using malfunctioned and caused them to be injured. The Organization further cites the Claimants' testimony that they operated the jack in a normal fashion. The Organization argues therefore that the Claimants were not responsible for the accident, and should not have been disciplined by Carrier. The Organization argues further that Carrier's inability to find any defect in the jack is not conclusive, in that malfunctioning jacks often show no sign of defect after malfunctions.

Carrier contends that the Claimants' negligence, and not a malfunctioning jack, was the primary cause of the injuries sustained. Carrier cites the testimony of both Claimants regarding the incident in question, and argues that their testimony reveals material inconsistencies. Specifically, Carrier cites the fact that Claimant Hilton testified that the jack was lifted several notches before the mishap, while Claimant Freischlag testified that the mishap occurred after the jack was lifted one notch. Carrier further cites the testimony of Track Supervisor R. Steele that the Claimants' versions of the accident differed during his interview with them the following day.

Carrier further contends that the jack in question was not defective. Carrier cites Steele's testimony that the jack performed adequately under conditions similar to those on the date in question. Carrier further cites the results of a test performed by its Research and Test Laboratory in

Alexandria, Virginia, stating that the test ". . .revealed no defects or damage that could account for malfunction. . ." Carrier argues that the test results and other testing done indicates that the only explanation for the mishap was misuse of the jack by the Claimants.

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.

We find that Carrier has sustained the charges against the Claimants through substantial evidence. The only real question concerns the cause of the mishap. The Claimants' testimony, while containing minor inconsistencies, is consistent regarding the cause of the mishap, namely a malfunction in the jack. This testimony, however, must be discredited in light of Carrier's data concerning the condition of the jack. Both in its initial tests and in later testing by the Research and Test Laboratory, the jack in question was found to be without defect. Absent evidence to the contrary, we cannot find that a defect caused the mishap. The Organization's assertion, without more, that the jack might have malfunctioned without noticeable defect does not rise to the level of evidence necessary to refute Carrier's scientific testing. In sum, having credited Carrier's testing, we must discredit the Claimants' version of the mishap. We therefore find that Carrier did not abuse its discretion by inferring that the Claimants'

misuse of the jack was the primary cause of their injuries. We further find that Carrier acted within its discretion in imposing suspensions against the Claimants on the grounds of their negligence.

AWARD

Claim denied.

Nicholas Ruma
Neutral Member
W. L. Altman, Jr.
Carrier Member
Bryce L. Dally
Organization Member

DATE: 1-29-88