

PUBLIC LAW BOARD NO 5850

Award No.
Case No. 1

(Brotherhood of Maintenance of Way Employees

PARTIES TO DISPUTE:

(Burlington Northern Santa Fe Railroad

STATEMENT OF CLAIM:

Carrier's decision to issue Southern Region District 2 Foreman D. D. Gaas a cautionary letter dated May 8, 1995, advising him that he was responsible for his personal injury sustained on March 21, 1995, was unjust.

Accordingly, Carrier should now be required to expunge the May 8, 1995 cautionary letter.

FINDINGS

Upon the whole record and all the evidence, the Board finds that the parties herein are carrier and employee within the meaning of the Railway Labor Act, as amended. Further, the Board is duly constituted by Agreement, has jurisdiction of the Parties and of the subject matter, and the Parties to this dispute were given due notice of the hearing thereon.

Claimant was a part of an operation to spread three cars of ballast using the little giant crane to both unload the ballast and to move the three cars.

As required by the Operating Rules, the parties discussed what they intended to do and how they were going to do it prior to commencing work.

During the unloading process, a leak in the hydraulic system of the crane became evident which necessitated a change in plans.

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As required by the Rules, the Foreman in charge, the Machine Operator and a Truck Driver, discussed how to complete the work required by using the crane off the track and winching the ballast cars by cable. Claimant did not participate in this discussion.

During the operation, for some unknown reason, the boom cable to which was attached a magnet became free with the magnet falling and striking Claimant.

After Carrier's investigation was completed, Claimant was served a notice of investigation to determine if he violated any of Carrier's "Safety and General Rules for all Employees...."

Upon conclusion of the investigation, Claimant was found culpable of the charges and assessed a cautionary letter which was to become a permanent part of his record.

The Organization has taken exception to Carrier's position and, after unsuccessful handling on the property, it has been progressed to this Board for adjudication.

One of the Rules cited by Carrier was Rule 59.10, which reads as follows:

"Rule 59.10 - Subpart A Restrictions Near Hoisting Equipment

Working Near Equipment

Employees must not walk, stand, or work under a crane boom or pile driver lead or other hoisting equipment unless their duties require. If so, they must:

- Receive a job briefing
- Communicate with the operator to understand the work

Employees working with or near lifting operations must keep clear of the swinging boom or cab. Always be alert for the load to swing unexpectedly."

When the Rules alleged to have been violated were first introduced in the investigation, Claimant stated he understood them.

Subsequent testimony developed at the investigation clearly shows Claimant did not "...Receive a job briefing..." nor did he "...Communicate with the operator to understand the work...."

In fact, the Machine Operator was unaware of Claimant's presence alongside the boom as he concentrated on the opposite side watching the Foreman-in-charge who was directing the Machine Operator's moves.

Claimant further testified that although he was aware of the boom, he was not aware of the magnet attached thereto and was, in fact, concentrating on the winching process being apprehensive of its success because of the manner the cable was attached to the ballast car.

Under the circumstances, the Carrier has sustained its burden of proof necessary to establish Claimant's culpability. The discipline stands.

One other element which arose during this dispute was the Carrier's refusal of the Organization's request for a copy of the statements taken by a Claim Agent to prepare their position.

These statements, for reasons not explained, were never furnished to the Organization, but, in this instance, the Board

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finds the refusal is not cause for reversal of discipline. The Organization's handling of the defense cannot be faulted as it was well done. Of the statements, the Organization had access to each of the parties that were at the scene who did give statements, and did conduct its defense accordingly.

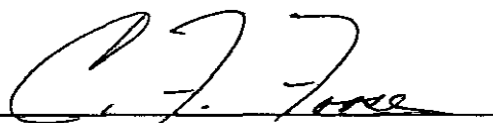
AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.


Robert L. Hicks, Arbitrator


C. F. Foose
Labor Member


Greg Griffin
Carrier Member

Dated 5-10-96