

PUBLIC LAW BOARD NO. 6102

Award No. 1
Case No. 1

PARTIES TO DISPUTE:

Brotherhood of Maintenance of Way Employes
and
Burlington Northern Santa Fe Railway
(Former St Louis - San Francisco Railway Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the current Agreement when it unjustly suspended Mr. P. A. Richardson from service for fifteen days based upon his alleged failure to work safely, resulting in injury to Derrick Warren.
2. As a consequence of the Carrier's violation referred to above, Claimant should be reinstated to service, paid for all time lost, and the discipline shall be removed from his record." [Carrier's File MWC 95-11-14AB. Organization's File B-2591].

FINDINGS AND OPINION:

Upon the whole record and all the evidence, the Board finds that the Carrier and Employees ("Parties") herein are respectively carrier and employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted by agreement and has jurisdiction over the dispute herein.

On September 7, 1995, the Claimant was in the process of aligning a joint bar so that a bolt could be inserted through the rail and the bar. In order to align the bolt holes in the rail and the bar, the Claimant struck the joint bar with a mall. A piece of metal broke loose from the bar and struck another employee in the arm, resulting in his injury. The Claimant was, as a consequence, suspended for fifteen (15) days, beginning September 11, 1995.

An investigation was requested and, after a mutually agreed-upon postponement, held on September 29, 1995. At said investigation, the Claimant was charged "to determine the facts in Mr. Richardson's alleged failure to work safely, resulting in the injury to Derrick Warren." In subsequent exchanges of correspondence, the Carrier stated the 15-day suspension was warranted because:

"The fact is the Claimant was instructed to notify employees working near him that he was going to strike a bar and that those employees should move to a safe location. The Claimant did not provide for the safety of his fellow workers and one of them was injured. The Claimant's actions violated Rules 1.1, 1.1.2, and 25.7."

The Board finds there was compliance with the applicable provisions of Rule 91, the Discipline Rule, of the Agreement between the Parties.

When the accident occurred, both the Claimant and the injured employee, Derrick Warren, were engaged in putting joint bars in place and bolting the bars to the rails being joined. The bolt holes in the rail and bar on Claimant's end of the bar did not align. The Claimant warned Mr. Warren that he was going to hit the bar with a mall, to attempt to align the bolt holes. All parties testifying at the investigation agreed that this was a customary way or "standard practice" in applying joint bars to jointed rail. The Claimant and Mr. Warren both stated they had observed and been taught this method of aligning bolt holes by senior employees and/or supervisors. Upon being warned of the Claimant's intentions, Mr. Warren stood up, and when the joint bar was struck with the mall, a piece of overflowed metal on the secondhand bar flew off and struck Mr. Warren in the arm.

Roadmaster Cheek, the Claimant's supervisor, stated that a similar accident had occurred in June, 1995, and a reenactment was held to determine the cause and preventive measures that could be taken to avert similar accidents. He and the Claimant agree the Claimant was present at such reenactment, but at this point their testimony became inconsistent. Paraphrasing, Roadmaster Cheek asserted the employees were told to make sure other workers are out of the way, standing behind the person swinging the mall or other tool, not in the direction the mall would be swung. The Claimant, however, asserted that although he was present at the June reenactment, he was not told how to prevent a recurrence of the same type accident.

We cannot resolve this divergent testimony by the Roadmaster and the Claimant. That the Conducting Officer credited the Roadmaster's account over that of the Claimant cannot be faulted. The Conducting Officer was in a position to observe and weigh the credibility of those testifying at the investigation.

Substantial evidence was adduced at the investigation to support the charge that the Claimant failed to work safely, resulting in the injury to Derrick Warren.

While the primary failure to work safely rested with the Claimant, others are not without blame. When asked whose responsibility it would be to insure that other workers are in a safe position under the circumstances of this accident, the Roadmaster answered, "First, it would be the foreman. And, it would be the one that's doing the striking. And everybody on the gang is responsible." The Roadmaster went on to state that although there was a foreman on the job site, he did not see the accident. It is also noted that when the Claimant warned Mr. Warren that he was going to strike the joint bar, Mr. Warren merely stood up and did not remove himself to a safe location. Indeed, he asserted he knew the Claimant would have to strike the joint bar to align the bolt holes.

The Roadmaster further implied some shared responsibility when he was asked how the accident could have been prevented. His reply was:

"I explained that if Mr. Derrick Warren could have said, 'Don't hit the bar until I get around out of the way because you're going to be swinging the mall directly at me,' he could have did that. Or Mr. Richardson could have said, 'Now, Derrick, you get around here beside of me or behind me 'cause I'm going to hit this bar,' and--'with this mundy mall. And, you know, I'd be swinging right at you and it'd be safe for you to get around behind me.'"

The Claimant was an employee with about 9½ month's service, and a clear record at the time of this accident. Discipline is warranted, in view of all the circumstances, but we find it excessive in view of the shared responsibility and apparent condonation of expedient, but unsafe, work practices under these circumstances. Nevertheless, the Claimant is primarily at fault.

In the Claimant's defense, it was implied through a line of questioning that the possible cause of the accident was use of a secondhand joint bar, one showing some metal overflow caused by the battering of wheel flanges. A condemnable defect was not proven. Even if this line of questioning had borne some fruit, the primary cause would still be the Claimant's unsafe act of striking the bar while another employee was in range of flying material.

The suspension is reduced to nine (9) calendar days. Payment for the excess number of lost work days encompassed by this reduction shall be made within the time limit prescribed in the Award below.

AWARD

Claim sustained in accordance with the opinion. The Claimant shall be compensated in accordance with the opinion above within sixty (60) days from date of this Award.

Robert J. Irvin

Robert J. Irvin, Referee

April 20, 1998

Date

