AWARD NO. 26
ITEM NO. 147

SPECIAL BOARD OF ADJUSTMENT NO. 541

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

AND

ERIE LACKAWANNA RAILWAY COMPANY

STATEMENT OF CLAIM:

1. The Carrier improperly dismissed from its service Class 1 Equipment Operator William V. Capozzi, as of October 16, 1964.

2. Work Equipment Operator Class 1, William V. Capozzi, be now reinstated in the Carrier's service, with full seniority restored, vacation rights, and all other benefits provided by the effective Agreement. And further that he be reimbursed for all wages lost by him, due to this improper action, complained of in Part 1 of this claim.

FINDINGS: This dispute concerns the dismissal of an equipment operator for negligence in not inserting the "locking pin" in the boom of the tie handler he had been operating that day. The evidence supports Carrier's findings that Claimant did not insert the pin in the boom and that later in the afternoon, when the equipment was being towed along with other machines to the gang's headquarters at Olean, New York, for tie-up, the boom of the tie handler swung over the westward track and was struck by the engine of a passing train. As a direct result of these events, a tie clamp broke loose from the boom and struck and fatally injured an assistant foreman.

It is emphasized by Petitioner that at the close of Claimant's work-day on the afternoon in question, while he was still at his machine and its motor was running, Extra Gang Foreman ordered him to leave it and go to the rear of the gang to assist in other work. Claimant promptly complied with these orders after shutting off the motor of the machine and did not return to it since his day's work was completed. In Claimant's absence, other employes then lined up and coupled the work equipment, including Claimant's machine, and proceeded to tow them to the headquarters point at Olean, New York, in accordance with regular practice.

There are a number of difficulties with the case from Claimant's standpoint. For one thing, the record leaves no question but that Claimant was negligent and that that negligence was a direct cause of the accident. None of the circumstances mentioned by Petitioner detract from the significance of that compelling consideration. He should have known enough to secure the boom and his lack of experience with the machine does not constitute a persuasive defense under the circumstances. Another difficulty is that the evidence does not adequately establish that any other employe actually had the duty to insert the pin in the boom of Claimant's tie handler or should have observed the hazardous condition or checked the machine to make certain that the boom was secured. As soon as the boom swung out and the condition was observed by the Foreman, he attempted to remedy the situation. On this record, we cannot validly hold that Carrier was in error or unreasonable in its findings of fact.

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We also find no merit in petitioner's contention that Carrier failed to give Claimant the notice of charges or hearing contemplated by Rule 30. The record showed that he received the following notice:

> "In accordance with Rule 30 of Agreement between Erie Railroad Company and Brotherhood of Maintenance of Way Employees, effective January 1, 1952, you are hereby notified to present yourself for investigation in connection with injury to Mr. Thomas G. Auman, assistant foreman, which occurred at M.P. 393.75 at Olean, New York, on August 14, 1964, at 3:45 P.M.
>
> The investigation will be held on Monday, August 24, 1964, after arrival of train No. 5 in office of division engineer, Room 502, Terminal Building, Youngstown, Ohio.
>
> At this investigation, you may have present representative (or representatives, according to agreement) or any witness you desire.
>
> If you are unable to attend the investigation, you should contact the undersigned at once, giving the reasons.
>
> Yours very truly,
>
> J. K. Weikol,
> Division Engineer"

The above notice was received on August 18, 1964, and was therefore timely within the meaning of Rule 30 which provides for not less than three days notice. As a matter of substance, it refers to Rule 30 which only concerns disciplinary hearings and clearly placed Claimant and his representatives on notice that a hearing of that type would be held at the designated time and place. Its significance was also clearly brought out in the sentence relating to "representative" and "witness." Claimant appears to have been accorded all rights prescribed by Rule 30 and no reversible error is found. A hearing was held and he was ably represented there and given fair opportunity to call, examine and cross-examine witnesses and develop his case. Neither Claimant nor his representative claimed surprise at the hearing or sought additional time to meet the issues.

The discipline in this case may be more drastic and extreme than we might find appropriate. However, considering the record in its entirety as well as Carrier's enormous responsibility for the safety of its personnel and others, no justification is perceived for disturbing the disciplinary action in controversy and substituting our judgment for that of management in the present situation.

We therefore are constrained to deny this claim.

AWARD: Claim denied

Dated at New York, N.Y. this 29th day of October 1968.

/s/Harold M. Weston
HAROLD M. WESTON, NEUTRAL

/s/A. J. Cunningham
ORGANIZATION MEMBER

/s/R. A. Carroll
CARRIER MEMBER