

**Award No. 3808**

**Docket No: 3691**

**2-PRR-MA-'61**

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**SECOND DIVISION**

The Second Division consisted of the regular members and in addition Referee Howard A. Johnson when award was rendered.

**PARTIES TO DISPUTE:**

**SYSTEM FEDERATION NO. 152, RAILWAY EMPLOYEES'  
DEPARTMENT, A. F. of L. — C. I. O. (Machinists)**

**PENNSYLVANIA RAILROAD COMPANY**

**DISPUTE: CLAIM OF EMPLOYEES:**

1 — That under the controlling Agreement Machinist W. J. Gallo was unjustly dealt with when the Carrier suspended him five (5) days for an alleged violation of Safety Rule No. 4073, and caused him to lose an additional day's wages in appealing said suspension.

2 — That the Carrier be order to:

(a) Compensate him for his wage loss on October 23, 24, 25, 26 and 27, 1958, the five (5) days he was suspended and for October 3, 1958, the day he was required to lose in having his appeal heard.

(b) Remove the notation of discipline from his record.

**EMPLOYEES' STATEMENT OF FACTS:** W. J. Gallo, hereinafter referred to as the claimant, is employed by the Pennsylvania Railroad Company, hereinafter referred to as the carrier, as a machinist, in the enginehouse, at Wilmington enginehouse, Wilmington, Delaware.

On September 8, 1958, the claimant was required to stand trial on the charge that he had violated Safety Rule No. 4073 on August 24, 1958. Safety Rule No. 4073 is as follows:

"Before handling material or object determine the best place to take hold. Place hands in proper position and take grip or hold sufficient to prevent material or object falling from hands or getting out of control."

Trial was held in the office of the enginehouse foreman, at Wilmington, Delaware, and a record was made of the trial proceedings.

Pursuant to, and in connection with, the aforementioned trial, the claimant was notified that he would be disciplined by a five (5) days' suspension. The claimant, in a letter to the superintendent of personnel, dated September 18, 1958, appealed the discipline. In a letter dated September 23, 1958, the superintendent of personnel acknowledged receipt of the claimant's appeal and notified claimant that his appeal would be heard on Friday, October 3, 1958, at 9:30 A. M. in Room 400, Pennsylvania Station, Baltimore, Maryland.

The claimant's appeal was heard as scheduled and, in a letter dated October 7, 1958, the superintendent of personnel denied the appeal.

In a note dated October 9, 1958, the enginehouse foreman served notice on the claimant that his suspension would be put into effect October 23, 1958, and, as a result, the claimant was not allowed to work on October 23, 24, 25, 26 and 27, 1958.

In a letter dated November 8, 1958, the local chairman appealed the decision of the superintendent of personnel and asked that a joint submission be prepared. The case was then turned over to the general chairman, who handled it with the manager of labor relations, the highest officer designated by the carrier to handle grievances.

After discussion of the matter at a regular meeting on March 17, 1959, the manager of labor relations denied the appeal in a letter dated April 3, 1959.

This dispute has been handled in accordance with the agreement covering rules effective April 1, 1952, as it has been subsequently amended, and said agreement is controlling.

**POSITION OF EMPLOYEES:** The position of the employees in this dispute is based on the following:

- 1 — That the agreement covering rules, effective April 1, 1952, as it has been subsequently amended, is controlling, and the safety rule invoked in the instant dispute is not a part of the said agreement but is a unilateral application of the carrier not accepted by System Federation No. 152, AFL-CIO.
- 2 — That the current agreement does not prescribe any penalty for a violation of these unilaterally applied safety rules.
- 3 — That the claimant was not guilty of violation of Safety Rule No. 4073, and that the carrier failed to produce evidence or testimony sufficient to prove his guilt.
- 4 — That even if the carrier's safety rules were a part of the current agreement, and were not unilateral (a contention that could not be supported by fact), the claimant would still be improperly charged, since Safety Rule No. 4073 does not apply to the circumstances in the instant case.
- 5 — That the carrier improperly handled the trial, and that the trial record discloses procedural defects.

In support of these five (5) items on which the employes' position is based, we offer the following arguments:

First, it is evident that the carrier's safety rules are not a part of the current agreement, since they have not been incorporated into the agreement. However, this does not mean that we are averse to employes working in a safe manner. We heartily endorse the practice of safety in all phases of the employes' work, but we do object to the carrier's use of their unilaterally applied safety rules just for the purpose of applying discipline. In the instant case it is evident that the claimant was the victim of an unavoidable accident, and was not deliberately attempting to violate any safe practice. Discipline in such cases is unwarranted.

The current agreement does not provide for any penalty for violation of those unilateral safety rules. In fact, the agreement is for the protection of the employes against unilateral action on the part of the carrier. Therefore, if the carrier is permitted to impose discipline at will, and outside the provisions of the agreement, then the employes are denied the protection of the agreement.

Further evidence that the carrier's application of the safety rules is unilateral is evidenced by the fact that the instructions on trial procedure are limited to the carrier's supervision alone. These instructions on the procedure for handling trials are an important part of the trial. If the local chairman and committeeman are not familiar with the procedure they are unable to afford the employes the proper representation to which they are entitled under the provisions of Rule 6-A-3, paragraph (b) of the current agreement, which reads as follows:

"6-A-3 (b) If he desires to be represented at such trial, he may be accompanied by the duly accredited representative as that term is defined in this Agreement. The accused employe or the duly accredited representative shall be permitted to question witnesses insofar as the interests of the accused employe are concerned. Such employe shall make his own arrangements for the presence of the said representative and of any witnesses appearing on his behalf, and no expense incident thereto will be borne by the Company."

The representative is unable to protect the interests of the employe if he is not familiar with the procedure used. In the trial in the instant case the claimant was represented by a duly accredited representative, but neither the claimant nor the representative was acquainted with the trial procedure, which is evidently a deep, dark secret, available only to the supervision. As support for this contention, this same representative, J. R. Carlin, has asked for a copy of the instructions on trial procedure and has been told by the carrier that these procedure instructions were for the supervision only and that there was no authorization for giving him a copy. Such practice on the part of the carrier precludes a fair and impartial trial for the accused employe.

Further, Safety Rule No. 4073, already quoted in the employe's statement of facts, is not applicable in the instant case. Safety Rule No. 4073 says that the employe will "take grip or hold sufficient to prevent material or object falling from his hands or getting out of control". Certainly the claimant had nothing fall from his hands. The "material or object" referred to was the drum of oil which he was transporting, and it was neither logical nor possible to suppose that he could hold it in his hands and at the same time transport

it on the hand truck. Also, since the claimant was using both hands to guide the hand truck it was not possible for him to take "grip or hold" on the "material or object", that is, the drum of oil. In this connection we respectively request the Honorable Board to scrutinize a different safety rule, Safety Rule No. 4081, which reads as follows:

"Load **material** securely to prevent its shifting or falling from truck, trailer or skid. Securely block round **material or objects** to prevent them rolling. Secure load with rope, wire or chain where necessary." (Emphasis supplied).

Whether or not the claimant could be considered in violation of Safety Rule No. 4081, is entirely immaterial. The important fact is that he was not so charged. However, it does bring two important points to the attention of the Honorable Board: first, that the carrier used the wrong safety rule, if any was indicated at all, and second, that Safety Rule No. 4081, as do the other safety rules of like nature, include Safety Rule No. 4073, supposes that the "material or objects" are entirely separate from, and have no reference to, the truck on which they are being transported. Therefore, it is evident that the claimant did not, and could not, grip or hold any "material or object" due to the fact that he was using both hands to wheel the hand truck, and that no "material or object" fell from his hands.

Lastly, it is evident that the carrier improperly handled the trial and the trial record. We have pointed out that the trial procedure is a unilateral proposition. The carrier denied the claimant a fair and impartial trial when it furnished the trial procedure only to the supervision. The claimant's interests could not be protected under the provisions of Rule 6-A-3 (b) of the current agreement if neither the claimant nor the representative was aware of the procedure.

As for the trial record itself, it is certainly out of order. In the fourth "Q" of the trial record, the presiding officer says:

"Q. For your information, the investigation statement taken from you at the time you were injured will be made a part of this trial record."

We bring to the attention of the Honorable Board that no such investigation statement appears in the trial record. Therefore, the trial record is incomplete. In addition, we find on the third page and at the end of the trial statement, the following:

"My signature on this and the **one** preceding page of this signifies I am satisfied it is a true and correct record of my trial statement." (Emphasis supplied)

Since there are **two** preceding pages to the trial record, rather than one, which preceding page are we to accept? Again it is evident that the trial record is incomplete, and, therefore, improper.

We submit that the claimant was disciplined on the basis of the testimony contained in an inconclusive, incomplete and improper trial record. The trial record clearly shows that the carrier failed to produce evidence or testimony which conclusively proved the claimant guilty of violation of Safety Rule No. 4073. We have already shown that the trial record is incomplete and improper.

On the basis of the foregoing we respectively request the Honorable Board to sustain the position of the employes, and reverse the decision of the carrier, and allow the employes' case as presented.

**CARRIER'S STATEMENT OF FACTS:** On August 24, 1958, Claimant W. J. Gallo was employed as a machinist at the enginehouse at Wilmington, Delaware, on the carrier's Chesapeake Region, with tour of duty 6:00 A. M. to 2:00 P. M.

At about 9:40 A. M. on this date, claimant was transporting a 50-gallon drum of oil from the storehouse to the oil rack at the enginehouse by means of a two-wheeled hand truck. Claimant was pulling the truck, and when he stopped at the oil rack the truck handles flew up. Claimant was unable to control this motion, and when he tried to jump out of the way, the truck handle struck him on the right hip. In the process the oil drum fell off the truck. Claimant reported the incident to the assistant enginehouse foreman at about 9:45 A. M. Claimant did not desire medical attention and lost no time from work.

Subsequently, claimant was requested to report for investigation on August 25, 1958.

By notice of September 4, 1958, claimant was notified to report for trial on the following charge:

“Violation of S.R. 4073 on 8-24-58 resulting in personal injury.”

Trial was held September 8, 1958, and on Form G-32, “Notice of Discipline,” claimant was notified he was being suspended for five days on the same charge as that quoted above.

By letter of September 18, 1958, claimant appealed the discipline to the superintendent, personnel. Appeal was heard October 3, 1958, and denied by letter dated October 7, 1958.

The matter was then handled with the superintendent, personnel by the local chairman, International Association of Machinists. At the request of the latter, a joint submission was prepared.

At meeting on March 17, 1959, the general chairman presented the matter to the manager, labor relations, the highest officer of the carrier designated to handle such disputes on the property. The manager, labor relations denied the appeal by letter of April 3, 1959.

**POSITION OF CARRIER:** As indicated in carrier's statement of facts, the claimant was disciplined by suspension of five days for violation of Safety Rule 4073, which reads:

“4073. Before handling material or object determine the best place to take hold. Place hands in proper position and take grip or hold sufficient to prevent material or object falling from hands or getting out of control.”

Before discussing the contentions presented by the employes during the handling of this matter on the property, carrier wishes to make it abundantly

clear that there has been no dispute between the parties that the claimant failed to receive a fair and impartial trial. Neither has there been any dispute that any procedural defect existed in the handling of this dispute which had the effect of denying the claimant any rights granted him by the provisions of the applicable rules agreement. The carrier submits that there are few principles more firmly established than that which your Honorable Board has recognized in many Awards, i.e., that the Board will not substitute its discretion for that of the carrier as to the propriety of discipline imposed where the carrier has not acted arbitrarily, maliciously, or in bad faith. For example, in Third Division Award 5032, Referee Jay S. Parker stated this principle as follows:

“Our function in discipline cases is not to substitute our judgment for the company or decide the matter in accord with what we might or might not have done had it been ours to determine but to pass upon the question whether, without weighing it, there is some substantial evidence to sustain a finding of guilty. Once that question is decided in the affirmative the penalty imposed for the violation is a matter which rests in the sound discretion of the company and we are not warranted in disturbing it unless we can say it clearly appears from the record that its action with respect thereto was so unjust, unreasonable or arbitrary as to constitute an abuse of this discretion.”

The carrier asserts, and will hereinafter show, that its action in disciplining the claimant was neither unjust, unreasonable, nor arbitrary, but was taken only after an investigation and proper trial clearly established his guilt as charged.

The sole question at issue in this dispute is whether or not the claimant was properly charged with a violation of Safety Rule 4073 or, to put it another way, whether or not said rule is applicable to the situation involved.

Carrier submits that, under the circumstances here present, it is obvious that Safety Rule 4073 was precisely applicable and that claimant was clearly guilty of violating said rule. In support of this statement, the attention of your Honorable Board is directed to the following testimony of the claimant, quoted from the record of his investigation and trial.

#### **Investigation Record**

“Q. Tell me in your own words just how this accident happened?”

A. I was pulling a 50 gallon drum of oil from the storehouse to the oil rack near No. 1 track in Wilmington Enginehouse. I stopped when I arrived at this location and the barrel got away on me. The hand truck handle started to go up and I couldn't hold it so I started to jump away and as I did the top of the barrel hit the forks what I could figure and it threw the handle up in the air and it flew wild and hit me in the right lower back over my hip.

Q. Then the barrel slipped off the hand truck is that correct?

A. I didn't actually slip off the truck from not being secured. As I stopped it caught me off balance and the handle started to raise.

The bottom of the barrel hit the floor which evidently threw the barrel off the forks in the front. I tried to gain control which I couldn't and as the barrel slid down the top of the barrel hit the forks and threw the truck. As that happened I jumped away and it caught me on the right side."

#### **Trial Record**

"A. I was pulling a barrel of oil over from the storehouse to the oil rack and as I stopped the truck just raised up on me. In other words it got away from me. The barrel hit the bottom of the floor which threw the barrel off the forks. The barrel slid down and the top of the barrel hit the forks which threw truck wild and as I jumped out of the way it got me on the side of the hip."

Applying the above quoted testimony to the clear and precise language of Safety Rule 4073 clearly reveals that said rule is applicable to the situation and that claimant obviously violated its provisions.

For example, the rule states, "Place hands in proper position and take grip or hold sufficient to prevent material or object falling from hands or getting out of control."

Carrier submits that, quite simply, the instant situation is revealed as one in which claimant, in his use of the hand truck, failed to take grip or hold sufficient to prevent the object from getting out of control. Under the facts as revealed in the record of the investigation and trial, no other conclusion is possible, and it must be emphasized that the claimant admitted that the hand truck had gotten out of his control.

Despite this, the employes contend that Safety Rule 4073 is not applicable. Their position in the joint submission reads:

"Mr. Gallo was improperly charged with violation of Safety Rule 4073. This rule was not applicable to the situation, since Mr. Gallo was not at the time handling or lifting the drum of oil. He was engaged only in trucking it. Therefore, he would have no reason to 'determined the best place to take hold', since he was not holding the material. Neither did he have reason to 'take grip or hold sufficient to prevent material or object falling from hands', since he was not lifting the drum at the time he was charged."

From the above quoted Position, it is apparent that the employes consider that, insofar as the instant situation is concerned, Safety Rule 4073 has application only to the drum of oil. The carrier is frankly at a loss to understand by what process of reasoning the employes have arrived at such a conclusion, but submits that any such conclusion is completely fallacious. It must be clear that the oil drum is not the object of concern in this case. Admittedly, the claimant was not lifting the drum at the time the incident took place, and there is no dispute that said drum was properly placed on the hand truck. It is the hand truck that is the object of concern here, not the oil drum. The specific language of Safety Rule 4073 requires an employe to grip or hold an object, in this case the handles of the truck, in such a manner as to prevent the object from getting out of control, which is precisely what happened.

To put it another way, the carrier respectfully submits that the employes would apparently have your Honorable Board believe that, under Safety Rule 4073, the claimant had no responsibility to so grip the handles of the truck that it would not get out of control.

In other words, it is apparent that the employes have concluded, by some wholly unexplained process of reasoning, that the words "material" and "object" in Safety Rule 4073 cannot be applied to a hand truck. Carrier asserts that any such conclusion is totally without merit and ignores the broad meaning and intent of the rule. Safety Rule 4073 is, by its specific language, intended to require that any material or object subject to manual handling shall be gripped or held in such a manner that such material or object will not get out of control. This meaning of the rule is based upon practical common sense, and carrier respectfully submits your Honorable Board should take no cognizance of any arguments the employes may present to the contrary. Indeed, if the contentions of the employes in this regard were to be considered valid, then no employe using a hand truck would have any responsibility for keeping said truck under control, an obviously ridiculous result.

In view of all of the foregoing, carrier submits it is clear that the employes have failed to assume the burden of proving that the claimant was unjustly dealt with, which, as the complaining party, it is incumbent upon them to do. They have presented no valid evidence whatsoever to support their allegations, and upon this point alone their claim in this dispute must fall.

So far as the applicability of a specific safety rule is concerned, it is of interest to note the following principle quoted from the opinion of Board in First Division Award 17047 (Referee Rogers):

" 'Safety First' is an unwritten rule on all American railroads. All formalized safety rules are subordinate to it. They only implement it. Every employe is presumed to know and obey the 'Safety First' rule from the instant of his employment. Most disciplinary cases involving accidents are clearly covered by this unwritten 'Safety First' rule. Our findings in such cases should not be affected by failure to cite a specific safety rule or even by the fact that there is no specific safety rule covering a particular accident."

In the instant case, of course, as the carrier has pointed out, the claimant's carelessness and his failure to keep the hand truck under control was covered by a specific safety rule. However, even if his dereliction had not been covered by any specific rule, such fact would not constitute an excuse for his action. The fact remains that the claimant, by his own admission, was guilty of performing his work in a careless and unsafe manner and such performance could easily have resulted in serious injury to himself and/or his fellow employes.

Finally, the attention of your Honorable Board is directed to claimant's past discipline record, which was made part of the trial record and was used in determining the amount of discipline to be assessed. Your Honorable Board has held in many awards that the past discipline record of an employe may properly be so considered, and the employes raised no objections to its inclusion in the trial record. Claimant's past discipline record is as follows:



"Violation S.R. 4600T	11-17-50	— Reprimand 12-18-50
Violation S.R. 4402	6- 4-54	— 1 day suspension approved but not placed in effect account em- ploye furloughed
Violation S.R. 4600M	5-26-55	— 1 day suspension 6-30-55
Violation S.R. 4468	2-13-57	— 2 days suspension 4-27-57
Violation S.R. 4205	4-25-58	— Reprimand 6-30-58"

In view of this past record of discipline, which shows that repeated discipline has been required against this claimant because of his violations of the safety rules referred to on his record, carrier submits that the suspension of five days given the claimant was by no means excessive.

The carrier submits that for the reasons summarized below, its action in disciplining the claimant was proper and should not be disturbed.

1. The claimant was afforded a fair and impartial trial at which he was accompanied by a representative of his own choosing and at the conclusion of which he answered in the affirmative to the question "Mr. Gallo has this statement been taken in a fair and impartial manner?"

2. The testimony of the claimant at his investigation and trial represented more than sufficient evidence to support the charge.

3. Safety Rule 4073 was precisely applicable to the circumstances here involved and claimant was properly charged with a violation of said rule.

4. The employes have presented no valid evidence whatsoever to support their contention that claimant was improperly charged with violation of Safety Rule 4073.

In view of all of the foregoing, the carrier respectfully requests your Honorable Board to deny the claim of the employes in this matter.

**FINDINGS:** The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

Claimant was charged with violating safety rule 4073, which reads as follows:

"Before handling material or object determine the best place to take hold. Place hands in proper position and take grip or hold sufficient to prevent material or object falling from hands or getting out of control."

Specifically the charge seems to be that claimant did not "take grip or hold sufficient to prevent \* \* \* object \* \* \* getting out of control"; for the object (the hand truck) did get out of control. But the evidence does not

show that it did so because of an insufficient grip or hold. On the contrary, it showed that the rolling of the 500 or 600 pound drum of oil is what took the truck out of control, and that since its weight must have been about three times his own, no possible hold by him could have kept the truck under control.

In other words, what claimant violated was safety rule 4081, which provides as follows:

“Load material securely to prevent its shifting or falling from truck, trailer or skid. Securely block round material or objects to prevent them from rolling. Secure load with rope, wire or chain where necessary.”

It is obvious that claimant's failure to obey this rule was the direct cause of the accident, and that the nature of his grip on the handles had little or nothing to do with it.

If the charge had been negligence in handling the truck and load in violation of the safety rules, the evidence would have sustained it. But the specific charge was the violation of rule 4073, and the record showed a violation of rule 4081. An employe may not be tried on one charge and convicted of another.

The claim is for compensation for claimant's five days suspension, and also for the day lost in the hearing of his appeal. No rule or award is cited authorizing compensation for time lost in an investigation by the employe investigated.

#### AWARD

The claim is sustained to the extent of claimant's wage loss during his five days suspension.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman  
Executive Secretary

Dated at Chicago, Illinois, this 30th day of June, 1961.