

Referee Robert M. O'Brien

PARTIES TO DISPUTE: Railroad Yardmasters of America
TO
DISPUTE: The Baltimore and Ohio Railroad Company

STATEMENT OF CLAIM: Claim and request of Railroad Yardmasters of America that:

Extra Yardmaster M. V. Gogerty be allowed nine and one-half days at the yardmaster rate, a total of \$313.02 and his record cleared account discipline administered on November 15, 1971 involving personal injury of Brakeman K. D. Cribbs on October 4, 1971.

OPINION OF BOARD: Claimant, extra yardmaster, was charged with responsibility in connection with injury to Trainman Cribbs on October 4, 1971, and with possession of an air rifle at time of the injury, and he was further charged with destruction of company property on same date. Following a hearing he was adjudged guilty of the charges and was disciplined 10 days actual suspension.

Initially, the Organization raises a procedural objection. It claims Article 7(b) was violated since Carrier failed to timely furnish Regional Chairman Healey with a copy of the notice of discipline. Superintendent Moorman, however, stated that a copy of the disciplinary notification was sent to Healey via U.S. Mail and that his Chief Clerk definitely recalled that a copy was so sent. This has not been sufficiently refuted by the Organization which has the burden of proving its allegation, and consequently we find it to be without merit.

Relative to the merits of the charges brought against claimant, it is the Organization's position that Carrier has failed to prove the guilt of claimant by substantive evidence. Rather, it feels that all the evidence adduced at the hearing was circumstantial and speculative and thus not sufficient to sustain the charges against claimant.

It is uncontroverted that on October 4, 1971 Trainman Cribbs was injured when he was struck in the left eye by a foreign object. He was in the hospital as a result of the injury and lost 10 days time. Claimant was held responsible for the injury.

At the hearing Yard Foreman Moore testified that on the date of injury he observed claimant with an air rifle in his possession, although he never saw him fire it. This was about 4:05 or 4:10 P.M. He again saw claimant with the rifle at 8:20 P.M. standing over Mr. Cribbs when Cribbs was hurt. Yard Helper Mahannah testified that he also observed claimant with a

rifle at approximately 8:00 P.M. on October 4 while Engineer Weaver stated that he saw claimant with an air rifle or BB gun in his hand just after Cribbs was injured. Neither witness, however, observed claimant fire the rifle. Cribbs testified that something hit him in the eye though he could not definitely say that it was a shot from a rifle or that claimant was responsible for it. Claimant denied having fired the rifle while conceding that he did have it in his hands when bending over Cribbs when Cribbs was hurt.

In order to withstand reversal by this Board the record must reveal that the charges against claimant have been proven by substantive evidence adduced at the hearing with Carrier bearing the burden of proving same. We find that Carrier has sustained that burden in the claim before us. We are mindful that the evidence presented at the investigation was primarily circumstantial. Yet circumstantial evidence in some instances, such as the present claim, is sufficient to uphold an imposition of discipline by Carrier. While no one actually observed claimant shoot Cribbs with the rifle he was observed by three witnesses in possession of an air rifle at the time of the injury and also earlier the same day. He even admits having the rifle in his hands while bending over Cribbs but fails to adequately explain why. We believe there was substantive evidence brought forward at the investigation to uphold Carrier's findings relative to the injury of Cribbs.

While we do not see where Carrier has proven that claimant was responsible for the damage to a switch light and an illuminating light, it has sustained the burden upon it relative to the other charges and we will allow the discipline to stand.

FINDINGS:

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

The carrier and the employe 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.

The parties to said dispute were given due notice of hearing thereon.

The parties to said dispute waived right of appearance at hearing thereon.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Fourth Division

ATTEST: *E. A. Killeen*

E. A. Killeen
Secretary

Dated at Chicago, Illinois, this 29th day of May, 1973.