

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13736
Docket No. 13628
03-2-01-2-35

The Second Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

(Brotherhood Railway Carmen Division
(Transportation Communications International Union

PARTIES TO DISPUTE: (

(Springfield Terminal Railway Company

STATEMENT OF CLAIM:

“Claim of the Committee of the Union that:

- (1) The Springfield Terminal Railway Company violated the terms of our agreement, in particular Rule 13 when they arbitrarily administered a formal reprimand to Carman Sylvantus Moses as a result of an investigation held on August 10, 2000.
- (2) That, accordingly, the Springfield Terminal Railway Company be ordered to remove the formal reprimand from the record and file of Carman Sylvantus Moses. Also, compensate him for any time lost to attend this investigation.”

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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.

The instant claim, filed on August 30, 2000, protests the Carrier's issuance of a formal reprimand to the Claimant for negligence resulting in sustaining a personal injury on July 14, 2000, as a result of an Investigation held on August 10, 2000.

There are few disputed facts. The Claimant returned to the Lowell yard at 6:30 A.M. from his work at Ayer Yard, with a 70 pound scrap knuckle in his truck. He parked near the rear of the scrap metal dumpster that was 1/2 to 3/4 full, and dropped the knuckle into its back end which is approximately 45 inches high. The knuckle fulcrumed a 30-36" piece of metal in the dumpster when it hit causing it to rise up and hit the Claimant in the forearm, requiring 14 stitches. There were no witnesses to this incident. As the Claimant was completing his shift at the time, and the following two days he was scheduled off, he did not miss any work as a result of this injury. It was immediately reported to his Supervisor, David Melvin, who administered first aid; Manager James Olson took the Claimant to the hospital.

The instant charge of negligence is based upon Olson's belief, and testimony at the Hearing, that the Claimant should not have put his arm out over a dumpster half full of scrap and drop a heavy weight into it from the highest edge. Olson stated that the dumpster has a sloped front edge 10" shorter, which should have been used by the Claimant to slide the knuckle into it. Based upon Olson's conversation with the Claimant as they passed the dumpster on the way to get medical attention and his view of the scene, Olson believed that the Claimant had put his arm into the dumpster when dropping the knuckle, thereby placing it in a position where it was in jeopardy, resulting in this injury. The Claimant disagreed with only this portion of Olson's account, testifying that his arm was extended about 4-6" above the top of the dumpster when he released the scrap knuckle and was not inside the dumpster, and explaining that he used this end since he could park next to it and it was the most direct route to disposing of the knuckle, which he held to his chest as he transported it from the truck. Olson testified that other employees dispose of scrap in this dumpster from the higher back end. Olson explained that he felt it appropriate to charge the Claimant for negligence since prior attempts at counseling and safety reviews have not helped, and the Claimant has sustained ten injuries during the course of his 26-year employment.

The Carrier argues that there is substantial evidence in the record to support the charge that the Claimant was negligent in the manner in which he disposed of the

knuckle, resulting in his injury. It asserts that there were no procedural errors in the conduct of the Hearing or proof of the Carrier prejudgment of guilt, as alleged by the Organization, noting that the entry of the Claimant's personnel record solely for the purpose of assessing the appropriate penalty in the event of a finding of guilt is appropriate, (Note Second Division Award 13680) and there is no requirement that the Hearing Officer "rule" on objections or permit two Organization representatives to question witnesses at the Hearing, Second Division Awards 13611 and 13538. The Carrier contends that the Claimant's record reveals nine prior injuries, formal and informal safety reviews, and another formal reprimand for violation of a Safety Rule, and supports the propriety of the minimal penalty imposed herein.

The Organization contends that the Carrier engaged in procedural irregularities at the Hearing which denied the Claimant his right to a fair and impartial Hearing in violation of Rule 13, including prejudging his guilt prior to hearing, the Hearing Officer's failure to rule on objections, permit two representatives to ask questions of witnesses, and allowing the entry of the Claimant's personnel file into the record. It argues that the Carrier failed to meet its burden of proving that the Claimant was negligent in the manner he disposed of the scrap metal on July 14, 2000, noting that not all injuries are the result of employee negligence, and there was no proof that the Claimant acted contrary to specific instructions concerning disposal of heavy scrap.

Initially, we note that we find no basis for overturning the discipline in the Organization's procedural objections. The Board has held on this property that the manner in which the Hearing Officer dealt with objections by the Organization and permitted only one representative to question witnesses, was proper. Second Division Awards 13611 and 13538. A review of the transcript reveals that the Claimant was not denied due process or a fair Hearing. Further, it is clear that the Claimant's personnel record was admitted into evidence solely for the purpose of determining the amount of discipline to be assessed in the event he was found guilty of the charges. Second Division Award 13680.

With respect to the merits, a careful review of the record convinces the Board that the only evidence in the record to support the Carrier's charge of negligence is the fact of the injury, the physical dimensions of the scrap metal dumpster, and Olson's belief that the Claimant should have used the lower sloped front edge of the dumpster and not placed his arm inside the dumpster when disposing of the knuckle. He did not witness the incident. The Claimant stated that he never placed his arm inside the

dumpster, only 4" above its top edge, and explained that he used the back side because it was the most direct and closest route from where he could park next to the dumpster, its edge was only waist high, and the knuckle was very heavy. It is admitted that employees routinely use the back end of the dumpster to dispose of scrap metal, and there has been no showing that they have been informed that this is inappropriate, or that a Rule exists directing employees to the sloped front edge. While the Claimant may well have avoided his injury if he used the front end of the dumpster, and common sense might dictate its use, the fact remains that the Claimant did not act in violation of any Safety Rule or procedure by dumping the knuckle from the back end of the dumpster. To establish substantial evidence supporting a charge of negligence, the Carrier must do more than show that it might have been advisable to act in a different manner. While the Carrier cannot be faulted for wanting to bring home the message to the Claimant that he must act more diligently in pursuit of his own personal safety, the Board is unable to uphold the imposition of discipline based upon the record before us.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division**

Dated at Chicago, Illinois, this 30th day of June 2003.