

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISIONAward No. 9390
Docket No. 8922
2-EJ&E-CM-'83

The Second Division consisted of the regular members and in addition Referee John J. Mikrut, Jr. when award was rendered.

Parties to Dispute: (Brotherhood Railway Carmen of the United States
(and Canada
(Elgin, Joliet and Eastern Railway Company

Dispute: Claim of Employees:

1. That the Elgin, Joliet and Eastern Railway Company unjustly suspended Carman Charles D. Britt from service for a three (3) day period commencing Wednesday, October 31, 1979 through and including Friday, November 2, 1979 as a result of an investigation held on October 18, 1979. Said suspension is in violation of Rule 100 of the current working Agreement as well as being without cause, unfair, unjust and harsh.
2. That the Elgin, Joliet and Eastern Railway Company be ordered to remove the letter of discipline from the personal file of Carman Britt and clear his record of said discipline.

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 waived right of appearance at hearing thereon.

On the morning of September 10, 1979, Claimant, a Carman at Carrier's Gary, Indiana Repair Track, with seniority date of October 9, 1956, was assigned to operate a tractor. Later that same morning, Car Foreman K. J. Senzek assigned Claimant and another Carman, A. Clark, to straighten up various materials in the Materials Yard starting with the brake beams.

Claimant alleges that while so engaged he and Mr. Clark had stacked about 30 to 40 brake beams each weighing approximately 100 lbs. apiece during which time Claimant "felt a pain in his back".

At approximately 9:30 AM Claimant was observed by Repair Track and Derrick Foreman, E. W. Fritz, who, knowing that Claimant was working under a 1975 medical restriction which prohibited heavy lifting and straining, ordered Claimant to cease his work with the brake beams. Mr. Fritz assigned Claimant instead to operate the ready-power crane.

According to the record, although Claimant acknowledges hurting his back on September 10, 1979, and that he was in some degree of constant pain throughout the following days, Claimant made no formal complaint to Carrier at that time. On September 13, 1979, however, Claimant reported to Foreman Fritz that "... his back and legs were hurting him from Monday". Foreman Fritz then asked Claimant if he wanted to go to the U. S. Steel Dispensary, but Claimant declined. Later that same day Foreman Fritz mentioned the incident to the General Inspection Foreman, G. E. Goodwin.

Early on the morning of the following day, September 14, 1979, Claimant informed Mr. Goodwin that his "back and leg hurt him" and that he wanted to be taken to the Dispensary. This procedure was facilitated, but later that morning when Claimant returned to Mr. Goodwin's office he refused to fill out an accident report when requested to do so by Mr. Goodwin. Claimant maintains that he was in great pain and was physically unable to complete the form at that time. Said form was ultimately completed by Claimant on September 17, 1979.

As a result of said incident, Claimant was charged with:

"... failure to promptly report an alleged injury that allegedly occurred at 9:00 AM, Monday, September 10, 1979, but was not reported until approximately 8:00 AM, Friday, September 14, 1979.

... alleged refusal to promptly fill out the required accident report upon returning from the U.S. Steel dispensary at approximately 10:00 AM, Friday, September 14, 1979."

Pursuant to an investigation which was conducted on October 18, 1979, Claimant was adjudged guilty as charged and was assessed a three (3) day suspension without pay. Said suspension is the basis of the instant proceeding.

Organization's contentions in this dispute are as follows: (1) neither of the charges which were raised against Claimant were proved by Carrier in the investigation; (2) "Claimant was assigned a task by his Supervisor ... which was contrary to previous instructions from Carrier's Medical Department which specifically restricts Claimant from any heavy lifting or excessive straining"; (3) Claimant did not report his injury on September 10, 1979 because it "... did not really cause him severe pain or concern at the time, but it progressively worsened and on the twelfth the Claimant advised his Supervisor of his problem"; (4) Claimant was unable to complete the accident report on September 14, 1979, when he returned from the Dispensary because he was in severe pain; (5) "... Claimant was charged with a totally different charge than those he was found guilty of"; (6) Carrier's statement of charges against Claimant was not precise; and lastly (7) reference by Carrier in its Submission to Claimant's prior service record was improper because said information and/or argument was not presented by Carrier when the matter was handled on the property.

Carrier's position herein, simply stated, is that Claimant committed the infraction as charged; that there is substantial evidence in the record to support this charge; that Claimant's investigation was conducted fairly and impartially; that Claimant's work record indicates that Claimant was not "... unfamiliar with the Carrier's policy with respect to promptly reporting personal injuries"; that Carrier's right to promulgate and enforce rules such as those involved in the instant case are clearly supported; and that, in view of Claimant's work record, the amount of discipline assessed in the instant case is considerably "lenient" when compared to the discipline which has been assessed and authorized in numerous other cases.

Upon a careful analysis of the complete record in this matter, the Board is convinced that there is sufficient evidence in the record to determine that Claimant was guilty of the infraction as charged. In this regard, Claimant's own admissions which were made at the investigation hearing are most damaging to Claimant's position since said admissions establish that: (1) at the time Claimant was stacking brake beams on the morning of September 10, 1979, he became aware that he had injured his back; (2) Claimant's refusal to fill out the accident report after returning from the Dispensary on September 14, 1979, was caused more by his obvious feelings of hostility toward Supervisor Goodwin than by the degree of pain which Organization alleges Claimant was suffering at the time. In this regard the following testimony is significant:

"Q by Mr. Reed Your injury report that you filled out indicates
 you stacked 30 to 40 brake beams when you felt
 pain in your back, is that correct?

Claimant Right

Mr. Reed Did you report this pain to anyone on September 10?

Claimant No

Mr. Reed ... why didn't you report this pain at the time
 it happened, when Mr. Fritz changed your assignment?

Claimant Well, anytime I do a lot of bending, stooping, I will
 get pains in my back and a soreness, and this has
 happened before, so I usually don't report it unless
 its real serious, so on October the 12th my back was
 beginning to bother me more, the soreness didn't go
 away ...

Q by Mr. Randolph ... when Mr. Goodwin first asked you to fill out the
 accident report, what was your reply?

Claimant I did not feel like it.

Mr. Randolph And his second question to you was what?

Claimant Well, the second question, he told me, I'm pretty sure, Mr. Brag had asked him to be sure that I filled out my accident report and I told Mr. Goodwin that I didn't feel like it and if he would give me a message I would maybe fill it out.

Mr. Randolph What was the reason for telling him that?

Claimant Well, I think Mr. Goodwin, he always has harassed me here in a lot of ways. And he'd call me names ..."
(Emphasis added by Board.

Having determined the merits portion of this dispute, we turn next to the various procedural objections which Organization has raised. In similar fashion to the foregoing, the Board finds these contentions unmeritorious for the following reasons: (1) Carrier's statement of charges was sufficiently precise so as to properly apprise Claimant of the specific charges which were brought against him; (2) though somewhat different terminology was used by Carrier in Claimant's statement of charges and his discipline notice, both documents were identical in their substance; and (3) Carrier's reference to Claimant's record was proper since it was undertaken for the sole purpose of determining the appropriate penalty which was to be assessed and which, it must be added, under the circumstances, was an extremely lenient penalty to have been levied by Carrier.

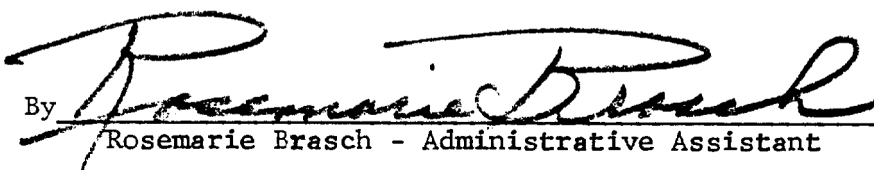
A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Acting Executive Secretary
 National Railroad Adjustment Board

By


Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 9th day of February, 1983.