

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISIONAward No. 10443
Docket No. 10261
2-N&W-CM-'85

The Second Division consisted of the regular members and in addition Referee Hyman Cohen when award was rendered.

Parties to Dispute: (Brotherhood Railway Carmen of the United States and Canada
(Norfolk & Western Railway Company

Dispute: Claim of Employees:

1. That the Norfolk & Western Railway Company violated the controlling agreement of September 1, 1949, as subsequently amended, when on November 25, 1981, Carman, K. R. Riley, was given a formal investigation resulting in unjust assessment of thirty (30) day actual suspension, plus a thirty (30) day deferred suspension against his personal record, effective January 11, 1982.
2. That the investigation was improperly arrived at and represents unjust treatment within the meaning and intent of Rule 37 of the controlling agreement.
3. That because of such violation and unjust action, the Norfolk and Western Railway Company be ordered to compensate Carman K. R. Riley for all time lost plus removal of the thirty (30) day deferred suspension against his personal record.

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 employes 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.

The Claimant has been employed by the Carrier as a Carman at the Carrier's Portsmouth Yard facility located in Portsmouth, Ohio, for "almost seven (7) years". Following an investigation that was held on November 25, 1981, the Claimant was assessed thirty (30) days actual suspension and thirty (30) days deferred suspension for failing to promptly report an injury alleged to have occurred on November 10, 1981 and which was not reported until November 16, 1981. The failure to promptly report the alleged injury constituted a violation of NW Safety Rule 1001.

The merits of this case are not in dispute. On November 16, 1981 the Claimant notified Gang Foreman Lybrook that while pushing on a plug-door handle of a box car on November 10, 1981 he felt some pain. He was absent from work on November 13, 1981. The Claimant indicated that because he hurt his shoulder on November 10, he did not call in to mark off work on November 13. There is no question but that the Claimant reported his alleged injury to the Carrier on the sixth day after such alleged injury had occurred.

The Claimant cannot be said to have been unaware of his obligation to immediately report on-duty injuries to the Carrier. Prior to the events in November, 1981, four (4) such injuries have been reported by the Claimant to the Carrier. Furthermore, on October 12, 1979, the Claimant was assessed a 10 day deferred suspension for his failure to comply with Rule 1001, in that he failed to report an injury alleged to have occurred two (2) years before the report was filed. Thus, it is clear that the Claimant did not report his alleged personal injury to his "immediate supervisor or the designated employee *** before leaving the Company's premises" on November 10, 1981 as required by NW Safety Rule 1001.

The Organization contends that the Carrier's use of a tape recorder to record the testimony given at the investigation resulted in an unfair hearing. Rule 37 which sets forth the procedure to be followed when an employee has been disciplined contains no language with respect to the preparation of a transcript. However, if a "stenographic report of the investigation" is taken, "the aggrieved employee or his representative" must be furnished a copy of the report under Rule 35.

In two (2) Awards involving the parties to the instant dispute, this Board has supported the Carrier's right to use a tape recorder to record testimony of an investigation. In Award 9378, this Board indicated:

"The use of tape recorders at a hearing, when it is ascertained that it does not violate any provision of the controlling Agreement, has been upheld in prior Board Awards (Second Division 8451; Third Division 15890)."

In Award 9379, this Board addressed the Organization's claim that the Carrier's use of a tape recorder violated Rule 37, as follows:

"The Board finds no grounds to support the contention that Carrier violated Rule 37. According to the record, the use of tape recorders at hearings has precedent on this property, and if the Organization wished to check the accuracy of the written transcript against the recorded tapes it was offered the opportunity to do so during the appeal process on property. This Board has ruled in the past that the use of tape recorders at investigative hearings do not per se diminish the fairness of such hearings (Second Division 8451; Third Division 15890). The Board holds this to be such in the instant case."

After carefully examining the record in this case, the Board concludes that there is no reason to deviate from the principles set forth in Awards 9378 and 9379. Moreover, the Carrier's refusal to allow the Organization to use a tape recorder at the investigation is not a violation of Rule 37. It should be pointed out that the Organization does not have a contractual right to record investigative proceedings.

The record fails to disclose that a paragraph in the transcript was omitted due to a blank in the tape. However, two (2) words were missing from page 6 of the transcript and the Organization was duly notified by the Carrier to insert the words "were injured". There is no evidence to indicate that the Carrier has altered or in any way changed the testimony in the transcript of the investigation that was supplied to the Organization. Furthermore, this Board cannot conclude that the use of the recording device by the Carrier prejudiced the rights of the Claimant or deprived him of a fair hearing under Rule 37.

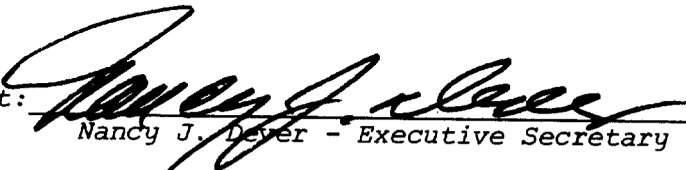
In light of the Claimant's past disciplinary record, including the assessment of discipline in October, 1979 for the same offense which led to the filing of the instant claim, the discipline imposed in this case is not excessive and should not be disturbed.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 12th day of June 1985.