NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Form 1

Award No. 12653
Docket No. 12356
94-2-91-2-145

The Second Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

PARTIES TO DISPUTE: (Brotherhood Railway Carmen/Division TCU
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(Norfolk and Western Railway Company

STATEMENT OF CLAIM:

"1. That the Norfolk & Western Railway Company violated the terms, conditions and provisions of the Agreement when they posted a bulletin dated April 20, 1990 headed PERSISTENT UNSAFE PRACTICES at Williamson, West Virginia.

2. That accordingly, the Norfolk & Western Railway Company be ordered to rescind this bulletin. That this bulletin be taken down, removed from any and all files, not be referred to in the future for any reason and that it be completely removed from all Company records."

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 waived right of appearance at hearing thereon.

In April, 1990, the following bulletin dated April 27, 1990[1] was posted at all Carrier's Mechanical Department facilities, including Williamson, West Virginia:

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[1] The Organization in its submission to this Board made reference to an April 20, 1990 bulletin. However, it is clear that this is a typographical error, since during the handling of this dispute on the property both parties referred to the April 27, 1990 bulletin at issue.

"PERSISTENT UNSAFE PRACTICES

Safety is a serious matter and the cornerstone of our working relations. Each person is duty bound to protect himself, others, and the property. In order for the Company to do its best in compliance with our policy for safety, employes who cannot correct the continuance of unacceptable acts that place themselves, others, or the Company at risk must be removed from service.

Definition of persistent unsafe practices: 'The continuance of unacceptable and avoidable incidents adversely affecting safety.'

Unsafe incidents which were reasonably avoidable will be counted.

If the frequency shows a pattern of unsafe behavior (including a safety rule violations and/or injuries) over a period of time during the active work history, where corrective training and consulting has failed, the employee will be discharged from service.

Safety of Operations is Norfolk Southern's number one priority. All injuries can be prevented. Every employee is charged with the responsibility of working safely to protect himself, his co-workers and Company property. Let's all help each other to work safely.

/s/ D.W. Mayberry

April 27, 1990"

On June 20, 1990, the Organization took exception to this notice and initiated the instant claim. It contended that the issue of unsafe practices and the Carrier's attempt to discharge those employees who demonstrate persistent unsafe practices falls squarely under terms and conditions of employment and thus become a mandatory subject of bargaining.

The Organization elaborated upon this argument further in its submission to this Board. It argued that the Carrier in issuing the April 27, 1990 bulletin has unilaterally imposed a new term and condition of employment. Prior to April 27, 1990, the Organization submits, employes were never told that they had an affirmative obligation to protect themselves, others and the Carrier's property or risk the imposition of discipline. By the same token, employes had never previously been informed that persistent unsafe practices

would result in discharge. The bulletined notice by the Carrier, particularly in view of the fact that it was promulgated without negotiation or agreement with the Union, contravenes the status quo requirements of the Railway Labor Act, Section 1, Seventh which provides:

> "No Carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in Section 6 of the Act."

The Organization also cites the Section 1, Tenth of the Act, which states as follows:

> "Tenth. The willful failure or refusal of any Carrier, its officers, or agents to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the Carrier, officer, or agent offending shall be subject to a fine of not less than $1,000 nor more than $20,000 or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall be [in violation...it shall be] the duty of any district attorney of the United States to whom any duly designated representative of a carrier's employes may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: Provided, that nothing in this Act shall be construed to require an individual employe to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employe an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent."

In further support of its position, the Union cites a case decided by the United States Supreme Court which, in its view, controls, the outcome of the instant matter. In Detroit and Toledo Shore Line R.R. v. UTU, 396 U.S. 142, 152-53 (1989), the Court stated:

> "Until the Carrier's serve a Section 6 Notice requesting bargaining, they are obligated by the Railway Labor Act to maintain the status quo pending the resolution of the Act's bargaining provisions. 45 U.S.C. Section 156. The status quo has been defined by the United States Supreme Court as the 'actual objective working conditions and practices, broadly conceived, which were in effect prior to the time the pending dispute arose and which are involved in or related to that dispute.'"

That same principle was recognized in Special Board of Adjustment No. 957, Award No. 17, which concluded that the existing agreements on the property did not provide the Carrier with the authority to discipline employes for failing a drug test. The Arbitrator noted:

> "that the Authority's unilateral implementation of 85-1 created a 'major' dispute insofar as it mandates discharge of an employe found with a trace of a controlled substance in his system, without these also being proof of impairment while at work. As a major dispute, it is necessary that the dispute resolution procedures called for in the Seventh section of the Act be followed before implementation of the Order."

While the Organization's principal position is that Carrier acted improperly in issuing the bulletin at issue without first negotiating over the desired change, the Organization for the first time in its submission raised several additional arguments. First, it asserted that the April 27, 1990 bulletin violated the controlling Agreement. Essentially, the Organization took the position that employees are contractually required to report injuries as they occur, but with the promulgation of the new policy, employes would unfairly be subject to discharge for complying with the reporting requirement.

Second, it was argued that the new policy is unreasonable on its face. The Organization submits that since there are many scenarios in which an employe could, through no fault of his own,

be involved in a safety related incident which under the new policy would result in discipline to the employe, it is inherently unfair to subject employes who often work under dangerous conditions to an added disciplinary penalty.

The major thrust of Carrier's argument is that it has the inherent managerial right to promulgate safety rules and in particular to ensure that employes perform their duties as safely and efficiently as possible. Carrier argues that the Organization has no right to demand negotiation regarding the establishment of operating or safety rules. Carrier stresses that it has the right to establish reasonable safety rules so long as they do not conflict with the collective bargaining agreement or the law.

Third and equally important to the Carrier, the Organization, in its view, has failed to establish that any rule or agreement was, in fact, violated. As the moving party, the Organization had the burden of proving the elements of its claim, and, in this case, Carrier maintains that the record is devoid of any evidence to support the Organization's newfound contention that the bulletin constituted a violation of the Agreement.

Finally, Carrier asserts that the April 27, 1990 bulletin merely stated what has been standard practice for many years. Safety has always been a paramount concern and employes who violate safety rules or are negligent in the performance of their duties have always been subject to discharge. Thus, Carrier argues, there is no basis for the Organization's contention that the April 27, 1990 notice constituted a unilateral change in working conditions.

After careful review of the record in its entirety, this Board is persuaded that the Organization's claim in not meritorious. As a preliminary matter, we note that the Organization raised a number of arguments before this Board which were not advanced during the handling of this dispute on the property. We are precluded from addressing those arguments as they are improperly advanced, as numerous prior awards of this Board have stated.

Therefore, the sole issue properly before us is the question of whether the bulletined notice regarding persistent unsafe practices constituted a mandatory subject of bargaining because it was in fact a change in the status quo. The burden of proof on that issue lies with the Organization, but the record provides no evidence beyond assertions and argument on the part of the Organization, we believe. Moreover, Carrier clearly rebutted the Organization's assertion that safety rules have not been promulgated in the past. Whether or not employes have been disciplined or discharged for "accident-proneness" is new argument. The Organization also has not established that this safety bulletin is

a "rule" which conflicts with the collective bargaining agreement or the law or is unreasonable on its face. Issues of application of the bulletin as a rule may be resolved on a case-by-case basis, as routinely done. Given the particular posture of this record, we are constrained to find that the Organization has not met its burden of proof.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Catherine Loughrin
Catherine Loughrin Interim Secretary to the Board

Dated at Chicago, Illinois, this 19th day of January 1994.