

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 14057
Docket No. 13923
13-2-NRAB-00002-110004

The Second Division consisted of the regular members and in addition Referee Robert E. Peterson when award was rendered.

PARTIES TO DISPUTE: (International Brotherhood of Electrical Workers
(Soo Line Railroad Company

STATEMENT OF CLAIM:

- “1. That the Canadian Pacific Railway Company [Soo Line (CP/Soo)], violated the controlling Labor Agreement, effective September 1, 1949, as amended in 1982, in particular Rule 35, when they wrongfully assessed Mechanical Department Electrician Andrew Moulton a five (5) calendar day suspension, and that in violation of Rule 35(m) the Claimant was prevented from working an additional thirteen uncompensated days in which he was wrongfully withheld from service.
2. That the CP/Soo Railway Company failed to provide Mechanical Department Electrician Andrew Moulton with a fair and impartial investigation as mandated under Rule 35.
3. That accordingly, the CP/Soo Railway Company be ordered to make Mechanical Department Electrician Andrew Moulton whole for all lost service, with all seniority rights unimpaired and to make him whole for any and all losses incurred including, but not limited to: straight time pay, overtime pay, vacation benefits, health and welfare benefits, Railroad Retirement benefits and any other benefits he would have earned or received during the time held out of service. Further, that any and all reference to the discipline hearing and subsequent assessment of discipline, including all correspondence, be removed from Mr. Andrew Moulton’s 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 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 claim before the Board requests that a five-day suspension from service assessed the Claimant be set aside and the Claimant be compensated for all time lost as a result of such suspension. In addition, the claim requests that the Claimant be compensated for 13 days that the Carrier withheld him from service pending the outcome of the disciplinary Hearing which was conducted on February 12, 2010 and had led to the above-mentioned suspension from service.

The five-day suspension was assessed the Claimant in a Carrier determination that testimony presented at the February 12, 2010 Hearing supports a finding that the Claimant had failed to follow instructions that he was to wear protective gloves while changing light bulbs.

It is undisputed that on January 26, 2010, while the Claimant was changing a light bulb on the rear walkway of a locomotive, and admittedly not wearing protective gloves, that the light bulb he was changing broke, resulting in the Claimant sustaining a cut finger that required immediate medical attention. The Claimant had to have the wound to his finger attended by a physician, and he was not released to return to duty by his personal physician until February 5, 2010.

The Carrier contends that the degree of discipline assessed was based upon the seriousness of the incident, asserting that the Claimant's blatant violation of instructions given in a prior Safety Alert relative to wearing protective gloves when changing light bulbs could have resulted in an even more serious injury, such as the loss of fingers.

The Carrier submits that the Safety Alert about a required need to wear protective gloves when changing light bulbs followed an earlier incident in which an employee cut his finger while changing a locomotive ditch light bulb on October 16, 2009 - just two months prior to the incident the subject of this dispute.

With respect to the Claimant being withheld from service, it was upon the Claimant advising the Carrier that he was released for a return to duty on February 5, 2010, that the Carrier notified the Claimant that he was then being withheld from service pending a review of the proceedings of an investigative Hearing that was scheduled to be conducted on February 12, 2010.

The Investigation was initially scheduled for February 2, but was postponed to and held on February 12, 2010 at the request of the Claimant's representative. The Carrier issued its notice of discipline to the Claimant under date of February 22, assessing the Claimant the five-day suspension to run from Thursday, February 18 through Monday, February 22, 2010.

In regard to the Carrier having withheld the Claimant from service, it contends that there is no restriction in Rule 35 of the current Agreement as to the amount of time that it can withhold an individual from service. The only requirement, the Carrier asserts, being that a disciplinary Hearing must be held within ten days from the date the employee is first held out of service. In the instant case, the Carrier contends that the Claimant was out of service from the date of the incident (January 26, 2010) and under the care of a physician until February 5, 2010. Therefore, the Carrier asserts, it had the right in application of Rule 35 to withhold the Claimant from service from February 5, 2010 until the outcome of its review of the investigative Hearing, and the sending of a notice of discipline on February 22, 2010.

The Carrier further offers that pursuant to Rule 35 it has the right to withhold an employee from service for serious offenses commencing with the date of occurrence without penalty.

Accordingly, the Carrier asserts that no discipline in excess of five days was assessed the Claimant.

The Organization, on behalf of the Claimant, asserts that the Carrier violated the provisions of the controlling Agreement, in particular Rule 35, when it withheld

the Claimant from service, pending an Investigation and, with what it contends was total disregard for the facts presented, subsequently arbitrarily, capriciously and wrongfully assessed the Claimant a five calendar day suspension, with an additional uncompensated 13 days during which he was wrongfully withheld from service.

The Organization also maintains that whereas Rule 35 provides that an employee may be held out of service for “serious offenses commencing with the date of occurrence to be investigated,” the incident in question does not rise to the level of a “serious offense.”

The Organization further states that even if discipline were warranted, loss of pay under the circumstances of record was arbitrary, capricious, unjust and excessive. It asserts that discipline in the railroad industry is historically used as a tool for teaching, and in this particular case, the discipline was merely punitive, and of no instructional value.

As concerns the merits of the five-day suspension, the Board is satisfied in its review of the record that the Claimant had been instructed, along with other shop craft employees, that protective work gloves were readily available and to be worn when changing light bulbs. The Board notes that at the Hearing, the Claimant testified that he would change about 20 light bulbs a day or, on average, 100 a week, albeit he asserted that very few break. Moreover, the Claimant admittedly told a Carrier supervisory official, after the incident that is the subject of dispute, that he wished he had gloves on when changing the light bulb that caused him to cut his finger.

In the light of the above considerations the Board finds the assessment of the five-day suspension to be supported by the facts of record. The penalty was neither excessive nor unreasonable. Further, contrary to Organization’s argument, the Board finds that the Claimant was afforded the benefit of a fair and impartial Hearing. Accordingly, that aspect of the claim which requests that the five-day suspension be set aside and the Claimant be paid for time lost as a result of such suspension is denied.

As concerns the withholding of the Claimant from service, the Board does not find the incident to have been of sufficient nature to have called for the withholding of the Claimant from service pending the outcome of his formal Investigation. In this respect, the Board will direct that the Claimant be compensated for time lost during the five calendar day period of February 13 through February 17, 2010. We compute

this time period on the basis of not including that period of time from February 2 to February 12, 2010, for which the Hearing was postponed at the request of the Claimant's representative.

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 April 2013.