Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 6600
Docket No. 6421
2-EJ&E-CM-'73

The Second Division consisted of the regular members and in addition Referee Edmund W. Schedler when award was rendered.

Parties to Dispute: (System Federation No. 6, Railway Employes' Department, A. F. of L. - C. I. O. (Carmen)
(Elgin, Joliet and Eastern Railway Company

Dispute: Claim of Employes:

1. That Carman Wallace D. West, hereinafter referred to as the Claimant, was improperly suspended for a period of five (5) working days, February 7, 8, 9, 10 and 11, 1972.

2. That accordingly, the Elgin, Joliet and Eastern Railway Company, hereinafter referred to as the Carrier, be ordered to pay Claimant West eight (8) hours at the pro rata rate for each of the five (5) days listed.

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 this dispute the Organization contended the Claimant did not understand the questions on the Carrier's personal injury accident form and the Organization contended the letter to the Claimant notifying him of the formal investigation lacked the requirement of a "precise charge" against the Claimant. This Board will dispose of these two points of defense.

The Board has reviewed the accident form in question and the questions particularly germane to this dispute were questions 12, 14 and 15, to wit:

"12. Was the accident in any way due to tools or machinery being in bad order? If so, describe defects."

"14. How might the accident have been avoided? Make any suggestions that you think might prevent a similar accident. (The prevention of accidents is one of your most important duties.)"

"15. Was the accident to carelessness of any employe? _____
If so, how and by whom?" Yes or No

These questions are clearly stated and this Board finds that the questions are not confusing or ambiguous.

The statement in the letter notifying the Claimant of the investigation said:

> "This investigation is being held to develop all facts and determine your responsibility, if any, in connection with the personal injury you sustained on January 18, 1972 at approximately 9:00 A.M. when you were working on the center sill job on K-9 in the Steel Car Shop."

This Board finds that the above written statement was sufficiently precise to fully apprise the Claimant of the offense charged to enable him to prepare to defend himself. (See 3rd Division Awards 18963, 12898, 18037, and Award 14 of Public Law Board 176).

It appears to this Board that the burden of proof upon the Carrier is threefold:

(1) The Claimant must be guilty of carelessly injuring himself on the date in question.

(2) There must be sufficient evidence to show the Claimant's safety record was poor compared to other employees doing similar work under similar circumstances.

(3) The discipline assessed must bear a reasonable relationship to the Claimant's misconduct and there must be evidence of a consistent application of discipline for such misconducts.

It appears to this Board the Claimant was careless when he used the sledge hammer. The evidence disclosed:

(1) The hammer had a shortened handle.

(2) The particular hammer in question had been used since the start of this particular job.

(3) The Claimant testified he had used a sledge hammer for about 100 sills at the time of investigation.

The Organization's argument that the hammer handle was too short is of no merit. After using an elementary tool, such as a sledge hammer on 100 different occasions, the Claimant should have know if the short handle was safe to use; and, if it was an unsafe tool, he should have procured another hammer.

The Board has reviewed the Claimant's safety record and notes that there were 18 entries over a span of 16 years. Four of the 18 entries were non-chargeable eye injuries (non-chargeable because there was no indication the Claimant failed to wear safety goggles). There was an additional entry dated 10-19-67 that was not an injury. Thus, the burden of proof upon the Carrier was to show that 13 injuries in 16 years was an excessive number of injuries. This Board recognizes that there are some jobs that are inherently hazardous and the employees working at those jobs are exposed to more opportunities for accidents than those employees working at less hazardous jobs. Although the Claimant had a list of entries on his safety record; there was nothing to show that his record was poor in comparison to the records of others doing the same work.

It also appears to this Board that there must be some reasonable relationship between the seriousness of a negligent injury and the discipline assessed. The Carrier argued that a five day disciplinary suspension in the instant grievance was not unjust, unfair, arbitrary or excessive and the Carrier cited the following awards:

(1) Third Division - Award 13854. Claimant violated Safety Rule 1067 and was off work approximately 6 months due to an industrial accident. Claimant received a 30 day suspension that was affirmed by the award.

(2) First Division - Award 16409. Claimant violated Safety Rules 1818 and 1609 and was unable to work for 18 days. Claimant was discharged and returned to work after 6-1/3 months with his time out of service to be considered a suspension. The Board considered the Claimant's record of three other disciplinary actions for violations of safety rules in sustaining this suspension.

(3) Public Law Board 37 - Award 119. Claimant's record showed 11 previous injuries and 785 off duty days. The penalty was sustained.

(4) Public Law Board 176 - Award 14. The file did not show the discipline assessed.

It appears to this Board that there must be some established practice showing a reasonable relationship between discipline assessed for negligent injuries and that these penalties would bear some relationship to the frequency of injuries and the seriousness of the injury. Surely this Board would consider the discipline for an injury requiring a few hours off duty to be different from the discipline for an injury requiring an employee to be off duty a few weeks.

The record did not disclose the Claimant violated any rules; the record did not disclose that the Claimant was off work for his injury; the record did not disclose the Claimant had received prior discipline for his work habits; and it appears to this Board the Carrier arbitrarily selected a 5 day suspension for the instant injury. Under circumstances where a discipline imposed is arbitrary or an abuse of management responsibility the employee can successfully challenge the Carrier's actions. The evidence disclosed the Carrier had discussed with the Claimant his work habits. Since this discussion was not fully effective the Claimant should receive a more severe warning in the form of a written reprimand for his carelessness.

A W A R D

The Carrier's action will be reversed and the Claimant will receive a written reprimand for his carelessness.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 19th day of November, 1973.