NATIONAL RAILROAD ADJUSTMENT BOARD

Form 1 SECOND DIVISION Award No. 12652
Docket No. 12355
94-2-91-2-144

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 Southern Railway Company

STATEMENT OF CLAIM:

"1. That the Southern Railroad Company violated the terms, conditions and provisions of the Agreement when they posted a bulletin dated April 27, 1990 headed PERSISTENT UNSAFE PRACTICES at Andover, Virginia.

2. That accordingly, the Southern Railroad 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 was posted at all Carrier's Mechanical Department facilities, including Andover, Virginia:

"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 13, 1990, the Organization took exception to this notice and initiated the instant claim. In support of its position, the Organization raised several arguments during the handling of this dispute on the property. First, it contended that the notice constituted a change in working conditions in violation of the Railway Labor Act. Second, the Organization argued that the notice was unreasonable, and vague on its face, and failed to give employes notice of what constituted "persistent and unsafe practices." Third, the Organization contended that the notice violated Rule 59 which requires employes injured at work to report all accidents, no matter how minor. To the Organization, the disciplinary implications of the bulletined notice posed serious problems for employes who are not necessarily at fault when injuries or accidents occur. Essentially, the Union argues that this new policy will place employes between a "rock and a hard place" in terms of reporting injuries and accidents. Finally, the Union objects to what it perceives is the Carrier's predetermination under this new policy to discipline and discharge employes who violate the policy. To the Organization, this represents a curtailment of the procedural and due process rights afforded employes charged with rule violations or other disciplinary infractions.

Accordingly, the Organization requests that the notice be rescinded and the grievance sustained in its entirety.

Carrier defends by arguing that the April 27, 1990 bulletin does not constitute a unilateral change in the labor agreement. It asserts that Carriers have the right to adopt or modify rules when not precluded from doing so by agreement or law. Moreover, Carriers have a duty and correlative right to establish reasonable safety rules, and, historically, policies have been established such as that in the instant case in order to ensure to the safety and welfare of employes and the public. In other words, Carrier's position is that this bulletin merely states formally what has been the longstanding practice in this industry.

Carrier further rejects the Organization's claim that the policy eliminates the "just cause" requirements afforded to employees subject to discipline. According to Carrier, the collective bargaining agreement provides for procedural due process and the bulletined notice does not change that provision of the contract. For these reasons, Carrier requests that the claim be denied.

This Board has carefully reviewed the record in its entirety. We have considered only those arguments raised by the parties during the handling of this dispute on the property and, in doing so, must conclude that the claim should be denied.

The Organization has argued that the April 27, 1990 notice constituted a change in working conditions under the Railway Labor Act, and thus was subject to negotiation. Carrier argues that the notice was a rule or work-related policy which is not subject to negotiation. It is clear that the Union must have input and must be a party to negotiations if the bulletin is indeed a change in the condition of employment, as the Union argues. On the other hand, Carrier takes the position that the notice is clearly work-related and that for purposes of safety considerations is no different or more onerous than safety rules and practices which have historically been implemented by the Carrier.

We concur with Carrier's position. The Organization has pointed to no contractual provisions which the Carrier is attempting to modify in promulgating the April 27, 1990 notice. As the Carrier has pointed out, without refutation by the Organization, Safety has always been a paramount concern and employes who violate safety rules or are negligent in the performance of their duties so as to cause accident or injuries have always been subject to discipline. Absent evidence that the notice represents a change in what appears to be a longstanding practice regarding safety, we cannot agree with the Organization's contention that the April 27,

1990 notice represents a change in working conditions. We do not see the rule, on its face, to apply to "accident-proneness", but to volitional unsafe behaviors.

The additional arguments advanced by the Organization are similarly unavailing. One contention raised by the Organization was that the April 27, 1990 notice was unreasonable and vague. We disagree. Carrier has specifically defined "persistent unsafe practices" as "the continuance of unacceptable and avoidable incidents adversely affecting safety." Discipline up to and including discharge will occur if there is "a pattern of unsafe behavior (including safety rule violations and/or injuries) over a period of time during the active work history." We find the language sufficiently clear so that its meaning can reasonably be ascertained.

The Union has also made the point that situations do arise in which employes, through no fault of their own, are involved in accidents or other situations which cause injuries. While we do not disagree with that premise, it is clear that the thrust of the notice deals with safety rule violations and injuries which are avoidable and which arise from the negligent performance of an employe. This is not a "no-fault" policy, as the Union appears to suggest.

The same logic applies to the Organization's contention that "it has always been a practice to report injuries when they occur but it has never been a practice to be discharged for reporting a number of them." Employes are required under Safety Rule 1000 to report all injuries sustained while on duty. It is not the mere fact of the injury itself which triggers the possibility of discipline under the April 27, 1990 notice, however. It is the degree of culpability on the part of the employe and the overall pattern of safety rule violations or negligence resulting in injury which are the critical factors in determining whether discipline will ensue.

In short, this Board does not accept the Organization's assertion that the notice is unreasonable, vague or inconsistent with existing rules or practices. We do not read this notice as allowing for corrective action to be taken against employes who are innocent bystanders to an accident or injury or who are involved in same due to unavoidable work hazards.

Finally, the notice has not changed or eliminated the procedural and due process rights afforded employes under the contract. In a sense, Carrier's policy is merely its definition of excessive safety rule violations. Violation of the policy is perhaps prima facie cause for discharge. However, as the Carrier

recognizes, there is a review procedure under the agreement so that all exigencies are considered in the individual case. Any decision by the Carrier is thereafter subject to the grievance procedure and ultimately to review by this Board. The notice does not alter or eliminate any of those fundamental rights and procedures, in our view. See, Arbitration decision rendered March 25, 1991 involving the Norfolk and Western Railway Company, The Norfolk Southern Railway Company v. International Brotherhood of Electrical Workers; International Association of Machinists and Aerospace Workers; International Brotherhood of Boiler Makers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers; Brotherhood of Railway Carmen - Division of TCU.

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.