Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 12970
Docket No. 12853
95-2-93-2-226

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

PARTIES TO DISPUTE: (International Brotherhood of Electrical
(Workers, System Council No. 7
(
(Consolidated Rail Corporation

STATEMENT OF CLAIM:

"Appeal of discipline of dismissal from service imposed upon Radio Maintainer T. I. KIRKWOOD on March 8, 1993, Altoona, PA, by the Consolidated Rail Corporation."

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 waived right of appearance at hearing thereon.

Claimant was employed as a Radio Maintainer by Carrier at its Altoona, Pennsylvania, Radio Shop. On the morning of February 9, 1993, Claimant was removing a siren from a police vehicle which was held in place by 1/4 inch bolts. In removing the bolts, two broke off causing Claimant to sustain an injury to his shoulder.

Claimant failed to report his injury until February 11, 1993, and his failure prompted Carrier to issue a Notice of Investigation dated February 12, 1993, reading in pertinent part:

"1. CONDUCT UNBECOMING A CONRAIL EMPLOYEE WHEN YOU FAILED TO COMPLY WITH S7C SAFETY RULES AND PROCEDURES, MAINTENANCE OF WAY, RULE 3001(b), WHEN YOU INJURED YOURSELF ON FEBRUARY 9, 1993, AT APPROXIMATELY 10:30 A.M., WHILE WORKING AS A RADIO MAINTAINER, AT ALTOONA RADIO SHOP, ALTOONA, PA, AND YOU DID NOT REPORT SAME UNTIL FEBRUARY 11, 1993, AT APPROXIMATELY 8:20 A.M. TO YOUR SUPERVISOR, K. E. MATTERN.

2. VIOLATION OF RULE 3115, PARAGRAPHS (e) AND (f) OF THE S7C SAFETY RULES AND PROCEDURES, MAINTENANCE OF WAY, WHEN ON FEBRUARY 9, 1993, WHILE WORKING AS RADIO MAINTAINER, AT THE ALTOONA RADIO SHOP, ALTOONA, PA, AT APPROXIMATELY 10:30 A.M., WHILE REMOVING A SIREN YOU INJURED YOURSELF.

3. YOUR FAILURE TO CONDUCT YOURSELF IN A MANNER TO AVOID INJURY AND BEING ACCIDENT PRONE WHEN ON FEBRUARY 9, 1993, AT APPROXIMATELY 10:30 A.M., WHILE WORKING AS A RADIO MAINTAINER, AT ALTOONA, PA, YOU SUSTAINED ANOTHER PERSONAL INJURY, BRINGING YOUR TOTAL OF PERSONAL INJURIES TO FIVE AS EVIDENCED BY THE ATTACHED LIST."

The list of Claimant's personal injuries attached to the Notice of Investigation reads:

"INJURY LIST

5-22-86 CUT HEAD ON HOOD OF VEHICLE DURING RADIO INSTALLATION.

4-07-89 CUT FINGER WHILE TAKING WIRE OFF OF A METAL SPOOL.

4-06-90 INJURED LOWER BACK WHILE PUTTING RADIOS IN READY BOX.

11-25-92 INJURED LOWER BACK WHILE ATTEMPTING TO LIFT MATERIAL CAR DOOR.

2-09-93 INJURED SHOULDER WHILE REMOVING A SIREN FROM POLICE VEHICLE."

Due to inclement weather, the Investigation was postponed and rescheduled for 10:00 AM, March 1, 1993. A copy of the transcript of Investigation was furnished to the Board.

Following the Investigation, Carrier found Claimant guilty of the charges, and on March 8, 1993, assessed discipline of dismissal in all capacities.

The Organization promptly appealed the decision in accordance with the terms of the Agreement. Failing to obtain satisfactory resolution, the claim was filed with this Board for final adjudication.

Before proceeding to consideration of whether substantial evidence was adduced in support of the charges, it is necessary to dispose of procedural issues raised by the Organization.

The Organization vigorously argues that its appeal should be sustained without consideration of the merits because Carrier in Charge 3, being accident prone, cited injuries sustained by Claimant that it had knowledge of more than 30 days prior to February 22, 1993, the date the charge was scheduled for investigation, and cites that part of Rule 6-A-3 reading:

> "The trial shall be scheduled to begin within thirty (30) calendar days from the date the employee's General Foreman or equivalent officer had knowledge of the employee's involvement."

and numerous prior awards it contends supports its position.

The position of the Organization cannot be upheld for two reasons. First, in order to determine if an employee is accident prone, it is necessary to look at the record of injuries sustained over a period of time. There is just no other way that determination of whether an employee is accident prone can be made. Certainly, Carrier has the right and the responsibility to consider an employee's past record of injuries to determine if the employee is accident prone so that it can take appropriate action to protect itself against potential liability.

Secondly, review of the Investigation transcript reveals that no exception to the charges filed by Carrier including citation of the prior injuries was made prior to or during the Investigation. Accordingly, the argument now advanced is deemed to have been waived. In Third Division Award 24296, the Board stated:

> "Furthermore, it is well settled that if exceptions are to be taken to letter of charge, or the manner in which an investigation is conducted, such exceptions must be taken prior to or during the course of the investigation; otherwise, they are deemed waived."

The Organization's objection concerning the Investigating Officer reading into the Investigation Claimant's extensive disciplinary record is disposed of under the reasoning set forth in second above. It must be deemed waived as no exception or protest was made during the Investigation.

Study of the Investigation transcript in conjunction with the charges preferred against the Claimant persuades this Board that Carrier adduced substantial evidence to support its charges.

On Charge 1, failure to report an injury sustained at approximately 10:30 AM on February 9, 1993, until approximately 8:20 AM February 11, 1993, no dispute exists. Claimant testified that he did not report his injury until February 11, 1993, for the reason he did not know if it was an "incident" or an "injury" and he had no pain until the night of the 9th and the 10th. Such reasoning is flawed. Rule 3001 of Maintenance of Way S7C Safety Rules and Procedures provides in part:

"3001. For any injury, you must immediately:

> (b) inform your immediate supervisor. When the person in charge is not close at hand, inform that person at the earliest opportunity but not later than quitting time of the date of the occurrence." (Emphasis added)

Claimant had previously been counseled concerning the reporting of an incident versus injury. He was advised that if he sustained an incident which could possibly manifest an injury, it must be reported as though it was an injury. Claimant did not do so and his failure to do so constitutes violation of Rule 3001 of the Safety Rules and Procedures.

On Charge 2, Violation of Rule 3115, paragraph (e) and (f) of S7C Maintenance of Way Safety Rules and Procedures reading:

"3115. When using a wrench:

* * * *

(e) use a braced position in case the wrench disengages.

(f) do not immediately apply full force; make sure the wrench has a proper grip then gradually increase the force."

We have weighed the testimony of Claimant's Supervisor and that of Claimant along with the fact that Claimant presented 3/8 inch bolts as the bolts that broke when removing the siren from the police vehicle and the fact that it was actually held in place with 1/4 inch bolts. All things considered, we are convinced that Claimant did not follow the provisions of Rule 3115 (e) and (f) of the Safety Rules and Procedures when removing the siren from the vehicle on February 9, 1993.

On Charge 3, "...failure to conduct yourself in a manner to avoid injury, and being accident prone...", we are persuaded that the evidence reflects accident proneness. We say this because the record shows that for the period January 1986 through February 9, 1993, Claimant's total service performed was only 4.62 years during which he sustained 5 injuries. The record also shows that the employee immediately ahead of Claimant on the seniority roster has sustained 2 injuries during the period October 1976 and February 1993, while the employee immediately below Claimant on the seniority roster has had no injuries. We also note Claimant's response to questions during the investigation:

"Q. Mr. Kirkwood, do you feel that any of those injuries you incurred, could have been avoided?

A. On my actions, possibly.

Q. Yes?

A. Yes, it would have been avoided."

This Board can find no justification to interfere with the discipline of dismissal assessed by Carrier. the Organization's appeal is denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 1st day of November 1995.