Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 13735
Docket No. 13623
03-2-01-2-27

The Second Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

(Brotherhood Railway Carmen Division
(Transportation Communications International Union
PARTIES TO DISPUTE: (
(Springfield Terminal Railway Company

STATEMENT OF CLAIM:

"Claim of the Committee of the Union that:

(1) The Springfield Terminal Railway Company violated the terms of our current agreement, in particular Rule 13 when they administered a five (5) working day suspension to Carman Percy R. Goodblood as a result of an investigation held on August 2, 2000.

(2) That, accordingly, the Springfield Terminal Railway Company be ordered to return Carman Percy R. Goodblood to service with compensation, in the amount of eight (8) hours pay for each workday he was withheld from service, commencing August 28, 2000 through and including September 1, 2000. Further, that the Carrier compensate him for any other lost wages as a result of this investigation."

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 instant claim, filed on August 30, 2000, protests the Carrier's issuance of a five day suspension to the Claimant on August 23, 2000 for violation of Safety Rule GR-G, as a result of an Investigation held on August 2, 2000. The basis for the claim is Rule 13, requiring that employees receive a fair and impartial Hearing prior to the issuance of discipline.

The record reveals that the Claimant has worked for the Carrier for about 20 years. He has been receiving treatment and medication for high blood pressure over the past three or four years. There is no evidence that the Claimant ever specifically informed the Carrier of his medical condition. It was notified that the Claimant failed his physical for his CDL exam twice because of this condition. The Claimant stated, without contradiction, that the medication adversely affected the safety of his job performance, did not require him to decline assignments, and did not restrict his specific job.

On July 6, 2000, the Claimant was assigned to repair doors inside the Carrier's carshop facility at Waterville, Maine. His crane inside the shop malfunctioned. His supervisor, Mike Lazano, requested that he go outside and help another Carman work on doors. The outside area is a cement slab with approximate dimensions of 20' x 40' x 2' and has no shade around it. The Claimant informed Lazano that he could not work outside because it was too hot, he was on high blood pressure medication, and he had to avoid heat and high temperatures. The Claimant explained that he had worked outside on other jobs in the past without any problems, because there are other opportunities for shade when working on boxcars. However, he believed that this location got very hot due to a combination of the sun's rays, welding, and torch work. Lazano testified that he was unaware of the Claimant's condition or any restrictions, reported it to his superior, Manager of Car Maintenance Stephen Berkshire, and assigned the Claimant to work elsewhere inside that day. Lazano did not think that the outside temperature was that hot, recalling the thermometer in the shade being 63 degrees at about 10:00 A.M. According to the Claimant, Lazano told him to bring in a doctor's slip indicating that he could not work outside, and he took issue with that characterization. The Claimant made a doctor's appointment on July 10, 2000 and informed Lazano of that

fact. Lazano recalled speaking to the Claimant the following day and requesting information on the Claimants medication and its side effects.

Berkshire testified that he spoke with the Claimant on July 6, 2000. He told the Claimant to bring in a doctor's note concerning his condition, medication and any side effects or restrictions. He did not give the Claimant a deadline for its production. The Claimant did not recall speaking to Berkshire about this until after he furnished the first doctor's note on July 10, 2000. The note states that the Claimant is on hypertensive medication and recommended that he avoid extreme heat or temperature. The note invited the Carrier to call the doctor with any questions.

Upon receipt of this note, Berkshire directed his staff to contact the doctor requesting information on the nature of the medication and any restrictions. He received a July 11, 2000 note faxed from the doctor identifying the medication, and indicating that the Claimant may continue to work, "as he always has" while taking medication. Berkshire testified that this note indicates that the Claimant had been taking the medication for awhile and that the Claimant could work without restrictions. The Carrier contacted the pharmacy to obtain information concerning the side effects of the particular medication on July 12, 2000.

The Claimant was off work between July 13 and 24 on personal, sick and vacation leaves. When he returned on July 24, 2000, he was called into a meeting. Berkshire told the Claimant that he had gotten information on his medication and its side effects, but had expected the Claimant to furnish it. The Claimant stated that he did not find the time to do so before his vacation and that the Carrier already had the information at the time of this meeting. The Claimant testified that he had an obligation to inform the Carrier of any medication that may affect his work and he had not done so prior to this time with respect to this medication which he had been on for three to four years. Berkshire could identify no written rule or policy requiring employees to report their medications to the Carrier. However, the Claimant testified that he knew he was to do so. Based upon learning that the Claimant had been taking this medication for years, Berkshire scheduled him for a complete physical with the company doctor, which was conducted on July 31, 2000. The results of that exam also stated that the Claimant is to avoid excessive heat and sun exposure as a result of his anti-hypertensive.

The Notice of Hearing served on the Claimant on July 26, 2000 charges him with violation of Safety Rule GR-G in that he allegedly ignored Berkshire's instructions to provide the Carrier with medical information including the nature of his illness, the name of his medication, and a complete list of its side effects. Safety Rule GR-G, which states, in pertinent part:

> "Employees must not report for duty or be on Company property under the influence of or use while on duty . . . any . . . medication or other substance, including those prescribed by a doctor, that will in any way adversely affect their alertness, coordination, reaction, response or safety.
>
> Employees using prescription or non-prescription medication must determine from their physician or pharmacist whether or not the medication will impede the safe performance of their duties."

By letter dated August 23, 2000, the Carrier found the Claimant responsible and assessed him a five-day suspension. The suspension is the subject of this claim.

The Carrier argues that there is substantial evidence in the record, including the Claimant's own admissions, to support the charge that the Claimant failed to provide the Carrier with the requested information. It asserts that there were no procedural errors in the conduct of the Hearing, that the use of co-hearing Officers is proper (Second Division Awards 13610 and 13533), the entry of the Claimant's personnel record solely for the purpose of assessing the appropriate penalty is appropriate (Public Law Board No. 5805, Award 4; Second Division Awards 8527, 6632; Third Division Awards 29264 and 28886), and there is no requirement that the Hearing Officer "Rule" on objections at the Hearing. It contends that the Claimant's record reveals two prior instances of deceitful behavior for which he received five and three day suspensions support the propriety of the penalty imposed herein.

The Organization contends that the Carrier engaged in procedural irregularities at the Hearing which denied the Claimant his right to a fair and impartial Hearing in violation of Rule 13, including prejudging his guilt prior to Hearing, using Co-Hearing Officers to intimidate, failing to rule on objections, and entering the Claimant's personnel file into the record. It argues that the Carrier failed to meet its burden of proof that the Claimant violated Rule GR-G because no Rules or policies require employees to provide the Carrier with their medications. The Organization asserts that

the Claimant complied with the Carrier's request that he provide it with medical information concerning his condition and restrictions. The Organization states that the Carrier admittedly had all of the information it requested of the Claimant by July 12, 2000, and so informed him of such when he returned to work on July 24, 2000. Nevertheless, the Carrier chose to pursue this charge two days later when there was nothing else the Claimant could provide. It notes that all medical documentation supports the Claimant's original refusal to work on doors outside on July 6, 2000. The Organization argues that there was no basis for the Notice of Hearing, let alone the imposition of the protested penalty.

Initially, we find no basis for overturning the discipline in the Organization's procedural objections. The Board has held on this property, in a case involving the same Claimant, that the Carrier's use of two Hearing Officers is not contractually barred, and absent evidence establishing prejudice thereby, does not form a proper basis to vacate or modify the discipline imposed. Second Division Award 13633. We find no evidence adduced in the instant claim that the use of two Hearing Officers or the manner that they dealt with objections by the Organization denied the Claimant due process or a fair Hearing. Further, it is clear on the record that the Claimant's personnel record was admitted into evidence solely for the purpose of determining the amount of discipline to be assessed in the event he was found guilty of the charges, a procedure found appropriate by this, and other Boards. See, Public Law Board No. 5805, Award 4; Second Division Awards 8527 and 6632; Third Division Award 20099.

With respect to the merits, a careful review of the record convinces the Board that the Carrier has failed to prove, by substantial evidence, the charged Rule violations. It is clear in the record that the reason Berkshire chose to charge the Claimant is because the Claimant had failed to inform the Carrier of the medication he was taking over the past few years and its side effects, and the Claimant's failure to timely provide the specifically requested information. There is no dispute that the Claimant provided his supervisor information concerning his condition, hypertension, and his restrictions, e.g., avoiding extreme heat or temperature. While he did not provide the name of his medication and its side effects, the Carrier was able to procure this information from the Claimant's doctor and pharmacist. The Claimant was not specifically made aware after July 11, 2000 that he was still being requested to furnish anything additional by a certain date. Further he was told upon his return to work on July 24, 2000 that the Carrier had obtained all the information it needed.

Safety Rule GR-G, reprinted above, does not require an employee to provide medication information to the Carrier. Berkshire could not point to any written Rule which does. Rather, Rule GR-G deals with the use of substances which may affect an employee's health and safety on the job. The Rule requires employees to determine from their physician or pharmacist whether any medication they are taking impedes safe performance of their duties. There is no specific reporting requirement. It is undisputed that the Claimant never previously refused to perform any work based upon his taking of this medication. Further his doctor (and, subsequently, the company doctor) believed that he could safely perform all of his duties if he avoids excessive exposure to heat and sun. Thus, the Carrier has failed to present substantial evidence to find the Claimant was guilty of violating Rule GR-G.

Because the Carrier failed to prove the Claimant's guilt, the Board directs that the five-day suspension be removed from his record and that he is made whole for any loss of wages associated with his suspension. Despite not finding that the Carrier met its burden of proof of guilt of Rule GR-G by substantial evidence, the Notice of Hearing was not frivolous. The Carrier acted within its rights in pursuing the matter of the Claimant's failure to abide by his supervisor's instruction to produce specific medical information.

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 June 2003.