

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13909
Docket No. 13786
06-2-05-2-33

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

(International Brotherhood of Electrical Workers

PARTIES TO DISPUTE: (

(Kansas City Southern Railway Company

STATEMENT OF CLAIM:

- "1. That the Kansas City Southern Railway Company violated the Controlling Agreement, particularly, but not limited to Rule 29, when Shreveport, Louisiana Electrician, Samuel Cain was unjustly and arbitrarily dismissed from service on September 14, 2004, following investigation held on August 17, 2004.
2. That, accordingly, the Kansas City Southern Railway Company make Electrician Cain whole as follows: reinstate him to service with seniority rights unimpaired; compensate him for all wages lost at the prevailing rate of pay of electricians, and all applicable overtime; compensate him for all vacation rights; make him whole for all health and welfare insurance benefits; make him whole for any and all other benefits including Railroad Retirement and Unemployment Insurance; make him whole for any and all other benefits that he would have earned during the time withheld from service, and; any and all records of this arbitrary and unjust disciplinary action be expunged from his 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 Claimant was employed by the Carrier as an electrician in its Shreveport, Louisiana Diesel Shop. The Claimant was in service with the Carrier for approximately ten (10) years. The Claimant was dismissed as a result of an investigation held on August 17, 2004 for alleged failure to timely report an on-the-job injury.

The Organization argued that the Claimant is not guilty of any rule violation and the discipline was unduly harsh and excessive. The Organization stated that the hearing officer prejudged this matter from the outset and that the Carrier engaged in a "fishing expedition." The investigating officer not only preferred charges but also presided over the investigation where he acted in the manner of a prosecutor. The notice of investigation was not precise and did not meet the standards set forth by Rule 29.

The Claimant was charged with not promptly reporting an injury to his knee, however, the record shows that this was a degenerative condition of longstanding with this particular Claimant. The Claimant has degenerative arthritis which has been treated for several years. There was no specific date or incident that caused this Claimant's condition, therefore, he could not report a personal injury as the Carrier suggested. The Claimant clearly identified his condition consistent with his doctor's diagnosis. The Carrier was well aware that the Claimant obtained a leave of absence for knee surgery. The Organization asks the Board to recognize the Carrier's lack of legitimate charges and lack of evidence to sustain those charges. The Organization states record is clear that the Carrier has been overly harsh and excessive. Therefore, the claim must be sustained.

The Carrier argued that the Claimant believed as early as August 1, 2002 that he had sustained an on the job injury. The Carrier was unaware of this until it heard from the Claimant's attorney. The record shows that the Claimant never made a

written report of this alleged injury. The Claimant felt that his injury was job related and that it occurred as a result of an incident on the property. It is critical that the Carrier be notified immediately under such a situation. Failure to report is a serious offense and carries with it a serious discipline.

The record shows that the Claimant was afforded all contractual due process to which he is entitled under the Agreement. Likewise, the Organization and the Claimant were aware of exactly the charges that the Claimant must defend. This property has a historical practice of not including rules in the charge. The investigating officer asked the Claimant if he was ready to proceed and the Claimant responded affirmatively. Therefore, the Organization's procedural arguments are wholly without merit.

Upon complete review of the evidence, the Board finds that with respect to the procedural arguments made by the Organization there is nothing in the record that shows that the Claimant was not given the appropriate due process required under the rule in question. There is no proof that the hearing officer was not impartial in this matter. The question before the Board then is, "What was the cause of the Claimant's medical condition?" It is true that the Claimant stated that he fell on the property in 2002. The Carrier was not aware of his situation until some two years later. This is a very important rule to the Carrier since, if it is aware of a potential medical problem with a particular employee, it can take steps to mitigate the Carrier's losses by making different job assignments and order medical treatments.

This is what is often called the "chicken and egg case." What is nexus of the disease versus the alleged injury? The Claimant could possibly have been confused about the nexus of the incident versus the disease. Which came first, the Claimant's fall or his degenerative osteoarthritis? It may be that the alleged fall did aggravate an already present condition, and it is possible to understand why the Claimant did not make an immediate medical report because of the nature of this degenerative progressive disease. At the very least, however, the Claimant should have let the Carrier know that he was diagnosed with osteoarthritis as early as 2002 so it could make whatever appropriate arrangements might be necessary. Based on the unique features of this case, the Board feels that dismissal was somewhat harsh under the circumstances. The Claimant has a FELA claim pending. If the Claimant is not found to be permanently disabled and if he is able to pass a return-to-work physical, the Claimant should be allowed to return to work with his seniority intact. The Board further finds that all other claims are specifically denied.

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 19th day of October 2006.