NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 26528

THIRD DIVISION Docket Number MU-26741

Edwin H. Benn, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(The Chesapeake and Ohio Railroad Company (Southern Region)

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement when it suspended B&B Mechanic D. 0. Sutton for three and one-half (3 1//2) hours on August 13, 1984 and three and one-half (3 1/2) hours on August 17, 1984 without benefit of a hearing (System File C-TC-2471/MG-4856).

2. The dismissal of B&B Mechanic D. 0. Sutton for alleged insubordination was without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement (System File C-D-2448/MG-5019).

3. The claimant shall be compensated for seven (7) hours at his straight time rate of pay because of the violation referred to in Part (1) hereof.

4. As a consequence of the violation referred to in Part (2) hereof, Mr. D. O. Sutton's record shall be cleared of the charge leveled against him, he shall be reinstated with seniority and all other rights unimpaired and he shall be compensated for all wage loss suffered because of the violation referred to in Part (2) hereof."

OPINION OF BOARD: Claimant was employed as a B&B Mechanic with 10 years of service. At the time of the incidents involved in this matter, Claimant was employed on the Carrier's Virginia Division. At that Division, the Carrier maintained a mandatory eyewear safety policy permitting the use of Photo-Gray lenses but only upon recommendation of the employee's eye doctor and approval of the Carrier's Chief Medical Officer.

With respect to the pay claims, the record reveals that on August 13, 1984, Claimant was not wearing Carrier approved safety glasses or coverall goggles. The Organization asserts that Claimant requested a new pair of goggles since the one he had was covered with burn spots. According to the Organization, that request was denied on the grounds that no new goggles were available. According to the Carrier, new goggles were available but Claimant did not ask for new goggles. After refusing to wear the goggles, Claimant was held out of service for 3 1/2 hours. On August 17, 1984, Claimant went to an eye doctor. Claimant now seeks 3 1/2 hours pay for both dates.

Claimant subsequently advised the Carrier that he required Photo-Gray safety glasses because of an eyesight condition and presented a prescription for such glasses dated August 17, 1984. By letter dated August 20, 1984. the Carrier notified Claimant that its Casualty Prevention Department had no: approved the use of Photo-Gray lenses and further notified Claimant that he was required to wear coverall goggles at all times while on duty. Al though the prescription contains the phrase "photo gray . . . side shield," the prescription does not disclose a medical recommendation for such glasses. Further, at no time did Claimant seek approval for such glasses from the Carrier's Chief Medical Officer.

On October 30, 1984, Claimant was assigned to work applying walkway planks at the Richmond Viaduct. Claimant raised his coverall goggles to his helmet while working. B&B Foreman C. A. Roberts instructed Claimant to wear the goggles over his eyes. Claimant refused asserting in his testimony that could not safely perform his duties by following that instruction due to the type of work involved, the traffic, the condition of the lenses of the goggles and the nature of the goggles in general. Claimant was then removed from service. Shortly after Claimant was escorted from the work site, Claimant's Foreman offered Claimant a new pair of goggles. Claimant declined stating that he would like the holding of a Board of Inquiry to determine if he had to wear coverall goggles.

By letter dated November 9, 1984, Claimant was notified to attend an Investigation on November 19, 1984, concerning his alleged insubordination and violation of Safety Rules 39(z) and 41 stemming from the October 30, 1984, incident. After Hearing on November 19, 1984, and by letter dated December 3, 1984, Claimant was dismissed from service.

With respect to the pay claims, we do not view the withholding from service for 3 1/2 hours on August 13, 1984, until Claimant agreed to wear the required safety glasses as a disciplinary action entitling Claimant to an Investigation under Rule 21. Claimant was well aware of the requirement concerning the wearing of approved safety glasses or goggles and his refusal to wear appropriate glasses was of his own choosing. Under similar circumstances, this Board has rejected the argument that withholding employees from service until they came to work with the proper safety glasses was disciplinary action. See Third Division Awards 25814, 24392. Similarly, we do not view the pay claim for August 17, 1984, as valid. There is no evidence in the record to support an assertion that Claimant was required by the Carrier to go to the doctor on that date. Claimant's actions on that date were also of his own choosing and we cannot say refusing to pay Claimant for that time was disciplinary in nature entitling Claimant to an Investigation. The fact that Claimant gives a different version of the incidents does not change the result. The burden in a non-disciplinary case such as these pay claims is on Claimant to show a violation of the Agreement. In this case, giving a different factual version does not meet that burden.

With respect to the dismissal, the Organization initially argues that the Carrier violated Rule 21(b) in that Claimant received insufficient notice of the Investigation. Rule 21(b) states that "The employee involved will be notified in writing of the charge against him, not less than (10) days before the hearing, ... " The Organization asserts that actual receipt of the notification by the employee ten days prior to the Hearing is required under the Rule and such did not occur in this case. The Carrier asserts that it met its obligations by sending the notice ten or more days prior to the Hearing.

Clearly, Claimant did not actually receive ten days prior notice of the Hearing. While there may a degree of ambiguity in a reading of the Rule as to whether the sending of the notice is sufficient as argued by the Carrier, we note that the Carrier sent the notice in this case by certified mail thereby indicating that it viewed the date of receipt as opposed to the date of mailing as important. However, we also note that there is no evidence that the Carrier has engaged in a pattern of playing fast and loose with the notice provisions in that there is no evidence that Hearings are routinely set in this fashion. While the Organization argues that little or no actual notice can be received under the Carrier's interpretation of the Rule thereby depriving an employee of the ability to adequately prepare for a Hearing, we cannot sustain the Organization's argument on the basis of a hypothetical set of circumstances. The resolution of the issue therefore must come from an analysis of whether Claimant "as prejudiced by the lack of actual notice for a period of ten days to a degree sufficient to find that he could not adequately prepare his defense. The record does not support a finding of such prejudice. A review of the record shows that the issues were thoroughly litigated and the evidence material to the charges and the Organization's arguments were similarly brought forward in a thorough fashion.

Although the Organization requested the presence of certain witnesses after the commencement of the Hearing, which request "as denied, those witnesses were not originally contemplated by the Organization as necessary (i.e., the Organization stated at the commencement of the Hearing that it had no witnesses (aside from Claimant)) and hence, the non-attendance of those witnesses cannot be attributed to the alleged notice deficiency. Additionally, the witnesses were offered for the purpose of impeaching the credibility of a Carrier witness on an issue ultimately immaterial to the charges. That witness' credibility no longer became critical to the resolution of this case since during Claimant's testimony, Claimant specifically agreed with the relevant portions of that witness' account of the incident at issue. contrary to the position of the Organization. the Hearing Officer's ruling did not sufficiently prejudice Claimant to a degree for us to conclude that Claimant "as not afforded a fair and impartial Investigation. Therefore considering the totality of the events occurring and giving the Organization the benefit of the doubt by assuming for the sake of argument that the correct interpretation of the Rule requires actual notice, at best, we view the notice issue as a technical violation of Rule 21(b) not requiring the issuance of a sustaining Award.

With respect to the merits of the dismissal, we find substantial evidence in the record to support the Carrier's determination that Claimant violated Rule 39(z) as charged and that he was insubordinate. The record clearly establishes that on October 30, 1984, Claimant was given a direct instruction to wear his safety goggles and he admittedly refused to do so. By that time the safety goggle requirement was well known to Claimant. In addition to the previous withholding from service for failure to wear the goggles discussed above, Claimant had numerous safety citations against him for the same misconduct. Claimants refusal was insubordination and was further in violation of Rule 39(z) which requires the wearing of approved eye protection. There is conflict in the record concerning whether the actual goggles issued to Claimant on the date in question were safe under the circumstances in which Claimant was required to work. We need not *resolve* that conflict since aside from the well accepted doctrine that our function is not to reverse credibility determinations made during the Investigation on the sole basis that a factual conflict exists (see Second Division Awards 10840, 10394), the argument is moot since Claimant refused to wear a new set of goggles when those were offered to him after he was removed from the work site. That refusal coupled with the fact that Claimant's approach in this case has been more concentrated on challenging the general type of coverall goggle utilized by the Carrier as opposed to the actual pair he was required to wear on October 30, 1984, leads us to conclude that Claimant's main objection goes to the implementation of the eyewear safety policy itself. On the basis of this record, we are unable to conclude that the implementation of that policy was unreasonable or otherwise invalid so as to void the discipline.

However, we are of the opinion that dismissal was excessive as a penalty. This is not a case of an employee who simply refuses to wear safety equipment. Claimant desires to wear Photo-Gray safety glasses for what he considers legitimate medical reasons. However, Claimant did not timely submit a recommendation from his eye doctor for the use of those kinds of glasses as required by the eyewear safety policy. A prescription for such glasses does not amount to a recommendation from Claimant's eye doctor. Nor has Claimant ever sought the approval of the Carrier's Chief Medical Officer as required by the policy. Therefore, under the circumstances, we shall require that Claimant be returned to service with seniority unimpaired. However, since Claimant violated the Carrier's Rules as discussed above, return to service shall be without compensation for time lost. If Claimant is desirous of wearing Photo-Gray safety glasses, then it is Claimant's responsibility to obtain a recommendation from his eye doctor and seek the approval of the Carrier's Chief Medical Officer as stated in the eyewear safety policy. We shall afford him that opportunity. In the meantime, Claimant will be required to comply with the Carrier's eyewear safety policy.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Discipline was excessive.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 30th day of September 1987.

CORRECTED

Serial No. 335

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 26528

DOCKET NO. MW-26741

NAME OF ORGANIZATION: Brotherhood of Maintenance of Way Employes

NAME OF CARRIER: The Chesapeake and Ohio Railroad Company (Southern Region)

QUESTIONS FOR INTERPRETATION:

"(A) Does the Award require that the Claimant be restored to the seniority rosters in no worse a position than he would have been had he not been improperly withheld from service?

(B) If Question (A) is answered in the affirmative, does the Award require that the Claimant be placed on the foreman's seniority roster immediately ahead of Foreman A. Cannon?

(C) If Questions (A) and (B) are answered in the affirmative, should the Claimant have been allowed to displace Foreman A. Cannon upon his return to the Carrier's service?"

On September 30, 1987, the Board issued an Award in this matter holding as follows:

"However, we are of the opinion that dismissal was excessive as a penalty. This is not a case of an employee who simply refuses to wear safety equipment. Claimant desires to wear Photo-Gray safety glasses for what he considers legitimate medical reasons. However, Claimant did not timely submit a recommendation from his eye doctor for the use of those kinds of glasses as required by the eyewear safety policy. A prescription for such glasses does not amount to a recommendation from Claimant's eye doctor. Nor has Claimant ever sought the approval of the Carrier's Chief Medical-Officer as required by the policy. Therefore, under the circumstances, we shall require that

Claimant be returned to service with seniority unimpaired. However, since Claimant violated the Carrier's Rules as discussed above, return to service shall be without compensation for time lost. If Claimant is desirous of wearing Photo-Gray safety glasses, then it is Claimant's responsibility to obtain a recommendation from his eye doctor and seek the approval of the Carrier's Chief Medical Officer as stated in the eyewear safety policy. We shall afford him that opportunity. In the meantime, Claimant will be required to comply with the Carrier's eyewear safety policy."

At the time of his dismissal, Claimant was on the Mechanics and Mechanics' Helpers seniority roster and was also at the top of the promotion list for Foreman. During the period that the Claim was pending, employee A. Cannon was promoted to Foreman. Claimant asserts that his rights pre-date Cannon's and our Award requires that he be granted Foreman's seniority rights.

The Board rejects Claimant's argument for two reasons. First, our Award required that Claimant be returned to service with seniority unimpaired. He has been returned to service, given his previous seniority and placed at the top of the promotion list. At the time of his dismissal and at the time of our Award, however, Claimant held no Foreman's seniority. He was therefore entitled to none as a result of the Award. Second, to hold otherwise would be manifestly unfair in this case since a reading of our Award shows that Claimant's loss of work was the result of his own voluntary refusal to comply with the Carrier's eyewear safety policy.

Accordingly, the Board makes the following response to the question presented for Interpretation:

The answer to Question (A) is yes.

The answer to Question (B) is no.

Since Question (C) requires an affirmative response to Questions A and B, no response is required.

Referee Edwin H. Benn sat with the Division as a Member when Award No. 26528 was rendered, and also participated with the Division in making this Interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 22nd day of September 1988.