NATIONAL RAILROAD ADJUSTMENT BOARD

Form 1 THIRD DIVISION Award No. 30116

Docket No. MW-29743

94-3-91-3-103

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Elgin, Joliet and Eastern Railway Company

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

1. The sixty (60) demerits assessed against the record of Welder E. Gomez for his alleged '... failure to promptly report ... personal injury of August 25, 1989. ***' was without just and sufficient cause, capricious and on the basis of unproven charges (System File SAC-22-89/UM-51-89).

2. As a consequence of the violation referred to in Part (1) hereof, the Claimant's record shall be cleared of the charge leveled against him and the discipline assessed shall be rescinded.

Note: This Division has recommended that only one party submit the transcript as a part of the record in cases of this kind and has suggested that the Carrier will ordinarily be the party submitting the transcript. Therefore, the Employes will not submit the transcript but will expect the Carrier to submit a true transcript as part of its submission for the record in this case, as per the last sentence of the first paragraph of 'INSTRUCTIONS FOR PREPARING SUBMISSIONS TO THE THIRD DIVISION ...' dated December 18, 1958."

FINDINGS:

The Third 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.

On August 25, 1989, Claimant was one of four employees who were involved in the performance of track welding work. One of the four employees was the acting Foreman of the crew and another of the employees was also a Welder-Foreman who had been assigned to assist with the work which was being done. Claimant's regular Foreman had been temporarily assigned to fill a vacation vacancy at another location and was not present at the time of the incident here in dispute.

The case record reveals that the crew had completed their welding work and were in the process of clearing up the work area. Claimant was on one side of the track picking up material. The Welder-Foreman who had been assigned to assist the crew was on the other side of the track approximately five feet from Claimant. He was picking up wooden wedges which were to be placed on the crew's truck. As he picked up the wedges, he tossed them across to the other side of the track in the vicinity of where Claimant was picking up material. One of the wooden wedges tossed by the Welder-Foreman struck Claimant - Claimant says on the side of his face, the Welder-Foreman says on the top of his hard hat. There was no report made of this incident either by the Claimant or by the Welder-Foreman at the time of the occurrence. Subsequently, on September 15, 1989, twenty-two days after the incident, Claimant prepared and submitted a Form 187-Report of Personal Injuries to Employees alleging that he had sustained a personal injury on August 25, 1989.

Thereafter, by letter dated September 19, 1989, both Claimant and the Welder-Foreman who had tossed the wooden wedges were instructed to appear on September 27, 1989, for a hearing on a charge of:

> "Failure to promptly report the personal injury to E. Gomez which occurred at about 1:30 PM, August 25, 1989."

The hearing was held as scheduled at which time both Claimant and the Welder-Foreman were present, represented and testified on their own behalf. Following completion of the hearing, Claimant was notified by letter dated October 6, 1989, that he had been found guilty as charged and was assessed discipline of 60 demerits. The discipline notice contained the following statement:

> "The degree of discipline assessed is based upon consideration of your prior record. With the assessment of this discipline, your record now reflects a total of sixty (60) demerits."

On this property, the Safety Rules and General Regulations Governing Maintenance of Way Employees reads, in pertinent part, as follows:

"WHAT TO DO IN CASE OF AN INJURY

1. Employees who are injured while on duty must immediately report this injury to their Supervisor or person in charge. In the event medical treatment is necessary, prompt medical treatment must be secured from an authorized Company doctor, or from a competent doctor in the vicinity if a Company doctor is not immediately available.

2. Foreman or other person in charge must be notified immediately of a personal injury to an employee on duty. If Foreman or person in charge cannot be reached prior to time medical treatment is necessary, he must be notified as soon as possible after the injury by the injured person or any other person who knows of the injury.

3. Employees must complete, sign and promptly forward to their immediate supervisor, Form 187. This form must accurately describe all facts relating to a personal injury which requires medical attention."

The Organization's position in this case is fourfold. It argues that: (1) the Carrier failed to call all pertinent witnesses to testify at the hearing; (2) the Carrier assessed discipline on the basis of evidence not introduced or discussed during the hearing; (3) the Carrier failed to prove that Claimant did not make "every reasonable effort to promptly report his injury"; and (4) the discipline imposed was arbitrary, capricious, improper, unjust, unreasonable and unwarranted.

For its part, the Carrier contends that Claimant received a fair and impartial hearing at which substantial evidence was adduced to support the finding of guilt and that the degree of discipline imposed was based properly upon the gravity of the violation when considered in light of Claimant's previous record which included a dereliction involving the same type of situation, i.e., his failure to promptly report a personal injury.

Agreement Rule 57(b) reads as follows:

"(b) A transcript of all evidence given at the hearing will be furnished the employee or his representative, upon written request. No evidence

> or statement made will be used in considering the discipline administered except such as may be introduced at the hearing and subject to cross-examination."

This Agreement Rule is the basis of the Organization's argument against Carrier's reference in the notice of discipline to a consideration of Claimant's prior record. The Carrier, of course, points to the well established maxim of this Board which has repeatedly held that once the guilt of the individual has been established by substantial evidence in the hearing record, a consideration of the individual's prior record can and should be considered when determining the degree of discipline to be assessed. Indeed, the Organization in this case candidly acknowledges that "This is not a case where the Organization is urging that this well-established principle should be overturned." Rather, they argue that, on this property, the language of the negotiated rule demands that the prior record must be introduced into the record at the hearing if it is to be considered in determining the degree of discipline.

This Board has ruled on many occasions relative to the propriety of considering an employee's prior work and discipline record when determining the degree of discipline to assess after guilt on the particular charge has been established by substantial evidence in the hearing record. Arguments have been advanced by the respective parties from all angles on this issue. Some have argued that it is prejudicial to the employee to introduce the prior record at the time of the hearing. Some have argued that the notice of hearing must contain a reference to consideration of the prior record if it is to be properly considered. Some have argued that the consideration of the prior record could properly be introduced into the proceeding at any level of handling of the discipline case. The Board has written many opinions which have upheld the principle that consideration of the prior work and discipline record is a proper procedure at any level of the on-property handling of the case. For example see Second Division Awards 9281 and 9704.

However, in this particular case, the Board is faced with particular language in a negotiated rule which clearly provides that "No evidence . . . will be used in considering the discipline administered <u>except such as may be introduced at the hearing</u>. . ." (underscore ours). That language is clear and unambiguous. Given the normal and customary meaning of the words of the negotiated Rule, the prior record of the Claimant in this case should have been introduced at the hearing if it was to be considered in the discipline administered. The Organization's contention in this

regard is upheld. For support of this conclusion, see First Division Award 17030.

This conclusion, however, does not mean that discipline was not justified and warranted on the basis of the charge and supported by the hearing testimony. From our review of the hearing transcript, it is apparent that there are two diametrically opposite versions of the situation. The Welder-Foreman who was tossing the wedges categorically denied that the wedge struck Claimant on other than the top of his hard hat. The Welder-Foreman categorically denied that Claimant indicated in any way that he had been injured or requested or required medical assistance. The Welder-Foreman's testimony was corroborated in all major aspects by the testimony of the acting Foreman of the crew. Claimant, on the other hand, testified that he was struck on the temple by the wedge, that he was bleeding and that he complained to the Foreman about the incident. However, his further testimony supports the conclusion that he did not file a report on the alleged injury when it allegedly occurred. Neither did he request or apparently require medical attention either at the time of the incident or twenty-two days later when he finally filed his report of the alleged injury. Paragraph 3 of the Rules governing what to do in case of an injury requires that an employee must complete, sign and properly forward a Form 187 describing the facts relating to the injury. Claimant did not comply with that requirement.

The Organization's argument relative to Carrier's failure to call Foreman Keralis to testify at the hearing has been carefully examined by the Board and is found to be of no serious consequence in this particular case. This Foreman was not present at the scene of the incident. The fact that Claimant did or did not talk to this Foreman at some later date is not significant. What is significant is Claimant's own testimony in regard to his conversations with the Foreman. According to the Claimant, when the Foreman asked him if he wanted to report the incident, Claimant stated "I don't want to have any problem with those people, it might go away." From this candid admission, it is inconceivable that the Foreman could have offered any testimony which would have impacted on Carrier's decision in this case.

That leaves us with only the degree of discipline to consider. Carrier has contended that the degree of discipline was based upon the fact that this was the second time in which Claimant was involved in a situation where he failed to report a personal injury. If that record had been introduced into the hearing transcript, Carrier's position would have been on solid ground. Carrier did not, however, include the prior record in the hearing transcript and therefore cannot assess discipline on the basis of the prior record. There is information in the case record that in

a similar case involving another employee the assessed discipline was 30 demerits. It is the judgment of the Board that a similar assessment of discipline is appropriate in this case. Therefore, it is the ruling of the Board that the discipline of 60 demerits be reduced to 30 demerits.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Catherine Loughrin
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 4th day of April 1994.

CARRIER MEMBERS' DISSENT, IN PART,
TO
AWARDS 30116, 30117, DOCKETS MW-29743, MW-29754
(Referee Mason)

The Referee found that the Carrier could not rely upon the Claimants' prior records of discipline in these disputes because the records were not introduced at the Investigations. As discussed in detail in the Awards, the requirement he believed to exist would probably be unique in the industry.

There is, of course, no such requirement. The fact of the matter is that the argument found persuasive by the Referee has been made from time to time in disputes the Organization has brought to the Board and, in each instance, it has been rejected by the Board. Indeed, this same Referee has had disputes in the past involving these parties in which the identical argument was made and each time the contention was rejected.

Unfortunately, the Awards think so little of the argument that they usually simply dismiss the "procedural argument" raised by the Organization without describing it. A cursory review of past Awards, however, reveals at least three instances in which the issue was described. See Third Division Awards 29247, 29293, 29602. In each instance, of course, the Organization's position was found wanting in merit.

Finally, the Referee should have received an intimation of the Organization's seriousness on this issue when he reviewed the case that resulted in denial Third Division Award 30118, involving the same parties. That dispute, adopted immediately following Awards 30116 and 30117, involved two claimants, both of whom were assessed demerits on the basis of their prior records. The personal records were not introduced at the Investigation and the Organization did not even argue that such procedure was a violation of the Agreement.

We are fully confident that the Referee's decision on this issue will be given a prompt interment.

M. W. Fingerhut

R. L. Hicks

M. C. Lesnik

P. V. Varga

LABOR MEMBER'S RESPONSE
TO
CARRIER MEMBERS' DISSENT, IN PART
TO
AWARDS 30116, 30117, DOCKETS MW-29743, MW-29754
(Referee Mason)

Despite the prolific wanderings through prior awards by the Carrier Members in an attempt to give "this issue ... a prompt interment", there still exists between the parties a rule which provides that "*** No evidence or statement made will be used in considering the discipline administered except such as may be introduced at the hearing and subject to cross-examination." [Rule 57(b)]. The employes' employment records fall into that category which should be "introduced at the hearing and subject to cross-examination". The Majority correctly interpreted Rule 57(b) and nothing in the Carrier Members' dissent distracts therefrom.

Respectfully submitted,

D. D. Bartholomay
Labor Member