

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30278
Docket No. MW-30282
94-3-92-3-11

The Third Division consisted of the regular members and in addition Referee Robert T. Simmelkjaer when the award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(CSX Transportation, Inc. (former
(Clinchfield Railroad Company)

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

- 1) The ten (10) days' actual suspension assessed Welder R. H. Williams for alleged violation of CSX Transportation Safety Handbook Rule 560 and Rule 1, in connection with a personal injury he suffered on September 18, 1990, was without just an sufficient cause on the basis of unproven charges and in violation of the Agreement [Carrier's File 12 (91-2080 CLR].
- 2) The Claimant shall be entitled to the remedy described by the parties within Rule 35 (g)."

Findings:

The Third 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.

By letter dated October 31, 1990, Carrier's Division Engineer directed Claimant to report for a formal Investigation to determine his responsibility, if any, in connection with the lost time personal injury he allegedly sustained on September 18, 1990.

Following the December 5, 1990 Investigation and by letter dated December 17, 1990, the Division Engineer informed Claimant that testimony developed at the Investigation proved he failed to get maximum leverage from the rail turner that he was using as a result of his violation of Safety Handbook Rule 560 and Rule 1. Accordingly, he was issued a ten day suspension.

The Roadmaster testified that Claimant informed him that he had the rail turner in his hand and was getting into position to turn the rail, but before he exerted any effort, he felt a pain in his back. The Assistant Welder testified that he witnessed the incident. He stated Claimant was making a saw cut on the rail in the track and when he finished sawing, he pulled up on the saw and stated to the Assistant Welder that he felt a burning or stinging sensation in his back. He further testified that Claimant helped turn out the rail and thereafter complained that the pain got worse. Claimant testified:

"... I was starting to roll the rail out, I felt that pain, burning sensation in my back and that was the extent of it."

* * *

"... with two men it seemed it was safe to do or I thought it was safe to do because two men rolled out rail of that length, I've done it several times, numerous times and so has anyone else that has ever had to change out defects."

* * *

"...we've been shown and taught how to roll out rail to prevent injury, why I got injured I don't know. I was doing everything I thought was the proper and safe way to do something and I just got hurt."

The Organization's February 7, 1991 appeal is advanced on two grounds. Initially, it is argued that the Hearing Officer's admission of testimony regarding Claimant's alleged violation of Rule 560 and Rule 1 from the CSX Safety Handbook was an act of prejudgment and denied him a fair and impartial Hearing.

The Board has held in certain cases that where a "precise" charge is required a general charge such as informing Claimant that an Investigation will be held to determine his responsibility, if any, will not suffice. However, the prevailing view supports the introduction of Safety Rules during the Investigation provided Claimant was apprised of the nature of the charge against him and he was not deprived of his contractual right to due process, specifically his opportunity to prepare a defense.

In Third Division Award 21278, the added phrase "'in connection with your being absent from work without permission ...' makes the difference and satisfies the requirements of specificity" Similarly, in the instant case, the phrase "in connection with a personal injury you suffered on September 18, 1990" provides comparable specificity. The Board further held:

"We conclude the accused here was afforded the proper notice so he could understand the accusations, prepare his defense, and meet the charges against him. On this basis we find there is no merit to claimant's argument concerning lack of specificity in the charges here."

Since Claimant received notice that the Investigation would gather evidence concerning his alleged personal injury on October 8, 1990, the Board finds the admission of Safety Rule testimony, a subject which one can assume Claimant had prior knowledge of, did not prejudice his right to a fair and impartial Hearing.

The crux of the Organization's appeal is its contention that the Division Engineer improperly assessed the discipline because he was not present at the Investigation and three conflicting stories were told as to how Claimant was injured. The Board has previously held that a duplicity of roles is permissible such as where the Hearing Officer assesses the discipline or, as in the instant case, the official who prepares the charge also assesses the discipline so long as an "improper overlapping of prosecutorial and judgmental" functions does not result in the deprivation of a fair and impartial Hearing.

Furthermore, in the instant case, unlike a situation where the credibility of opposing witnesses is the pivotal issue, the Claimant's own contradictory explanations of the events, including his improper use of the rail fork constitute substantial evidence of his guilt. It is clear that Claimant told the Assistant Welder one story, the Roadmaster another story, and he testified that the story he told at the Investigation was "the truth." He testified that the Roadmaster must have misunderstood him. With respect to the adverse testimony of the Assistant Welder, Claimant testified:

"Where Mr. Peterson came up with that, I don't know, it's been so long maybe he forgot something, I don't know...."

Given Claimant's inconsistent testimony, the Carrier deemed unnecessary the resolution of contradictions between Claimant's testimony and that provided by his helper, the Foreman at the location and the Officer who spoke to him subsequent to the injury. Therefore, as noted in Third Division Award 26526:

"...Claimant's admissions afforded Carrier substantial evidence upon which to conclude the charges were proven. There were no vital credibility findings to be made."

Finally, to the extent credibility determinations impinged upon the Carrier's findings, the Board has held on numerous occasions that it will not substitute its judgment for that of the Carrier in resolving conflicting testimony, even where those findings are controvertible so long as the findings are supported by substantial evidence. Absent significant procedural impediments, the Board discerns no basis for disturbing the Carrier's imposition of discipline.

AWARD

Claim denied.

O R D E R

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 Third Division

Dated at Chicago, Illinois, this 19th day of July 1994.