

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31299
Docket No. MW-30253
95-3-91-3-715

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

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

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

- (1) The discipline imposed upon Equipment Operator A.L. Lackey, in connection with the collision of Tie Handler (TH 540) and Scarifier (TBS 4891), on October 25, 1990, was without just and sufficient cause, excessive and in violation of the Agreement [Carrier's File 12 (91-179) MNN].
- (2) The Claimant's record shall be cleared of the charge leveled against him and he shall '*** be paid for ever (sic) day of pay lost, and that he be paid for any overtime lost, any holidays, and that all the time he is paid or restored go toward his vacation. The amount paid would be whether he returned to work as a labor (sic) or a machine operator. ***' "

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 November 28, 1990, the Division Engineer

directed Machine Operator A. L. Lackey to report for a formal Investigation to determine his responsibility, if any, in connection with the collision of Tie Handler (TH 540) and Scarifier (TBS 4891) at 9:30 A.M., October 25, 1990.

Following the December 12, 1990, Investigation and by letter dated January 11, 1991, the Division Engineer informed Claimant that testimony developed at the Investigation proved that Claimant was responsible for the accident in that he failed to move his machine prepared to stop within one-half the range of vision. As discipline, he was suspended 30 working days. Inasmuch as he had previously signed a waiver of Investigation on October 25, 1990, in connection with another incident, the ten day overhead suspension for six months assessed as a result thereof was activated.

The Organization raised several procedural defenses. Initially, the Organization contends that the Carrier, in violation of Rule 19 (a) of the Agreement, failed to hold an Investigation within ten days following the date on which Claimant was charged. By letter dated November 28, 1990, Claimant was apprised of the charges, however, the Investigation was not held until December 12, 1990. In support of its position that the disciplinary action is procedurally defective, the Organization cites, inter alia, Third Division Award 23082 where the Board found the Carrier's unilateral postponement of the originally scheduled hearing a violation of Rule 19 (a). That Award references Award 41 of Public Law Board No. 1844 which notes that "... each party is required to grant the other a postponement ... when requested to do so for good and sufficient reasons." As additional evidence, the Organization credits the General Chairman's letter of appeal, dated January 26, 1991, where he denies consenting to the change in hearing dates.

The Carrier, on the other hand, argues that a mutual agreement had been reached to reschedule the hearing from December 6 to December 12, 1990.

The Board finds that despite the Vice Chairman's exception to the postponement at the conclusion of the December 12 Hearing and the reiteration of his position in the letter of appeal, ample evidence exists to dismiss the procedural claim. Not only were no exceptions made to the Carrier's assertion of mutual postponement at the commencement of the Hearing, but the statement of the Hearing Officer, in response to the Organization's claim of unilateral postponement, that the parties had rescheduled the Hearing on December 4 due to the unavailability of the General Chairman, was unrefuted.

The Organization further contends that Claimant was denied his contractual right to due process when the Carrier failed to render the decision in a timely manner, specifically within ten days after the completion of the Investigation. The Investigation was completed on December 12, 1990, and the decision rendered on January 11, 1991.

Previous decisions of this Board have affirmed the principle that technical violations are insufficient to nullify an entire disciplinary proceeding, absent a specific provision to this effect. Where, as here, the Carrier failed to notify the Claimant within the proper time frame and the Rule provides "... no penalty for failure to comply strictly with its terms", unless the Claimant could demonstrate some prejudice resulting from the delay, absolute adherence to the ten day requirement is not essential. In balancing the reasonable expectations of the parties that the terms of the Agreement will be strictly enforced, including the due process protections afforded Claimants, with the practical administration of the labor relations process, the Board has consistently interpreted the purpose of the ten day rule as avoiding unnecessary delay while, at the same time, upholding disciplinary proceedings which contained harmless procedural errors.

Although some Awards have reinforced strict enforcement of the time limits for issuing decisions, particularly in unique situations (i.e., where an employee could be suspended without a Hearing, Third Division Award 23553), typical of the prevailing pattern is Second Division Award 2466 where the Board held:

".... Agreements of this kind regulating the employer-employee relationship must be given a reasonable, workable construction and not construed so narrowly so as to defeat justice."

In addition, the Board in Third Division Award 16172 considered a discipline rule identical to that at issue in the instant case which read: "... the decision will be rendered within ten (10) days...." In determining whether the provision was mandatory or directory, the Board concluded that the absence of negative words, expressed or implied, or the imposition of a penalty for non-compliance would provide evidence that the parties intended the language to be directory and, as such, would not "void and/or nullify the results of any proceedings pursuant to and in accordance with its provisions."

In advancing another procedural defense, the Organization argues that prior to the Hearing the Claimant was misled as to the precise charge against him and subsequently the Carrier provided no evidence that he was informed of the Safety Rule, holding him responsible for being able to move his machine "... prepared to stop within one-half the range of vision...."

The Organization's argument that the charge was insufficiently clear to enable Claimant to prepare a defense cannot be sustained. That Claimant and his representative participated in the Hearing without objection and that Claimant acknowledged at the Hearing he was properly notified of the charges provides significant evidence that a fair and impartial Hearing was conducted. And although Claimant is not qualified to interpret the Agreement, insofar as evaluating whether his Hearing was conducted in accordance with the contractual provisions, the Board's findings corroborate his affirmative response.

In addition, the Organization asserts that the Carrier improperly used an alleged past offense to support the charge leveled against the Claimant mid-way into the Investigation. Whereas the Organization is concerned that the introduction of the prior charge prejudiced Claimant's right to a fair Hearing, the Board finds that the introduction of a prior disciplinary action for which Claimant acknowledges his culpability in a virtually identical situation is admissible for penalty and notice purposes. Although the timing of the submission is problematic, the Board cannot conclude that the admission of the prior discipline was a pivotal element in the Carrier's finding.

Finally, with respect to procedural issues, the Organization maintains that the Carrier neither cited a specific Safety Rule in its letter of charges nor produced evidence during the Investigation that Claimant knew such a Rule existed. It is undisputed that "Claimant had not received the benefit of an operating Rules class during the history of his seven (7) years of service with the Carrier."

There is sufficient precedent to reiterate the Carrier's option of not citing specific Rule(s) violations in advance of the Hearing, but rather introducing them at the Hearing and disciplining the employees accordingly. Given the cases which support this view, the fact that the Hearing Officer read the Safety Rules into the record cannot be deemed evidence that the Hearing was not conducted in a fair and unbiased manner.

The fact that Claimant did not receive Safety Rules training prior to the alleged accident could provide grounds for mitigation of penalty, yet evidence that Claimant was involved in a nearly identical accident two weeks prior to the instant accident gave him, in the Board's judgment, adequate notice of the Safety Rules at issue. Since Claimant admitted fault in that case, waived an Investigation and received a ten day overhead suspension, he was undoubtedly alerted to the need for stricter compliance with the pertinent Carrier Rules and the consequences of future violations.

During the Investigation Claimant testified that he was operating the Scarifier when it hit the motionless Tie Handler causing considerable damage. Although Claimant acknowledged that it was his responsibility to keep the machine under control, he testified that a defective braking system caused the accident. Moreover, Claimant testified that the presence of frost and hydraulic oil on the rail combined with foggy conditions contributed to the mishap.

Claimant's testimony was directly contradicted by Mechanic R. S. Stockdale who testified that the Scarifier had operable brakes and that prior to the accident, Claimant had not complained about their operation. Stockdale also testified that the weather and rail factors described by Claimant were common working conditions for which the Machine Operator should compensate. Testimony which indicated that the parking brakes may have been faulty would not affect Claimant's ability to stop his machine.

There is additional evidence that Claimant did not exercise sound judgment in operating the Scarifier despite the fact he worked in the same area on two consecutive days. The following colloquy delineates his responsibility:

- "Q. Knowing that the rail was frosty, as an equipment operator, are you not supposed to keep the proper distance between machine(s) when traveling?
- A. Yes, I had a proper distance on that morning. Approximately, maybe a pole length, maybe a pole length and a half between the machines.
- Q. Mr. Lackey, on the morning of October 25th, was your vision between you and the machine, behind you or ahead of you impaired?
- A. It was impaired due to the fog, yes.

- Q. How much fog was there in the area, do you recall what the sight distance would be?
- A. You could probably see maybe twenty yards in front of you.
- Q. Keeping the one pole distance, would this ... you been able to keep the one machine in sight?
- A. No."

With respect to resolving conflict in the testimony or determining the credibility of witnesses, it is well established that the Board, in its appellate jurisdiction, does not substitute its judgment for the Carrier in matters of discipline so long as the findings are supported by substantial evidence in the record. Absent bad faith or abuse of discretion, the Carrier's action will not be set aside. Persuasive in the instant case was evidence that Claimant had notice of the proper procedure, acknowledged his responsibility to control his machine under the prevailing conditions and failed to reasonably exercise the proper precautions to prevent the collision.

The Board cannot find that the action taken by the Carrier to have been unreasonable, arbitrary or disproportionate to the offense. For the reasons set forth above, the claim is denied.

AWARD

Claim denied.

ORDER

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 January 1996.