

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32951
Docket No. MW-33728
98-3-97-3-189

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

(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(Consolidated Rail Corporation

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (five (5) day suspension) imposed upon Mr. R. Widup for alleged:

‘...FAILURE TO COMPLY WITH CONRAIL’S SAFETY RULES AND PROCEDURES OF THE MAINTENANCE OF WAY DEPARTMENT EFFECTIVE DECEMBER 1, 1990, RULE 3001 PARAGRAPH 2(B), SUBSEQUENTLY FOLLOWED BY SAFETY RULE 60.5, PARAGRAPH (B), OF THE CONRAIL SAFETY RULES AND PROCEDURES, ENGINEERING, EFECTIVE (sic) MAY 1, 1995, WHEREAS YOU RECEIVED MEDICAL ATTENTION FOR AN ALLEGED INJURY TO YOURSELF ON MAY 3, 1995, AN (sic) DID NOT REPORT IT TO SUPERVISION UNTIL JULY 17, 1995
****’

was arbitrary, capricious and in violation of the Agreement (System Docket MW-4109-D).

- (2) As a consequence of the violation referred to in Part (1) above, Mr. R. Widup’s record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered.”

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 were given due notice of hearing thereon.

On May 3, 1995 the Claimant was working as a Vehicle Operator in a gang at Burns Harbor, Indiana. Claimant and two other members of the gang were attempting to bend a rail with a jack when the rail broke and the Claimant fell into the bucket of a front end loader. Unaware that he had injured himself the Claimant continued to work without incident until July 17, 1995 when he informed his Supervisor, for the first time, that he was going to see a doctor for treatment as a result of the events of May 3, 1995. The Claimant was then treated by his doctor for muscle and ligament damage, nerve root damage, and a herniated disk.

On July 21, 1995 the Carrier issued a Notice of Hearing pursuant to the charges set forth above, but the Hearing was postponed at the Claimant's request. The Claimant again requested that another Hearing, this time set for October 3, 1995, be postponed, citing his medical condition and providing as support a note from his doctor. Despite the request, the Carrier went forward with the Hearing in absentia, and subsequently the Carrier suspended the Claimant for five days.

The Organization contends that the Carrier committed reversible error because proceeding with the Hearing despite the Claimant's inability to attend due to his injury did not constitute a fair and impartial Hearing. We disagree. First, we note that Rule 27, relied upon by the Organization, provides only that postponements "may" be granted. Thus, discretion is vested in the Carrier and we are to be concerned only if the Carrier abuses its discretion once a request is made. On this point, we find no abuse of discretion. Further, the doctor's note provided in support of the request for

postponement did not preclude the Claimant from attending the Hearing. Rather, the physician says only that the Claimant could not maintain a standing or sitting posture for more than 30 minutes “. . . without the ability to lie down, change positions frequently, and take his medications.” Moreover, the Carrier assured the Claimant that he would be accorded “. . . every courtesy and/or accommodation.” In light of the foregoing we conclude that the Claimant unreasonably failed to attend the Hearing. Thus, when the Carrier went forward without the Claimant he was provided, under the circumstances, a fair and impartial Hearing.

On the merits the record is clear that the Claimant failed to timely report his injury until more than 60 days after the incident despite a clear requirement in the Carrier's Rules that he do so promptly. In reply the Organization contends that the Carrier failed to make this argument at the investigatory Hearing or in its Submission before this Board. The record is clear that the facts necessary to establish this conclusion are clearly set forth in the record of the Hearing. Thus, neither the Organization nor the Claimant have suffered any prejudice when the Carrier points out those facts and makes arguments based on them. In such a case there is no new evidence not already in the record nor any argument that could cause this Board to reject the assertion.

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 23rd day of November 1998.