Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 33473
Docket No. MW-33228
99-3-96-3-695

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(CSX Transportation, Inc. (former Richmond,
(Fredericksburg and Potomac Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The thirty (30) calendar day suspension assessed Trackman G. F. Goodall for his alleged insubordination on March 22, 1995 was without just and sufficient cause, harsh and based on an investigation that was neither fair nor impartial [System File RFP-MISC-5992/12 (95-0972) RFP].

(2) As a consequence of the violation referred to in Part (1) above, Trackman G. F. Goodall shall now be compensated for all wage loss suffered during the suspension and the days served during the suspension shall be credited toward vacation and retirement benefits."

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 September 8, 1995, the Claimant, G. F. Goodall, was suspended for 30 days for failure to follow instructions given to him by Roadmaster G. L. Phelps on March 22, 1995. On March 21, 1995, Claimant, who holds seniority as a trackman, was assigned and working as a backhoe operator near Richmond, Virginia. On that date, Claimant sustained an injury to his left knee when a step broke as he dismounted a backhoe. He reported the injury to Foreman McLeigh and also notified Roadmaster Phelps.

Roadmaster Phelps asked Claimant on the day of the injury if he wanted to complete the forms for a personal injury and see a doctor, and that Claimant declined. Claimant did not seek medical treatment on the day of the injury since it was close to the end of the day, and he did not know if the injury was serious.

Claimant reported for work the next day, March 22, 1995, but was unable to perform his duties. His leg had become swollen overnight, and he was unable to walk on it. The Roadmaster and Division Engineer Tomkins asked Claimant if he would try taking pain medication and putting ice on his leg. Claimant complied with this request and remained in the break room until approximately 1:30 P.M. During this time, he completed an accident report. Before Claimant left for the day, the Roadmaster advised him that if his leg got worse during the night and he needed to see a doctor, he (Roadmaster) had to go with him, that there were certain forms that had to be filled out.

Claimant's leg was still causing him pain on the morning of March 23. He decided to go to the emergency room of a local hospital to have his knee examined. X-rays of his knee and leg were negative. The doctor directed Claimant to rest for one day and work light duty for four days. After he left the hospital, he went to the job site, expecting to be taken to the Company doctor. He informed the Roadmaster that he had been to the emergency room. The Roadmaster asked if he had taken any prescribed medication, and Claimant said no.

Claimant testified at the investigative hearing that the Roadmaster mentioned that there was a form that the emergency room doctor needed to fill out, but that he could do this at a later time. The Roadmaster did not take Claimant to the Company doctor. Rather, he asked Claimant to keep ice on his leg and continue taking pain medication. Claimant testified that the Roadmaster also asked if he would report for

work on Friday, March 24, sit in his truck with his leg propped up for a couple of hours, and then go home. He agreed.

During a telephone conversation with Claimant on March 23, the Division Engineer informed Claimant that since he had been to a doctor that morning, there was some additional paperwork that would have to be completed. This would involve returning the next day to the doctor who treated him in the emergency room. The Division Engineer told Claimant that he should make arrangements with the Roadmaster to return to the emergency room the next day, and that if Claimant had any problem with this, he should call him (Division Engineer).

The form referred to by the Division Engineer is a "Physician's Initial Report of Occupational Injury or Illness," commonly known as Form CJ-24. This form is to be completed by the attending physician, and includes the date of the injury or illness, the diagnosis, and the recommended treatment. The injured employee does not fill out or sign the CJ-24. At no time was Claimant given a copy of this form to take to his doctor for completion.

On March 24, Claimant was experiencing so much pain that he could not operate the clutch of his car and could not drive. He telephoned the office to advise the Roadmaster and Foreman that he was unable to report for duty. At approximately 10:30 A.M., the Roadmaster, accompanied by a special agent of the Carrier, arrived at Claimant's house to drive him to work. Claimant informed the Roadmaster that he intended to follow the emergency room doctor's directions to rest for one day. Claimant testified that the Roadmaster tried to persuade him to come to work for a couple of hours, and informed him that if he missed a day of work due to an injury, the injury would become reportable under FRA guidelines. Claimant refused to go to work.

The Division Engineer and the Roadmaster also telephoned Claimant at home on March 24. A woman answered and stated at first that Claimant could not come to the phone. She then informed them that Claimant would return their call, but he failed to do so.

By letter dated March 27, 1995, Claimant was charged with failing to comply with the Roadmaster's instructions of March 22, 1995, and was directed to attend an Investigation on April 3. Prior to the Investigation, the Organization sent Carrier two letters contending that the charge letter failed to properly notify Claimant of the charge

against him. The letters requested that the Carrier advise the Organization what specific instructions Claimant allegedly failed to follow so that it could prepare a proper defense. Carrier did not respond to the Organization's letters.

The Investigation was rescheduled to August 22, 1995. At the start of the hearing, the Organization again requested a more specific charge. The investigating officer noted this request, but nevertheless proceeded to conduct the hearing. The Organization participated under protest.

By letter dated September 8, 1995, Claimant was suspended for 30 days for failure to follow the Roadmaster's instructions of March 22, 1995. The Organization appealed the suspension on September 28, and the appeal was denied on November 27, 1995.

The Organization advances two procedural arguments challenging the fairness of the Investigation. First, it contends that Claimant was not notified of the charges leveled against him as required by Rule 30(a) of the Agreement between the parties. In this regard, the Organization notes that while the March 17, 1995 notice of investigation does mention Claimant's failure to comply with the Roadmaster's instructions of March 22, 1995, it does not specify what instructions the Claimant failed to follow. Second, the Organization maintains that the conduct of the hearing officer denied the Claimant a fair and impartial investigation. It asserts that the Hearing Officer repeatedly restricted the Organization representative's lines of questioning and demonstrated bias against Claimant and prejudgment of the merits.

We find no merit to the Organization's contention that the Carrier violated Rule 30(a) by failing to notify Claimant of the specific charges against him. The charge identified the alleged offense, i.e., Claimant's failure to follow instructions, the date of the incident, and the supervisor whose instructions Claimant allegedly failed to follow. We find that the charge presented sufficient information to place Claimant and the Organization on notice of the nature of the charge to be investigated. See, Third Division Award 18606 and Second Division Award 6346.

Similarly, although the hearing officer did restrict the Organization's lines of questioning at various points throughout the hearing, after objection, the Organization was allowed to present its defense. We find insufficient evidence that Claimant was deprived of a fair and impartial hearing.

The Carrier first argues that a "Settlement and Final Release of All Claims" signed by Claimant in October 1996 covers the incident at issue and the 30-day suspension. We cannot agree. The settlement agreement provides that Claimant releases the Carrier, the manufacturer and the rental agent of the backhoe from which Claimant fell from all liability connected with personal injuries received by Claimant on or about March 21, 1995. In the absence of language specifying that settlement agreement also released the Carrier from damages sustained by Claimant in connection with the discipline he received on September 8, 1995, we reject the Carrier's contention that the agreement acted as a release of the subject claim.

With regard to the merits of the claim, the Carrier maintains that Claimant admitted that he failed to comply with the Roadmaster's instructions of March 22, 1995, that Claimant should notify him (Roadmaster) if a visit to the hospital became necessary since there were forms that needed to be completed. Instead, Claimant went to the hospital without prior notification to the Roadmaster. Carrier further asserts that although Claimant was again instructed to meet with the Roadmaster the next morning to return to the hospital, he failed to do so, and later refused to come to work when confronted in person by the Roadmaster at his home.

The Organization contends that the Carrier failed to prove that Claimant was instructed by the Roadmaster on March 22 that if he needed to see a doctor, he should first notify the Roadmaster. The Organization further asserts that even if the Board finds that discipline was warranted, a 30-day suspension was unduly harsh.

Upon full consideration of the entire record and the arguments raised by the parties, the Board finds that the 30-day suspension assessed against Claimant was arbitrary and an abuse of Carrier's discretion. First, the conduct upon which the Carrier relied in suspending Claimant was not conduct that was encompassed by the charge. Thus, in the September 8, 1995 suspension letter, the Carrier finds that Claimant failed to follow the instructions of the Roadmaster, as charged, "[a]s evidenced by [his] testimony on page 18 of the transcript." Claimant was suspended as a result of this finding.

On page 18 of the transcript, however, Claimant states only that he never had a Form CJ-24 completed, and that he did not return Division Engineer Tomkins' telephone call on March 24, 1995. Neither of these actions were alleged in the charge. Thus, the Roadmaster testified that on March 22 he informed Claimant that if he needed

to see a doctor, he should first notify him (Roadmaster) because there were certain forms that needed to be completed. (Tr. 4). Inasmuch as Claimant was disciplined for conduct not included in the charge, we find that the 30-day suspension was arbitrary and capricious.

Moreover, the reasonableness of Claimant's suspension must be questioned in light of the fact that he was not charged with any wrongdoing until after his injury became FRA reportable. The record as a whole persuades us that the Carrier was more concerned with preventing Claimant's injury from becoming FRA reportable than with ensuring that he received proper medical care. First, Carrier offers no explanation for why it waited until March 27, after the injury had become reportable under FRA guidelines, to charge Claimant even though his failure to follow the instructions given to him on March 22 was serious enough to warrant a lengthy suspension. We note in this regard that the Roadmaster did not reprimand or discipline Claimant when he learned that Claimant had visited the hospital without first notifying him. Second, the Roadmaster admitted at the Investigation that in most cases he speaks with injured employees' doctors based on the fact that "[t]here are some things that they can do that keeps an injury from being FRA reportable." Finally, the Carrier made repeated efforts to stall Claimant from seeking medical attention and induce him not to miss work in an evident attempt to keep his injury from becoming reportable under FRA guidelines.

In sum, we find that under the specific facts of this case, the Carrier's insistence that Claimant notify it prior to seeking medical treatment was intended to discourage Claimant from taking action that would render his injury FRA reportable, and, as such, the instructions given to him were not reasonably related to the safe and efficient operation of the Carrier's business. See, First Division Award 20426. Consequently, we find that the Carrier acted arbitrarily and in bad faith in suspending Claimant for 30 days.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 22nd day of September 1999.

CARRIER MEMBERS' DISSENT
TO
THIRD DIVISION AWARD 33473, DOCKET MW-33228
(Referee Katherine Gerstenberger)

The facts of this case are that Trackman Goodall ignored the Carrier's directive to complete certain medical forms and further refused to notify his supervisor when he returned to the hospital for additional medical treatment. During the Investigation the Claimant freely admitted that he failed to follow the Roadmaster's instructions. In fact, the Claimant refused to come to the phone in order to update the Carrier's officials about his condition. On October 4, 1998, the Claimant signed a waiver, which stated in part, ". . . said payment hereby RELEASES and forever discharges CSX TRANSPORTATION, INC., its officers, agents, servants and employees, its predecessors, successors and assigns, its parent, subsidiary and affiliated companies . . . from all claims, suits, costs, debts, demands, actions and causes of action which the undersigned has or might have against them or any of them." The purpose of the waiver was to protect the Carrier from any claims or demands of any nature by Trackman Goodall.

Unfortunately, the Neutral chose to ignore the clear language in the Claimant's waiver and totally disregarded the facts of the case by nullifying the Claimant's 30-day suspension. According to the Neutral, the waiver did not cover the Claimant's suspension. In addition, the Neutral held that the Claimant's disobedience was not clearly outlined in the charge. However, this did not keep the Neutral from overstepping her authority in invalidating the waiver and from also making an utterly unsupportable statement concerning the Carrier's presumed motives for requiring the Claimant to provide the medical information. Much precedent has been developed that supports the Carrier's position on this issue. (See Third Division Awards 19527, 19528, and 19530, and Special Board of Adjustment No. 605, Award 474.)

There is also much arbitral precedent involving the Organization and claims of a similar nature to this dispute, such as Third Division Award 26694 (Meyers) where the Board in dismissing the claim as moot, explained:

> **"The Board has been presented with a release executed by the Claimant on May 26, 1987, which fully released the Carrier from any and all Claims, causes of action, and liabilities of any kind or nature arising out of his employment with the Carrier. Hence, given that the Claimant has fully released the Carrier from all liability, there is nothing for this Board to decide, and the Claim is hereby dismissed."**

In Third Division Award 28075 (Gold) the Board held:

"As a result of Claimant's signing the release, this Board must conclude that Claimant terminated the viability of his Claim. Having executed a valid and binding waiver, the Claim must be dismissed as moot."

These are but a few of the many Awards that hold that once an individual has signed a waiver the Carrier is released from any and all further liability. In a very recent Award of the Third Division the Neutral held that the Board did not have the jurisdiction to rule on a case very similar to this one. In Award 32571 (Suntrup) the Board noted:

"Thereafter, however, the Claimant signed a General Release waiving all ' . . . claims, demands, actions . . . ' which had been initiated against the Carrier, including the instant claim before this Board. The Claimant signed this release in return for a sum of money not specified herein by this Board.

After reviewing the full record on this claim the Board concludes that the claim has no viability in view of the March 21, 1997 Settlement Agreement signed by the Claimant.

This Board has ruled on numerous occasions that a claim is moot in the face of such a waiver. See Third Division Awards 20832, 26470, 26694, and 29408. Also First Division Award 24045 and Second Division Award 13034."

Had the Majority carefully considered the overwhelming precedent on this issue it would have concluded that Trackman Goodall's discipline appeal was moot.

Concerning the Board's critique of the Carrier's actions, the Carrier takes its charge of providing a safe workplace for all of its employees very seriously. To remove responsibility from an employee who flippantly disregarded the Carrier's directives causes serious concern. The seriousness of the offense lies with the Claimant's blatant disregard for the Carrier's authority. The Claimant's suspension was justified based on his actions, not those of the Carrier. The Majority in the instant case gave credence to the Claimant's version of facts and discounted the opposite testimony of the Carrier's witnesses. The Division Engineer's and the Roadmaster's interest in providing false testimony is far outweighed by that of Trackman Goodall. The Board apparently failed to comprehend the seriousness of disregarding Carrier directives concerning its medical policy.

Considering the Carrier's vigorous efforts to create a safe working environment, the Majority's decision here is unfortunate. This is especially true in the message it sends to employees. Disobedience and disregard for the Carrier's Rules among its employees, if left unchecked, could escalate into acts that may have tragic outcomes. It is distressing that the Majority's view allows an employee the liberty to decide for himself which of the Carrier's Rules he will choose to follow. For one employee to callously ignore important and proper instructions from his employer is insupportable.

This Award is wrong in that it ignores a long line of precedent showing that failing to follow the Carrier's instructions concerning an injury resulted in suspensions (many worse than that given the Claimant) and in some cases even dismissal. Those Awards (such as Third Division Award 28885, Public Law Board No.4707, Award 19 and Award 53 of Public Law Board No.2481) remain viable and should have been implicitly followed by the Majority.

The Majority's logic is misplaced in an environment where the Carrier is attempting to provide a safe workplace for all of its employees. According to the Majority, it is permissible to disregard the Carrier's injury policy. This clearly is unconscionable.

The Majority addressed the issues presented in this case with a blind eye toward a balanced approach based on the facts, merits, and Carrier policy.

We vigorously dissent.

Michael C. Lesnik

Martin W. Fingerhut

Paul V. Varga

September 22, 1999