Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 33492
Docket No. MW-33126
99-3-96-3-562

The Third Division consisted of the regular members and in addition Referee Sandra Gilbert Pike when award was rendered.

(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(Burlington Northern Railroad Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The discipline (5 day suspensions) imposed upon employe B. Kreie for alleged violation of Safety and General Rule 567 and Rule 1.1 of the General Code of Operating Rules in connection with a personal injury sustained on July 25, 1994, was unwarranted, on the basis of unproven charges and in violation of the Agreement (System File B-M-348-H/MWB 94-12-08AB).

(2) As a consequence of the aforesaid violation, the Claimant's record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered beginning September 12 through 16, 1994, including lost overtime opportunity, loss of accreditation for lump sum payments, loss of promotional opportunity and loss of vacation qualification accreditation."

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 July 25, 1995 Claimant stepped on a hydraulic hose positioned between a truck and the crossing being worked on by Claimant. The hose was moved by a laborman while Claimant's foot was on the hose. Claimant fell and injured his knee. Claimant was treated by Dr. Jystad at Jamestown Hospital several hours after the end of the shift.

By letter dated August 1, 1994, Claimant was instructed to attend an Investigation on "August 9, 1994 for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with the alleged personal injury on July 25, 1994, at approximately 1500 hours while installing crossing near Eckelson, North Dakota."

Following the formal Investigation which was ultimately held on August 10, 1994, Carrier stated in a letter dated September 7, 1994 that Claimant was suspended from service for a period of five days for violation of Safety and General Rule 567 and Rule 1.1 of the General Code of Operating Rules.

On procedural issues, the Organization asserts that due process was denied to Claimant because (1) the notice was not precise (2) the decision in the case was not rendered by the Hearing Officer, (3) the letter of discipline relied upon violation of specific rules which Claimant had not been notified he had violated and (4) the Carrier did not supply a complete Transcript of the Investigation in a timely manner. In addition to the procedural issues, the Organization asserts that the Carrier did not produce substantial evidence of Claimant's guilt.

According to Carrier, as to the suspension, Claimant was afforded a fair and impartial Hearing in accordance with the Agreement, and the Carrier sustained its burden of producing substantial evidence of Claimant's guilt, the discipline was fully justified and the procedural errors alleged by the Organization did not occur.

The Carrier maintains that it properly suspended Claimant for violation of Safety and General Rule 567 and Rule 1.1 of the General Code of Operating Rules.

During the Investigation the Organization timely raised the contention that the Carrier did not provide notice of the charge against Claimant and that the vagueness of the charge letter made it impossible to prepare a defense.

It is a well established principle that the sustaining of an injury, does not, in and of itself mean that a Safety violation occurred nor does such injury in and of itself represent evidence of a violation. See Third Division Awards 12535, 16600, 26089; Second Division Award 6306. Timely and adequate notice of the charge or charges against the accused is a part of due process of law. Fourth Division Award 2270.

In this instance, we find that Carrier's failure to specify a charge deprived Claimant of knowledge of the misconduct of which Claimant was being accused. We are unable to find in Carrier's August 1, 1994 letter to Claimant any allegation of wrong doing, or any violation of a Rule or Agreement or requirement imposed upon employees by Carrier.

Article V sets forth the procedural protection which must be afforded an employe before discipline can be imposed. He must be clearly charged, that is informed that he is on trial for an offense. Sustaining an injury on the job is not, in itself a misconduct. Carrier's letter falls short of being a clear charge. The letter dated August 1, 1994, states the purpose of "ascertaining the facts and determining your responsibility, if any, in connection with the alleged personal injury." It does not indicate to the Claimant that the Carrier thought him guilty of an offense. On the contrary, the notice says, in effect, that the Carrier does not know who is responsible but intends to find out. The letter specified a date (July 25, 1995), time (approximately 1500 hours), location (near Eckelson, North Dakota) but failed to assert any alleged misconduct. Thus, the charging letter notified Claimant that he would participate in a general inquiry, but did not notify him of a trial. This case is distinguished from previous cases where the alleged misconduct was specified in the notice. The distinction is a vital one.

The purpose of providing notice of the charge against an employe is so that the employe can prepare his defense. With this notice, the Claimant had no idea of wherein they had been remiss. The Carrier did not announce that they would try the Claimant but rather that a hearing would be held to determine who was responsible. A notice which does not clearly charge cannot be precise.

We hold that a notice to attend a broad, general inquiry to ascertain who, if anyone, was responsible for an injury does not satisfy the requirements of Article V.

In Third Division Award 32082 the Board stated:

> "Our review failed to indicate how the language of the Carrier's March 13, 1995 letters places the Claimant's on notice of the alleged violations of which the Carrier found them guilty. It merely states the Claimant Johnson sustained an on-duty injury from making repairs to a bolt machine . . . because of the Carrier's failure to give Claimant proper notice of the charges against them, their claims must be sustained . . . ."

Compliance with the procedure is a basic safeguard of the due process and failure to do so is fatal, regardless of the merits of the case. See Third Division Award 19642.

We do not attempt to determine the validity of the Organization's argument that Carrier lacked substantial evidence to sustain the disciplinary action, or of the Organization's other procedural objections.

We find that the Agreement was violated.

AWARD

Claim sustained.

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 33492 (docket MW-33126)
(Referee Pike)

In the Investigation transcript we find:

"139 Q. Mr. Kreie, did you comply with Rule 567 on July 25 when you fell down and injured your knee?
A. No, I didn't. . . ."

"244 Q. Did you comply with Rule 1.1?
A. No."

The record substantiated the fact that Claimant's failure to follow pertinent rules resulted in his injury. However, this Majority has concluded that the Notice issued was to, "a general inquiry"; not to a trial. The misconduct was Claimant's failure to follow the rules - a fact that he admitted. In so far as Claimant was concerned, the trial was for the Claimant to rebut that his injury was his own fault. Claimant knew it and so did, his Organization. As this Majority has noted elsewhere (Award 33491) the Notice is to:

> ". . . permit Claimant to adequately prepare his case to defend against those allegations. We do not find that Claimant was surprised or otherwise prejudiced by the nature of the charges as formed."

Here, the Majority has created a distinction for no purpose other than to uphold the Organization's base assertions - something universal to their claim handling. On this property and throughout this Industry the identical Notice, determined to be lacking here, has been used and followed.

In view of all the foregoing, we must register our Dissent.

P. V. Varga

M. W. Fingerhut

M. C. Lesnik

LABOR MEMBER'S RESPONSE
TO
CARRIER MEMBERS' DISSENTING OPINION
TO
AWARD 33492, DOCKET MW-33126
(Referee Pike)

The Majority was correct in its ruling in Docket MW-33126 and nothing present in the Carrier's dissent distracts from the correctness and precedential value of this award.

The dissent alleges that the Organization misled the referee in this case when we argued that the notice of investigation was insufficient. The referee was able to review the notice and determine whether it met the requirements of Rule 40. The referee obviously was able to determine that the notice was lacking in specificity and so ruled.

The most troubling aspect of the dissent is that the Carrier Members go on to contend that:

> "*** In so far as the Claimant was concerned, the trial was for the Claimant to rebut that his injury was his own fault. ***"

This Board has consistently held that the Carrier bears the burden of proving that the charged employe is guilty of the charges leveled against him. The Carrier Members' mindset that the Claimant is guilty until he proves his innocence is so fundamentally flawed that it deserves to be brought to light by those who read this response. The award is correct and stands as precedent.

Respectfully submitted,

Roy C. Robinson
Labor Member