Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36118
Docket No. MW-35659
02-3-99-3-592

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(New Orleans Public Belt Railroad

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Bridgeman J. T. Smith, Jr. for alleged violation of NOPB Safety and General Rules 1.6, 1.2.5 and 1.1 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File MW-98-1-NOPB).

(2) As a consequence of the violation referred to in Part (1) above, Claimant J. T. Smith, Jr. shall now '. . . be paid for all lost time to begin on June 19, 1998 and to conclude when this matter is resolved, to be exonerated of all charges against him and his record cleared, and be credited for vacation, hospitalization retirement and we also request compensation for any expences (sic) which the claimant had occured (sic), such as meals, mileage while attending the investigation on July 7, 1998 and July 8, 1998 at the New Oleans (sic) Public Belt Railroad, 4822 Tchoupitoulas Street, New Orleans, Louisiana 70115. . . .'"

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.

The Claimant was dismissed for insubordination, failure to report an injury, and for being accident prone. At the time the events of this claim arose, the Claimant was a Bridgeman with some 18 years of service.

On May 19, 1998, the Claimant reported concerns that he might injure himself if he had to work with the cable gang that day. He did not claim he was injured but, rather, that prior conditions with his leg, arm and neck might cause him problems due to the climbing that would be required. He was sent to be examined by the Carrier's physician on May 22, 1998 and was not withheld from service. He worked thereafter in non-cable gang duties and also took vacation. By letter dated June 8, 1998, the Carrier's physician expressed a need for medical information from the doctors treating the Claimant's neck and leg. The information from the doctor treating the leg was readily forthcoming. The Claimant's other doctor, however, required a written release before providing any information to the Carrier's doctor. The Claimant was informed of the need to supply the information on June 9, 1998 and was released from service to take care of the matter. The Carrier assumed he could conclude the matter that day by signing a release form and return to work the next.

There was no word from the Claimant on June 10. In a telephone conversation on June 11, the Claimant reported he had an appointment with his doctor the next day. The Claimant remained off payroll. On June 15, a Carrier official telephoned the Claimant to inquire about his status. During that conversation, according to the Official's testimony, the Claimant acknowledged having the required information, but he did not want to provide it to the Carrier that day, nor would he allow a courier to come to him to pick it up. Instead, the Claimant agreed to bring it in the following day. The Official stressed with the Claimant the importance of providing the information. The Claimant's own questioning of the Official, during the Investigation, acknowledges that he had the requisite information and agreed to provide it the next day.

On June 16, the Carrier received a letter from an attorney purporting to represent the Claimant in connection with an injury of December 1997. The letter requested the injury report and other information surrounding the alleged injury. The Carrier had no record of any such injury ever having been reported, although its records did reveal that the Claimant had 29 other prior injuries during his term of service, the latest being on October 4, 1996.

By June 19, the Carrier had still not received the medical information from the Claimant, nor had it heard from him. A dismissal letter was dispatched accordingly. The parties' Agreement does not require an Investigation prior to imposing discipline. Such an Investigation is provided only if requested by the affected employee. A Hearing was duly requested and held on July 7 and 8, 1998. It was undisputed during the Hearing that the Claimant had still not provided the medical information sought by the Carrier. The Claimant was found culpable on all three charges.

The Organization contends the Carrier failed to satisfy its burden of proof on any of the three charges. In addition, it maintained that the failure to successfully prove one or more of the charges must result in a revoking of all the discipline for any of the charges. It cited Third Division Award 2298 in support.

Our review of the record reveals no procedural shortcomings of significance by either party. Thus, we turn to the merits of the charges.

Two of the charges depend upon whether the Claimant actually sustained a 30th injury in December 1997. The Carrier has no record of it. Moreover, the Claimant denied suffering any such injury during his testimony. Although the Claimant admitted having spoken with the lawyer that wrote to the Carrier, he denied knowing much about the letter. The Hearing Officer at the Investigation did not explore the background of the letter beyond the single question to the Claimant.

Under the circumstances, we do not find the record to provide substantial evidence that the Claimant suffered another injury in December 1997. The lawyer's letter provides but a scintilla, but overall the letter appears to be wholly unfounded. Accordingly, the Carrier's guilt determination on the charges related to failing to report the purported injury and accident proneness must be overturned.

We do find the record to contain substantial evidence that the Claimant was guilty of insubordination. It is well settled that the Carrier here may hold an employee out of service when it has reasonable concerns about the employee's fitness for duty. In addition, the Carrier's right to require employees to provide medical information regarding their fitness for duty is similarly well recognized. The record herein provides the Carrier with justification for these actions.

We also disagree with the Organization's application of Third Division Award 2298. That dispute dealt with two charges of misconduct which, together, warranted only a 60-day suspension. It imposed joint punishment for separate offenses, neither of which merited severe discipline. When one of the offenses was found to be unproven, the Board had no way to ". . . unscramble . . ." the discipline imposed. That is not the case here.

Not only was the Claimant insubordinate in failing to supply the requisite information, he continued to use the situation to absent himself from work for no good reason shown. Indeed, he continued to withhold the information the Carrier was entitled to have even through the date of the Investigation. Under the circumstances, we find that the unique facts of this record portray an independent basis for termination of the Claimant's prior employment. Consequently, we will not disturb the Carrier's dismissal action.

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 22nd day of July 2002.