Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36119
Docket No. MW-36032
02-3-00-3-139

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Union Pacific Railroad Company (former Southern Pacific
(Railroad Company (Western Lines))

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

The discipline (withheld from service and subsequent dismissal) imposed upon Mr. E. Gonzales for alleged violation of ' . . . Union Pacific Rules 1.1.1, 1.1.2, 1.6(1), 1.6(2), 5.13(B), 7.13, 70.32.7, 81.4.1(P3), 81.5, effective April 10, 1994, and C.E. Bulletin 125.2.3, and 125.2.4,' was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement. (Carrier's File 1170912 SPW).

As a consequence of the violation referred to in Part (1) above, Claimant Mr. E. Gonzales shall now ' . . . be exonerated of all charges, reinstated with seniority unimpaired, and compensated for all wage loss.'"

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 March 6, 1998, while in active service as an Assistant Foreman, the Claimant was ordered to search out a list of cars that contained ties and had been misdirected en route. There is no dispute in this record that the Claimant entered the bowl track searching for the cars with Maintenance of Way materials, and while climbing up the ladder, fell and suffered an on-the-job injury. The Carrier issued a letter of Charge of March 24, 1998, and further, when the Claimant was cleared by his own physician, it directed the Claimant to return to active service on September 1, 1998. When the Claimant returned from his injury as required, he was removed from service by a second Charge letter dated September 1, 1998.

The Organization alleges that the Carrier violated the Rules by creating two different Charge letters utilizing different Rules and making it impossible for the Claimant to formulate a defense. It further points out that the Carrier's entire actions in immediately removing an injured employee from work constituted prejudgement. This was further evidenced by the partial and biased actions of the Investigation. The Claimant was badgered by Conducting Officers who never introduced evidence of proof. The Organization argues that the Carrier utilized hearsay and failed to properly call witnesses to the accident or incident. The Carrier's reliance on testimony of supervisors who were not present fails to substitute for testimony of material witnesses. The Claimant indicated he was injured while working in a safe manner. Nothing was presented to prove otherwise or refute his testimony.

The Carrier denies all procedural objections. It maintains that the Charge letters were clear, related to the incident of March 6, 1998 and complied with the Rules of the Agreement. The Charges were not vague and the Investigation was fair and impartial. The Carrier denies any actions that would deny the Claimant his Agreement rights. On merits, the Carrier argues that the Claimant did violate the Rules and the testimony is sufficient to prove the violations. It challenges the Claimant's credibility and accepts the testimony of Supervisors Romero and Bracken as more accurate. It maintains that the Claimant was properly investigated, the charges proved and the discipline consistent with the Carrier's policy. The Carrier denies any violation and denies the claim.

There were changes made to the two Charge letters. Certainly, the Carrier added some new Rules (for example, Rule 5.13(B)) and deleted others (for example, Rule 125.2.2) when it issued the second Charge letter of September 1, 1998. However, the two Charge letters were specific and not vague. They both related to the very same incident, date, location and issue. Both stated that the Investigation would concern itself with the "personal injury . . . while occupying Bowl Track 15 without proper protection and proper authority. . . ." The Board finds no violation herein of Rule 45. Nor do we find any procedural error in the handling of the Investigation that would constitute a violation of the Claimant's rights.

On merits, the Board studied the testimony. Further, while the Board does not judge credibility, we do consider whether the Carrier fairly decided such issues and in this instant case find no evidence to suggest error. There is substantial evidence of record to indicate that the Claimant entered the bowl track without following safety procedures. There is no record of written notice, no proof of permission from the tower, no evidence of blue flag protection and in our study of the accident itself, there is sufficient evidence that the Claimant failed to have proper shoes. Issues raised by the Organization that the Conductor, Yardmaster or others should have been called as witnesses are not persuasive. Supervisor Romero testified that nobody gave permission to the Claimant to enter the bowl track area and that the Tower had no records of any permission. There is no record of a name of any Conductor that called for permission, nor any evidence that the Carrier failed to fulfill its responsibilities to obtain the facts.

After careful consideration of the full and extensive record at bar, the Board finds sufficient evidence to support the Carrier's conclusions of guilt. The Board can find no support for the Organization's arguments of procedural error, nor for the conclusion of a Carrier failure to prove the charges. The Claimant was in the bowl without sufficient protection or authority and his actions therein resulted in personal injury. The record of evidence provides no alternative explanation or justification for climbing a gondola or attempting to investigate a car that by testimony could not have been on the list of missing cars. The Board will not interfere with the discipline assessed.

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.