

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37579
Docket No. MW-38360
05-3-04-3-310**

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employees
(BNSF Railway Company (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- 1. The dismissal of Mr. W. Kender on August 22, 2002 for alleged violation of BNSF Maintenance of Way Operating Rules 1.2.5, 1.2.7 and 1.6 in connection with a personal injury report was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File T-D-2541-B/11-02-0377 BNR).**
- 2. As a consequence of the violation referred to in Part (1) above, Mr. W. Kender shall now '... be reinstated to his position, paid for all time lost (including overtime), made whole for any and all benefits, and his record cleared of any reference to any of the discipline set forth in the August 22, 2002 letter from Robby J. Hughes, Division Engineer.'"**

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.

By letter dated May 30, 2002, the Claimant was notified to attend a formal Investigation to determine his responsibility, if any, "in connection with your failure to give factual statements concerning your alleged personal injury which you reported occurred approximately on May 18, 2002 while assigned as machine operator on RP07." After several postponements, the Hearing was conducted on July 26, 2002. By letter dated August 22, 2002, the Claimant was notified that as a result of the Hearing, he had been found guilty of violating Maintenance of Way Operating Rules 1.2.5, 1.2.7 and 1.6, and that he was being dismissed from service. The Organization thereafter filed a claim, challenging the Carrier's decision to discharge the Claimant. The Carrier denied the claim.

The Carrier initially contends that the record supports the Carrier's finding that the Claimant had violated the cited Rules, and that the Claimant was properly disciplined. The Carrier emphasizes Roadmaster Fluck's testimony that on May 22, 2002, the Claimant told him that he had not been hurt on the job, and that his injury was not the railroad's fault. Moreover, when Fluck told the Claimant that he was being removed from service until the Claimant could obtain a release from a doctor, the Claimant replied that this "might be the first step to getting disability." Although the Claimant attempted to explain his response to Fluck's question by asserting that he did not feel the need to give Fluck every detail about how he had injured his leg, the Carrier insists that the transcript leave no doubt that the Claimant violated Maintenance of Way Operating Rules 1.2.5, 1.2.7, and 1.6.

The Carrier points out that the Claimant testified that he filed the F27 Report on the advice of his attorney and because he had been pulled out of service and needed to protect himself. Contrary to the Organization's argument, the Claimant did not file the report in order to comply with the Rules. The Claimant did not

comply with Rule 1.2.5, which expressly required that he report the injury as soon as possible. Moreover, the Claimant admitted that he should "have been a little more specific" about how he had been injured, thereby acknowledging his violation of Rule 1.2.7, which prohibits employees from failing to give all the facts. The Carrier asserts that the Claimant did not bother to reveal all of the facts until the Investigation, more than two months after he filed the injury report.

The Carrier goes on to argue that the record also conclusively shows that the Claimant was in violation of Rule 1.6. The Claimant was suffering from an injury that prevented him from performing his duties safely. The Claimant acknowledged that Fluck was justified in removing him from service because he was jeopardizing his own safety and that of his co-workers. The Carrier therefore asserts that the Claimant obviously violated Rule 1.6 by being careless of the safety of himself and others, and by being negligent. The Carrier further points out that the record demonstrates that the Claimant also was dishonest, in further violation of Rule 1.6.

The Carrier maintains that under these circumstances, dismissal was justified, and it is supported by the testimony developed during the Investigation. The Carrier emphasizes that prior Board Awards have held that dismissal is appropriate where employees fail to file prompt, accurate, and complete accident reports.

The Carrier goes on to contend that the Organization has resorted to a far-fetched allegation that General Director of Labor Relations D. Merrell, the Carrier's highest officer of appeal, had predetermined to deny the claim because a committee of several high-ranking Carrier officers met and discussed the Claimant's case. The Carrier urges that there is no support for the Organization's assertion that Merrell would not overrule a decision made by this committee. The Carrier points out that instead of acting as a precursor to Merrell's decision, the committee gives the dismissed employee an "extra" chance at getting the dismissal overturned or reduced. The Carrier emphasizes that this is not uncommon, and dismissed employees have, in fact, been reinstated at Merrell's level. The Carrier maintains that this committee was established to screen out dismissals that appear biased or unsupported on their face, and the committee usually discusses several cases from various crafts, including BMW, at any one session. The Carrier argues

that this is another procedural safeguard that the Carrier has implemented to avoid injustice to accused employees.

The Carrier then asserts that the committee is irrelevant to the Board's consideration of this matter because each disciplinary case must rise or fall on the facts established in the record. The Carrier argues that the record in this case irrefutably establishes the Claimant's violation of the Rules and supports the discipline assessed.

The Carrier goes on to address the Organization's argument that it somehow was "unfair" to the Claimant that the specific Rules that may have been violated were not mentioned during the Investigation. The Carrier insists that the purpose of the Investigation was to develop the facts so that a determination could be made as to whether there had been an offense. Based on the facts that were developed in the Investigation, Division Engineer Hughes determined that the Claimant had violated Maintenance of Way Operating Rules 1.2.5, 1.2.7, and 1.6. The Carrier maintains that nothing in the Agreement requires it to specify, in either the charge letter or the transcript of the Investigation, the specific Rules that may have been violated. Moreover, prior Awards consistently have held that there is no requirement that specific Rules must be cited in the Notice of Investigation. The Carrier argues that the Claimant was fairly apprised of the type of conduct for which he was being investigated, so his ability to defend himself was not prejudiced.

The Carrier then asserts that even if it is found that the Carrier was not justified in dismissing the Claimant from service, there is no basis for an award of monetary damages. The Carrier maintains that based on the Claimant's testimony about "heading towards disability," it is obvious that the Claimant's medical condition would have prevented him from working even if he had not been dismissed. The Claimant admittedly is "basically disabled." The Claimant never furnished any medical information that would indicate that he is medically able to perform service.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Organization initially contends that Rule 40 provides that an employee will not be disciplined or dismissed without a fair and impartial Investigation, and that written notice to the employee will specify the charges against the employee. The Organization asserts that the letter of charges and the subsequent postponement notices fail to properly notify the Claimant of the Rules that he allegedly violated. The Organization argues that because the Carrier never actually charged the Claimant with a specific Rule violation, the Carrier's actions in this case cannot validly be upheld. The Organization insists that the Board consistently has held that an employee may be found in violation only of those Rules with which he is charged, as defined in the notice of charge. The Organization asserts that in this case, the Claimant was not notified of the Rules that he allegedly violated until August 22, 2002, when the Carrier issued discipline following the Hearing. The Organization maintains that any discipline imposed in connection with Rules not cited within the notice of charge or the three subsequent postponement notices was in violation of the Claimant's contractual right to due process.

The Organization emphasizes that it is well established that a fair and impartial Hearing requires that the accused employee be informed of the nature of the charges in a form definite and specific enough so that the employee may adequately prepare a defense. Moreover, the Board has held that fishing expeditions are to be avoided during Investigations. In the instant case, however, the Carrier failed to present any evidence that the Claimant had violated any specific Rule. The Organization contends that the Carrier's failure to properly apprise the Claimant of the specific charges for which the Investigation was being held resulted in the denial of the Claimant's contractual and due process rights to a fair and impartial Hearing. The Organization therefore argues that this matter should be resolved in favor of the Organization without the necessity of considering the merits.

With regard to the merits of this dispute, however, the Organization points out that Fluck's testimony reveals that the Claimant freely and honestly discussed his condition with Fluck on May 22, 2002. Moreover, the Claimant's prior knee injury, which occurred about 12 years before the incidents at issue, was a matter of Carrier record. The Organization maintains that there is no support in the record for the Carrier's contention that the Claimant in some way withheld information regarding his condition.

The Organization insists that an objective analysis of the transcript clearly and conclusively establishes that the testimony adduced at the Investigation neither justifies the discipline assessed against the Claimant nor supports the charges lodged against him. The Organization points out that the Board consistently has held that where discipline is excessive, capricious, improper, and unwarranted, it cannot stand.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The parties being unable to resolve their dispute, this matter came before the Board.

The Board reviewed the procedural arguments raised by the Organization and we find them to be without merit. A thorough review of the transcript makes it clear that the Claimant was afforded a proper Investigation and all of his Agreement due process rights were afforded to him.

The Board reviewed the evidence and testimony and we conclude that there is sufficient evidence in the record to support the finding that the Claimant was guilty of violating several Carrier Rules in connection with his personal injury report that he filed stating that he was injured on the job on "approximately" May 18, 2002. The record reveals that the Claimant had a conversation with the Roadmaster on May 22, 2002, and the Claimant stated that he "kind of overdid it here this past weekend laying sod." He went on to state that "I didn't hurt that on the job" and "the railroad's not at fault." The Claimant summed it all up by stating, "This might be the first step to getting disability."

The record further reveals that the Claimant stated "... the only reason why I filed a F27 on it is because I was pulled out of service, for one thing, and needed to protect myself that way. Also, upon advice of attorney, I did that."

The Claimant later admitted that he did not provide all of the facts to his Roadmaster.

The Board must conclude that the Claimant's filing of an on-duty injury report and his failure to provide all facts related to that injury violated several Carrier Rules.

Once the Board has determined that there is sufficient evidence in the record to support the guilty finding, we next turn our attention to the type of discipline imposed. The Board will not set aside a Carrier's imposition of discipline unless we find its actions to have been unreasonable, arbitrary, or capricious.

The Board recognizes that the Claimant has been employed by the Carrier for more than 25 years. However, given the very serious wrongdoing, the Board cannot find that the Carrier's action in terminating the Claimant's employment was unreasonable, arbitrary, or capricious. Therefore, the claim must be denied.

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 24th day of August 2005.