

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39524
Docket No. TD-39966
09-3-NRAB-00003-070208
(07-3-208)

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

(American Train Dispatchers Association
PARTIES TO DISPUTE: (
(Port Authority Trans-Hudson

STATEMENT OF CLAIM:

“This is an appeal of the decision of the Superintendent of Transportation in the hearing of Dispatcher J. Kwityn, ID #8322.

The charges made against Mr. Kwityn should never have been brought forth in the first place as this was an accident pure and simple. No fault on either party.

Since the Carrier obviously failed to meet the burden of proof it should expunge the discipline imposed and clear the Claimant’s record and make him whole.”

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 December 5, 2005, the Claimant was notified to appear at a formal Investigation on charges that he allegedly violated Carrier Safety Rules by failing to exercise constant care and avoid injury by carrying items in both hands while walking down a staircase, and therefore not using a handrail, which resulted in an injury to the Claimant's left arm and shoulder. The Investigation was conducted on March 23, 2006. By letter dated April 19, 2006, the Claimant was informed that as a result of the Hearing, he had been found guilty as charged and that he was being assessed a one-day suspension. The Organization filed an appeal on the Claimant's behalf, challenging the Carrier's decision to suspend the Claimant. The appeal Hearing was conducted on June 1, and by letter dated June 7, 2006, the Carrier denied the appeal.

The Carrier initially contends that it is obligated to investigate accidents and take appropriate measures to reduce the risk of injuries to employees and patrons. The Carrier asserts that it also has the right to require employees to exercise reasonable care for themselves and others, and these requirements are set forth in the Carrier's Rule Book.

The Carrier argues that it is well established that it is appropriate for a carrier to discipline an employee who violates Safety Rules or otherwise is careless or negligent. It emphasizes that the Claimant was not subjected to discipline for being accident-prone, nor did it rely on the happening of the accident per se to establish that Rule violations occurred. The Carrier asserts that the Claimant was disciplined because the credible evidence established that he failed to exercise care to prevent injury to himself, and that he failed to employ safe work practices when he failed to use the available handrail while walking down the stairs. The Claimant chose to have his hands full, and he therefore was unable to use the available safety equipment (handrails) when he lost his balance.

The Carrier insists that the evidence clearly shows that the Claimant failed to use the provided handrail, and that an accident occurred as a result. It argues that the suggestion that the Claimant tripped or slipped on a piece of metal, as well as the argument about the location of the handrail, are inconsistent with the statement given by the Claimant's co-worker on the day of the incident. The Carrier points out that there was no mention of the location of the handrail until the appeal, and this assertion was not supported by evidence.

The Carrier asserts that the record supports the finding that the Claimant was guilty as charged, and the Organization has not demonstrated that this finding is unsupported by the record. The Organization also failed to show that the penalty imposed was inappropriate. The Carrier argues that the lenient penalty of a one-day suspension is clearly designed to assist the Claimant to correct his behavior in the future and to compel compliance with Carrier Rules, including Safety Rules.

The Carrier contends that the Claimant was afforded a fair and impartial Hearing, and the evidence was sufficient to support a finding of guilty. The discipline imposed was not excessive, and it is designed to be corrective in nature.

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

The Organization initially contends that the record demonstrates that the Carrier committed procedural errors in handling this matter, particularly its failure to provide the Organization with a correct copy of the Investigation transcript. The Organization asserts that the Carrier grasped at straws to explain its failure to provide a corrected copy of the Investigation transcript. It argues that this failure made it difficult, if not impossible, to mount a proper defense for the Claimant. The Organization emphasizes that for this reason alone, the instant claim should be sustained. It additionally points out that the Carrier failed to have Ms. Bacon available for examination at the appeal Hearing, as requested by the Organization. Citing several Awards, the Organization maintains that the Carrier's actions compromised the Claimant's Agreement due process rights, and the discipline imposed therefore should be expunged from his record.

The Organization then insists that the Carrier failed to meet its burden of proof. It asserts that whether the Claimant had a hand free or not, it is clear that he could not have grasped the handrail until after he had taken his first step down the staircase. The Claimant therefore could not have utilized the handrail at the point where he slipped because, as the undisputed evidence shows, he slipped on a piece of metal attached to the top step of the staircase. The Organization contends that even if the Claimant was required to use the handrail, it was not available to him at the point where he slipped.

The Organization goes on to point out that the testimony demonstrates that not all employees at this location utilize the handrail, nor is there any Carrier Rule requiring that they do so. The Organization additionally asserts that the Carrier previously has not disciplined any employee for failing to utilize the handrail. The Organization also emphasizes that just because an accident occurs does not necessarily mean that an employee is guilty of a Rule violation. The Organization insists that the Carrier's accusations and subsequent determinations are baseless. The Claimant was not guilty of any Rule violation in connection with the incident at issue.

The Organization further emphasizes that during the on-property handling, the Carrier did not contest, refute, or challenge any of the Organization's arguments set forth in its August 17, 2006 letter. The Organization maintains that such unrefuted assertions and contentions must be accepted as fact, as several Awards have held.

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

The Board reviewed the procedural arguments raised by the Organization, and finds them to be without merit. A thorough review of the transcript makes it clear that the Claimant was guaranteed all of his Agreement due process rights.

The Board reviewed the evidence and testimony in this case, and we find that there is sufficient evidence in the record to support the finding that the Claimant was guilty of violating Carrier Safety Rules when he went down the stairs in a careless manner on November 15, 2005. The record reveals that the Claimant attempted to walk down the staircase without using the available handrails and fell and injured himself. The Carrier requires employees to abide by its Safety Rules; and in this case, the Claimant failed to do so.

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 Claimant was issued a one-day suspension for his wrongdoing. The purpose of discipline is to not punish an employee, but to make him aware of the Safety Rules so that he will abide by them in the future. It is obvious to the Board that the issuance of a written warning to the Claimant would have been sufficient to notify the Claimant that he had to use one of his hands to hold the handrail in order to protect himself while going down the stairs. There was no need for the Claimant to lose pay as a result of his error in judgment.

We find that the Carrier's action in assessing a one-day suspension to the Claimant was unreasonable and arbitrary and that that discipline should be reduced to a written warning. The Board orders that the one-day suspension shall be removed from the Claimant's record and he shall be made whole. A written warning outlining the Claimant's responsibilities when descending a stair case shall be sent to the Claimant and placed in his personnel file.

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 2nd day of February 2009.