NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 20279
THIRD DIVISION Docket Number MW-20368

Joseph Lazar, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Norfolk and Western Railway Company
((A&P Regions)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Extra Force Laborer D. J. Pauley for allegedly violating "Rule 25 of the current MW agreement and Rule "H" of the General Notice from the Safety Rules" was unwarranted, based upon unproven charges and in violation of the Agreement (System File MW-FG-72-100).

(2) Extra Force Laborer D. J. Pauley be reinstated with seniority, vacation and all other rights unimpaired and that he be compensated for all wage loss suffered, all in compliance with Rule 32(c).

OPINION OF BOARD: Claimant was hired as an extra gang laborer on the Carrier's Scioto Division on May 12, 1972. On June 9, he suffered an injury to his toe; on July 11, he suffered burns on his hands from creosote; on July 18, he suffered burns on his eyes from creosote. He was absent from work July 13, 17, 19, 20, 21, 25 and 26, having worked subsequent to his second injury of July 11, on July 12, 14, 18, and 24. On July 31, 1972, he was taken out of service and subsequently terminated for having been absent without permission in violation of Rule 25 of Agreement, and under Carrier's Safety Rule H, for being an unsafe employe. The Organization contends in the claim before this Board that the dismissal "was unwarranted, based upon unproven charges and in violation of the Agreement." (Paragraph (1) of Statement of Claim).

Our review of the record clearly shows that the claim as handled on the property and the claim as appealed to this Board are not the same, but that the claim has been substantially and materially modified by the Organization. The record is clear that on September 21, 1972, the General Chairman wrote the Regional Engineer requesting desired relief for Claimant: "We were only furnished a copy of the letter to the claimant. We did not receive a copy of the transcript." "We are citing Rules 32 and 33 of the Current MW Agreement in support of this request." On October 9, 1972, the General Chairman appealed to the Vice President-Labor Relations, saying:

"We do not agree...that the decision does not have to be rendered to me nor that they are not required to furnish me with a copy of the transcript." On December 5, 1972, the Vice President-Labor Relations wrote the General Chairman:

> "The only basis on which you progress this case is on the allegation that Rules 32 and 33 were violated when the letter announcing the decision rendered following the hearing was addressed to the claimant, with copy to you, instead of vice versa and that you were not furnished a copy of the transcript. You take no exception to the conduct of the hearing, the finding of guilt, or the discipline assessed."

Although the General Chairman received a copy of the transcript by Carrier's letter of October 3, 1972, the General Chairman wrote the Vice President-Labor Relations on December 6, acknowledging his letter of December 5, 1972, continuing the appeal on the basis of Rule 32: "Rule 32 gives the employe or his duly accredited representative the right to request a hearing, and common sense would know that whomever requested a hearing, a decision likewise should be rendered to the party requesting same." In this letter of December 6, it is clear that the Organization did not reply to the Carrier's challenge of "no exception" being taken "to the conduct of the hearing, the finding of guilt, or the discipline assessed." The Organization, however, apparently abandoned its argument concerning Rule 33 and the transcript. On December 20, 1972, the Vice President-Labor Relations answered the General Chairman's letter of December 6, pointing out: "...your Organization was notified by a copy of the same letter having been directed and forwarded to you at the same time. Your having been notified of the decision, there is no basis for your contention that the Carrier refused to render a decision to you." "Inasmuch as you were notified of the decision, which is the only basis upon which you progress the claim, it is entirely without merit and our previous denial is affirmed." On January 3, 1973, the General Chairman responded to the Vice President-Labor Relations letter of December 20, 1972, saying: "We feel that our position was clearly set forth in our letter of December 6, 1972, addressed to you. You have not at this point disproved the charges we have placed against the Carrier. You cannot deny the fact that I was not furnished with a copy of the transcript of the hearing after Rule 33 plainly set forth we should be furnished with same." Rule 33, apparently, is brought back into the position of the Organization, but it remains clear that there is nothing in the handling by the Organization relating "to the conduct of the hearing, the finding of guilt, or the discipline assessed."

By letter of May 22, 1973, the Vice President-Labor Relations refers to conference on May 8 with the General Chairman and, after pointing out that the General Chairman had received a carbon copy of the decision and had received a copy of the transcript with letter of October 3, 1972, stated: "Your not having been furnished a copy prior to that time did not in any way prejudice your right of appeal, or affect your appeal in any way. You have had full opportunity to argue the case to whatever extent you deemed necessary. In the circumstances, there is no merit to the position taken by you and our denial of December 5, 1972, must therefore stand."

The Carrier, in its submission, states: "The case was discussed in conference on March 7, at which the General Chairman made an informal plea for leniency. In a later conference, May 8, 1973, the informal request was denied. At no time during either conference did the General Chairman discuss or take exception to the conduct of the hearing, the finding of guilt or the discipline assessed. It was only after the Carrier's confirmation of the final conference that he amended his original position, almost as a final gasp, that the claimant's guilt was not proven. The Employees' efforts to so mend their hold should be denied by this Board."

We have reviewed this record in detail, at length, to establish beyond any doubt that the handling by the Organization on the property did not include any contentions or raise any questions or issues on the substantive merits of the termination of Claimant. Not until the handling in the usual manner on the property was exhausted did the Organization raise substantive matters, by letter of May 23, 1973, preliminary to appealing to this Board. In our considered judgment, this belated effort to amend the claim is without legal effect and is in contravention of Section 3, First (i) of the Act which requires handling in the "usual manner up to and including the chief operating officer." We are of the further opinion that Section 3, First (i) of the Act contemplates that the claim denied by the chief operating officer, on the property, is the claim which "may be referred" to the Board. (See, in this connection, Award No. 13235, Dorsey.)

The claim properly before this Board, accordingly, is whether the facts of record establish a violation of Rule 32 or of Rule 33. Rule 32(b) in question reads:

> "(b) The investigation shall be held within ten (10) calendar days after the receipt of request for same, if practicable, and decision rendered within twenty (20)

"calendar days after completion of the investigation."

The record shows that The Carrier rendered its decision on September 13, 1972 (Carrier's Exhibit C) in letter to Claimant with carbon copy to "JHB", the General Chairman, and it is not questioned that the copies were received. The rule does not state that the decision must be addressed to the general chairman. We find that the rule has been complied with, and even though the protocol of issuing the decision as contended for might have precluded this dispute, it is not for this Board to write the rules for the parties.

Rule 33, Transcript of Evidence, provides:

> "A transcript of an employe's evidence, when taken in writing at the hearing, will be furnished the employe upon his verifying and signing same. A copy of all the evidence taken in writing at the hearing will be promptly made available for use of the employe's representative when required in handling cases on appeal from the hearing."

The Organization was furnished copy of the transcript by letter of the Carrier on October 3, 1972, with delay resulting from Claimant's delay in verifying and signing the transcript. The rule requires that the transcript "will be promptly made available." "Promptly" contemplates an early and timely action, approximating immediateness, so as to ensure the fullest opportunity for careful study, consideration, and preparation for appeal. There must be no question or doubt raised concerning possible prejudice to an employee's rights on appeal. In the instant case, in view of the total lack of any possible prejudice to Claimant, we find that there has been no violation of the rule.

In view of what this Board has stated above, we find that the Agreement has not been violated, and the claim must be denied. Nevertheless, even if this Board were to consider the substantive merits of the discharge, the claim must still be denied. The transcript shows that the Safety Rules require the wearing of suitable clothing for the safe performance of duties, but yet Claimant burned his hands on creosote, admitting that his gloves "had holes in them". (Q. 255). Claimant's Foreman testified (Q. 174)that Claimant "would dismount moving equipment" and, in response to the question (Q. 175) "Was he properly clothed when he worked?" said, "No, sir. We have a bulletin and a letter that was put out on bell-bottom slacks." Claimant admits (Q. 303) that what the Foreman said "was pretty well true." The transcript shows, concerning absenteeism, the testimony of the Clerk at Fort Gay: "On three

"occasions after that I went up on Paddle Creek to hunt Dennis. One time I missed him and on the first time I found him he had two ladies in the car and I asked him if he could go back to the job and he said that he had to take those ladies back home before he could go. And on the second occasion, he was in Louisa, Kentucky where he had carried a Mr. Robertson's family to the Medical Clinic. Again I asked Dennis if he was going to work that day. And he told me then that he would go to work as quick as he visited the store in Louisa, Kentucky." Although there may be some question concerning how much absenteeism may have been due to injuries to the toe, hands, and eyes, and how much absenteeism may have been due to other causes, we find sufficient evidence in the record to support the Carrier's decision. We will not substitute our judgment for that of the Carrier where there is sufficient evidence to show that the Carrier did not act arbitrarily, capriciously, or in bad faith.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 14th day of June 1974.