

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24344
Docket Number MW-24143

Edward L. Suntrup, Referee

PARTIES TO DISPUTE: { Brotherhood of Maintenance of Way Employees
{ The Alton and Southern Railway Company

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

(1) The dismissal of Trackman Kenneth Hayes for alleged violation of 'the Uniform Code of Safety Rules, specifically General Notice, Paragraphs 1 through 5; General Rule "B"; General Rule "F"; General Rule "L"; and General Rule "N", Paragraphs 1, 2, 4 and 5' was without just and sufficient cause and in violation of the Agreement (System File A&S 1980-1).

(2) Trackman Kenneth Hayes be reinstated with seniority, vacation and all other rights unimpaired, the charge be stricken from his record and he shall be compensated for all wage loss suffered, including overtime pay, beginning January 2, 1980."

OPINION OF BOARD: Claimant, Kenneth Hayes, worked for the Carrier approximately 8 years and at the time of the incident in question was employed as a trackman. By letter dated January 2, 1980 Claimant and track foreman Willis T. McCoy were notified to attend a formal investigation on January 9, 1980 to "develop the facts and place ... responsibility, if any, in connection with alleged personal injury ... at approximately 10:00 AM, December 19, 1979, and failure to report the injury promptly to ... immediate supervision ...". The charge also included "... failure to make a full and complete report at once on prescribed form". After the hearing was held as scheduled Claimant received notice dated January 17, 1980 that he had been found guilty as charged and was discharged from service. Foreman McCoy was not disciplined.

A review of the transcript of the hearing shows sufficient substantial evidence to warrant that Claimant is guilty as charged. Substantial evidence is here defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" (Consol. Ed. Co. vs. Labor Board 305 U.S. 197, 229). Irrespective of whether foreman McCoy understood, which he apparently did in good faith, that Claimant had only a "sore" finger which was the result of a prior injury rather than an "injured" finger while Claimant was covering his assignment on December 19, 1979, it was still Claimant's responsibility himself to have reported said "injury" immediately. He did not do so until a later date. By not having immediately reported such injury Claimant was clearly in contravention of Safety Rules cited by Carrier in its letter of discharge.

With respect to the formal investigation itself which was held on property on January 9, 1980, however, this Board discerns a disregard on the part of the hearing officer for Rule 20A(c) requirements of current Agreement when the hearing officer permitted Claimant's past record to be introduced by Carrier witness while this witness was being cross-examined about the specific charge against Claimant. Rule 20A(c) reads, in pertinent part:

"No evidence or statement will be used at the hearing except those relating the specific charge against the employee."

There is considerable difference between the use of a Claimant's past record as evidence at a hearing and the use of the same record to assess reasonable quantum of discipline once a Claimant has been found guilty as charged. It is the determination of this Board that hearing procedures adapted by the hearing officer had the effect of doing the former rather than the latter. Irrespective, and while holding, nevertheless, for Claimant's guilt on merits despite such procedural malfeasance this Board rules, in the instant case, that it would not also be unreasonable to eliminate Claimant's prior work record altogether from consideration because of Carrier's contravention of the procedural requirements as so stated in Rule 20A(c). Thus treating this as a first infraction this Board rules that Claimant be reinstated with all seniority rights unimpaired, but without back pay and benefits for time out of service.

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 Employees involved in this dispute are respectively Carrier and Employees 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 discipline was excessive.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 27th day of April 1983.

