NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 24654
THIRD DIVISION Docket Number MW-24781

Tedford E. Schoonover, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Burlington Northern Railroad Company
((St. Louis-San Francisco Railway Co.)

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

(1) The dismissal of Trackman Driver W. L. Etter for alleged violation of Agreement Rule 94 and "176" and "713" of the "Rules for the M/W & Structures" was without just and sufficient cause (System File B-1956-1/MWC 81-10-23).

(2) The claimant shall be reinstated with seniority and all other rights unimpaired, his record cleared and he shall be compensated for all wage loss suffered.

OPINION OF BOARD: Prior to his dismissal Claimant was a trackman-driver assigned to Gang 441 under the supervision of Roadmaster R. C. Wagoner and Gang Foreman R. D. Foster. Claimant had some ten years service with the Carrier.

On April 15, 1981, Carrier addressed letter to Claimant a part of which reads:

> "This is to advise you that at the close of investigation scheduled April 21, 1981 at 9:00 A.M. another investigation will be held to develop the facts of this alleged injury and your violation of Rule 94 of the current Agreement and General Regulation 176 of the Rules for the Maintenance of Way & Structures, Rev. 7/78.
>
> You may have representative of your choice as specified by the Agreement Rules if you so desire."

The hearing date referred was postponed at the request of General Chairman and was held on May 26, 1981. In responding to the request for postponement, Carrier, on May 8, 1981, stated that during the hearing to be held on May 26, Claimant's personal record would be reviewed.

Rule 94 of the labor agreement and General Regulation 176 were the only rules cited by the Carrier in setting up the investigation hearing. In the dismissal notice issued by Carrier on June 2, 1981, these two rules were cited as the basis for the dismissal action and also Rule 713 of the Rules for Maintenance of Way & Structures. The three rules and regulations pertinent to the claim are:

> Rule 94: "Employes injured while they are at work will not be required to make accident reports before they are given medical attention, but will make them as soon as possible thereafter. Proper medical attention will be given at the earliest possible moment."
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> General Regulation 176: "Employes who are negligent or indifferent to duty, insubordinate, dishonest, immoral, quarrelsome, insolent, or otherwise vicious, or who conduct themselves and handle their personal obligations in such a way that the railway will be subject to criticism and loss of good will, will not be retained in the service."
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> Rule 713: "If physically able, an employe injured on duty must report the injury to his foreman or other supervisory officer before leaving company premises. A report must be made of every injury, regardless of how slight. The supervisory officer should arrange prompt first-aid for the injured person, then place him under care of medical doctor as soon as possible, reporting the injury promptly on prescribed forms regardless of how minor it may appear."

During the hearing, Mr. Etter acknowledged familiarity with all of the above rules. The alleged injury occurred while unloading chat with a work train at which time Claimant alleged he sustained pain in his back and abdomen. He completed the day's work without making any report of the injury to his foreman. Thus, the provisions of Rules 94 and 713 for immediate medical care or first aid were not brought into operation.

The evidence adduced during the hearing established beyond reasonable doubt that Claimant did not file an injury report soon after his alleged injury as required by the rules. Moreover, he did not inform Carrier authorities of the injury until some 7 days later on April 9, and then only after questioning as to why he was not at work. Although he was on the property on two occasions following that date, i.e., April 10 and April 15, he declined to fill in the report even though asked to do so. Claimant did not file an injury report until May 26, 1981, the date of his investigation hearing.

The reasons advanced by Claimant for failure to file the required report lacks credibility. He claimed to have lacked the time on one occasion when he was on the Carrier property but testified the report required only about ten minutes to complete. On another occasion he stated he was afraid to go on the property but gave no evidence in support of this.

The Brotherhood protests the fact that Rule 713 was not cited in the charging letter of April 15 but was listed along with Rules 94 and 176 in the dismissal letter of June 2, 1981. Rule 91(a) of the labor agreement requires that "employes disciplined or dismissed will be advised of the precise charge of such action, in writing if requested". In this case, the Claimant was advised precisely as the rule requires, but after the hearing rather than before. The rule does not specifically require such notice to be made before although this is a generally accepted requirement in order to permit the employe and his union representative to prepare a proper defense. It is noted that both Rules 94 and 713 are essentially the same in requiring prompt accident reports. Thus, having been advised specifically of the requirements of Rule 94, we are constrained to conclude that Claimant was not disadvantaged by failure of Carrier's charge letter of April 15 to include Rule 713.

Claimant admitted knowledge of the requirements for filing injury reports and had done so numerous times in the past when previously injured. That he failed to do so in this case until nearly two months after his alleged injury was not satisfactorily explained. Thus, we must conclude that Carrier fully established by probative evidence Claimant's violation of the safety rules. Rule 176 is also properly a part of the basis for the dismissal in that Claimant was clearly indifferent to his duty to file the injury report. The importance to the Carrier in having employes file injury reports and the seriousness of failure to do so has been the subject of numerous awards. We refer particularly to Third Division Award 19298 involving the Brotherhood of Maintenance of Way on the Atchison, Topeka and Santa Fe Railway:

> "We believe that it is common knowledge that any employee in any hazardous employment is entitled, and gets, certain benefits if the employee is injured in service, without regard to negligence or fault.
>
> Prompt reporting of injuries, whether real, suspected, or imaginary is extremely important to the employer because:
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> 1. The employer is entitled to mitigate his damages by having the employee treated promptly, so that an earlier return to work is possible and a valued experienced employee may return to his job.

"2. The carrier has a duty to its stockholders and its employees to correct any condition that causes injuries if such a condition may be corrected.

Prompt reporting of injures is necessary and extremely important. It is set forth in the rules and it is a reasonable requirement. In the matter at hand, the time elapsed before reporting was 12 days. We think that this is far in excess of a reasonable time."

"Claimant's testimony shows that he knew the content of the rules, and we see no reason to dispute this.

It is of the greatest importance for the Employer to know of any injury, whether real, suspected or imaginary, that has happened to any of its employees while on duty. An employee may not invoke his own judgment of what constitutes a reportable injury. He must report all of them, according to the rules, whether real, suspected or imaginary."

"The claimant was dilatory in reporting an injury.

The hearing was fair and impartial, and the penalty was not arbitrary or capricious." (Emphasis added)

Action of the Carrier in dismissal of Claimant was just and reasonable in the circumstances reviewed herein. Evidence that Claimant failed to comply with the rules cited was clear and convincing and supports the finding that Carrier action was not arbitrary or capricious.

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 Employe 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: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois this 30th day of January, 1984