

The Third Division consisted of the regular members and in addition Referee Jack Warshaw when award was rendered.

(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company

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

(1) The dismissal of Sectionman A. Sanchez for personal injuries '... which far exceeds the norm for similar employees in your classification....' was without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement (System File D-72/013-210-S).

(2) The claimant shall be reinstated with seniority and all other rights unimpaired, his record cleared of the charges leveled against him and he shall be compensated for all wage loss suffered."

FINDINGS:

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

The carrier or carriers and the employe or employees involved in this dispute are respectively carrier and employees 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 waived right of appearance at hearing thereon.

The Claimant was hired by the Carrier on February 1, 1977, and on April 1, 1986, was employed as a Sectionman. While working in the Carrier's Fischer Yards on April 1, 1986, the Claimant sustained a personal injury.

On April 28, 1986, the Carrier served a Notice of Hearing on the Claimant instructing him to attend investigation on May 1, 1986, to develop facts and place responsibility on charges that his employment record indicates an injury on April 1, 1986, and an accumulative personal injury record consisting of 14 personal injuries since 1977 "which far exceeds the norm for similar employees in your classification, indicating a violation of General Notice (A), (B), General Rules A, B, D, I, 607(1). Safety Instructions 4000 and 4001 of Form 7908, 'Safety, Radio and General Rules for all employes' *** You will be withheld from service pending such hearing pursuant to Rule 48(o)."

On May 6, 1986, the Organization filed a claim alleging that the nature of the investigation, i.e., looking at personal injuries dating back to 1977 violated the time requirements of Rule 48(a). The Organization also asserted that by withholding the Claimant from service prior to the hearing the Carrier violated Rules 48 and 50.

On May 15, 1986, the Carrier's District Engineer denied the May 6, 1986, claim stating that it would be improper for him to become involved in the matter while it was being handled at the local level. On May 13, 1986, the hearing was held. As a result of the hearing the Claimant was advised on May 29, 1986, that the charges against him had been sustained and that he was therefore dismissed from the Carrier's service.

On June 4, 1986, the Organization appealed the Claimant's dismissal alleging both procedural and substantive errors by the Carrier warranting that the claim be allowed. The Organization contends that 1) the Claimant was not accorded a fair and impartial hearing when he was removed from service prior to the hearing in violation of Rule 48(a); 2) the notification of charges as presented on April 28, 1986, were not clear and precise as required by Rule 48(c); 3) the Carrier violated Rule 48(a) by investigating thirteen (13) accidents that were each outside the thirty (30) calendar day time limits provided for in the Rule; 4) the Carrier failed to produce substantial and probative evidence that the Claimant committed serious violations of the Rules while sustaining personal injury on April 1, 1986; and 5) the Carrier failed to demonstrate that the Claimant was responsible for his on the property injuries.

The pertinent Agreement rules provide as follows:

"RULE 48. DISCIPLINE AND GRIEVANCES

(a) Except as provided in Paragraph (k), (l) and (m) of this provision, an employee who has been in service more than sixty (60) calendar days, whose application has not been disapproved, shall not be dismissed or otherwise disciplined until after being accorded a fair and impartial hearing. Formal hearing, under this rule, shall be held within thirty (30) calendar days from the date of the occurrence to be investigated or from the date the Company has knowledge of the occurrence to be investigated, except as provided hereinafter.

* * *

(c) Prior to the hearing, the employee alleged to be at fault shall be apprised in writing of the precise nature of the charge(s) sufficiently in advance of the time set for the hearing to allow reasonable opportunity to secure a representative of his choice and the presence of necessary wit-

nesses. The General Chairman and the Assistant General Chairman in the territory involved shall be furnished a copy of the charges preferred against an employee.

* * *

(o) It is understood that nothing contained in this rule will prevent the supervisory officer from suspending an employee from service pending hearing where serious and/or flagrant violations of Company rules or instructions are apparent, provided, however, that such hearing shall be conducted within thirty (30) calendar days from the date the employee is suspended and a decision rendered within twenty (20) calendar days following the date the investigation is concluded."

The Board finds no fatal procedural errors by the Carrier in its handling of this case which would warrant us to set the Carrier's action aside. Agreement Rule 48(o) permits the Carrier to withhold an employee from service pending hearing where it appears that serious or flagrant violations of Company rules or instructions may have occurred. It has been repeatedly held that withholding an employee from service prior to the hearing is not discipline but rather a part of the process leading to an eventual determination. Also Rule 48(b) provides for protection against loss of wages if the charges against the employee are not upheld. Thus an employee is protected against unfair removal from service pending a hearing if he is subsequently exculpated of the charges against him.

The Board also finds that the notification of charges against the Claimant were sufficiently clear and precise as to enable him to prepare an adequate defense. There was no element of surprise or deceit in the Notice of Hearing and no ambiguity as to the nature of the charges. Moreover, the transcript of the hearing discloses that on several occasions during the investigation, the Hearing Officer advised the Claimant's representative that he would allow a recess at any time for the Organization to prepare a defense if it so desired or needed more time to do so.

As regards the application of the time limits of Rule 48(a) upon the Carrier's review of the Claimant's personal injury record, the Board notes and subscribes to the position taken in First Division Award No. 20438 in which similar arguments were propounded by the Organization. In rejecting the Organization's contention, the Board held:

"On this contention the Division finds as follows:

(a) The first of carrier's two charges was an allegation of accident-proneness. By its very nature this charge could not properly have been made right after the first injury reports were filed by claimant. To have proper foundation said

charges could have been correctly made only after an accumulation of injury reports. (b) Given this holding, carrier could properly have filed its charge soon after the ninth or latest and most serious injury report of claimant. Thereafter the critical question here is whether carrier had reasonable justification for waiting more than fifteen months after said latest injury to lay its charge."

As to the merits of the Carrier's action the Board has carefully reviewed the investigation transcript and finds that there is sufficient probative evidence in the record, including the Claimant's admissions, to support the Carrier's finding of guilt in this case. The record established that the Claimant's frequency of personal injuries differed markedly from those of his co-workers who were performing the same work and were on the same seniority roster. Also the Claimant's testimony at the hearing was in fact contradictory and conflicted with that of other witnesses. Thus the issue of the Claimant's credibility was an appropriate factor for the Carrier to consider in considering the evidence before it. As to the issue of credibility this Board may not substitute its judgment for that of the Hearing Officer who was able to observe the witnesses and evaluate their testimony.

Moreover, the record indicates that the Claimant did not respond to the Carrier's efforts to impress upon him the need for safe work habits. As the weekly safety meetings, safety rules, safety functions and counseling by Carrier officials failed to bring about an improvement in the Claimant's safety awareness, the Carrier was justified in concluding that the Claimant was a danger to himself and others.

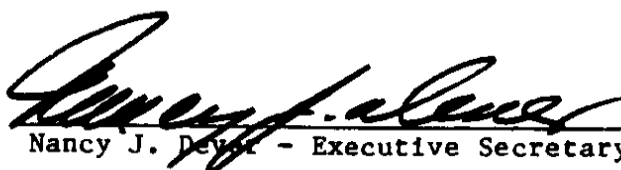
In summary, the Board finds no reason to disturb the Carrier's action. The discipline assessed was supported by the record and the seriousness of the Claimant's offense justified his dismissal.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dwyer - Executive Secretary

Dated at Chicago, Illinois, this 20th day of July 1988.