

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 28200
Docket No. MW-28310
89-3-88-3-55

The Third Division consisted of the regular members and in addition Referee Robert W. McAllister when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Duluth, Winnipeg and Pacific Railway Company

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

(1) The discipline [twenty (20) demerits in addition to five (5) days suspension] imposed upon Section Foreman A. Westby for alleged violation of DWP Safety Rules 3051, 3054 and 3055 on October 7, 1986 was harsh, unjust and in violation of the Agreement [System File #212/G.106-W(33/87)(S)].

(2) The Agreement was further violated when Roadmaster R. Soger failed to timely disallow the claim presented to him by the Acting General Chairman on November 17, 1986 as contractually stipulated within Rule 21(a).

(3) As a consequence of either or both Parts (1) and/or (2) above, the Claimant shall have his record cleared of the charges leveled against him and 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 employes involved in this dispute are respectively carrier and employes 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.

This Claim on behalf of the Claimant, is progressed to the Third Division on two issues. First, the Organization contends that Rule 21(a) was violated by the Carrier when it failed to timely disallow the Claim. Secondly, the Organization asserts the Carrier failed to accord the Claimant a timely hearing under Rule 20(a).

Turning to the claimed Rule 20(a) violation, this Board notes the Carrier in its on-the-property handling of this dispute informed the Organization that the Engineering Track Inspector had the authority to respond to the Organization's Claim. This was not rebutted by the Organization.

The record reveals that on October 30, 1986, the Carrier disciplined the Claimant by assessing him twenty (20) demerits, a five (5) day suspension for violating Safety Rules 3051, 3054, and 3055. The Claimant was involved in an accident and charged with not wearing approved safety glasses. On November 14, 1986, the Organization requested a hearing under the provisions of Rule 20, which was denied two (2) days later.

Rule 20(a) states in relevant part:

"No employee shall be suspended (except for investigation) or dismissed until his case has been investigated. An employee disciplined, or who considers himself unjustly treated, shall have a fair and impartial hearing, provided written request is presented to his immediate superior within ten (10) days of date of advice of discipline, and the hearing shall be granted within ten (10) days thereafter. An employee may have the assistance of one or more duly accredited representatives at an investigation and, on request, shall be furnished with a copy of evidence taken, and a written statement giving result of investigation. An employee found blameless, if disciplined or dismissed, shall be reinstated and paid at schedule wages for each day lost and also reimbursed for any reasonable expense incurred if required to be away from home in connection with investigation."

On November 17, 1986, the Organization disputed the Carrier's denial of a hearing under Rule 20 and charged there are no provisions within that Rule which allows the Carrier the right to deny a hearing. On November 25, 1986, the Carrier informed the Organization that a hearing was not held. On February 9, 1987, the Carrier in responding to a January 21, 1987, Organization letter, wrote to the Organization's Acting General Chairman and stated in relevant part:

"On November 6, 1986, myself, G. A. Carlson, G. Schneider, R. A. Olson and yourself met in Pokegama in Mr. Olson's office and discussed Mr. Westby's request for a hearing. It was agreed upon at that time that a hearing would be a waste of everyone's time since an investigation has already been conducted on October 22, 1986 and the Organization and employees had made no grievance towards the investigation or it's impartiality. Neither the Organization nor the employee gave any reason for a hearing, no new information was presented."

Although the Organization addresses the deficiencies of the October 22, 1986, investigation in its Submission to the Division and stressed the failure of the Carrier to charge the Claimant with a safety rule violation prior to the investigation, the Carrier's letter of February 9, 1987, raises a serious problem. In effect, the Carrier has asserted that as of November 6, 1986, there was agreement by the parties not to schedule a second investigation. This assertion was never thereafter addressed in the Organization's on-the-property handling of this Claim. Nonetheless, on November 17, 1986, the Organization sent a letter to the Carrier which the Organization described as a first step of the grievance procedure. Subsequently, the Organization consistently refers to this letter in charging the Carrier with failing to timely reply in accordance with Rules 20(a) and 21(a).

This Board has disposed of the Rule 21(a) issue hereinabove. With respect to Rule 20(a), the Carrier's action at first impression appears to be in violation. Nonetheless, the Carrier's assertion that the parties agreed on November 6, 1986, that a second hearing was unnecessary is not rebutted in this record. Accordingly, if a hearing on December 12, 1986, was not deemed advisable, this Board has difficulty finding the Carrier violated Rule 20(a) by not scheduling an investigation within ten (10) days of the request for that hearing. Had the Organization rebutted this Carrier's assertion, we would have upheld the Organization Claim. But, without rebuttal, the Carrier's assertions the parties agreed on November 6, 1986, to dispense with the hearing must be viewed as a factual representation that the Organization's subsequent charge of a Rule 20(a) violation was rendered moot. Finally, the record establishes the Claimant was not wearing prescribed safety glasses.

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 20th day of November 1989.