

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30277
Docket No. MW-30281
94-3-92-3-10

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(CSX Transportation, Inc. (former
(Clinchfield Railroad Company)

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

- 1) The thirty (30) actual days' suspension assessed Welder Helper M.E. Hampton for alleged violation of CSX Transportation Safety Handbook Rule 160, in connection with a personal injury he suffered and damages to CSXT Vehicle 75120 on September 28, 1990, was without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement [Carrier's File 12 (91-210) CLR].
- 2) The Claimant shall be entitled to the remedy described by the parties within Rule 35 (g)."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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.

By letter dated October 8, 1990, Carrier's Division Engineer directed Claimant to report for a formal Investigation to determine his responsibility, if any, in connection with his lost time personal injury and damage sustained by CSX Truck 75120 at about 8:30 AM on September 28, 1990.

Following the December 4, 1990 Investigation and by letter dated December 17, 1990, the Division Engineer informed Claimant that testimony developed at the Investigation proved that he drove Truck 75120 too close to the shoulder of Lundy Road at a speed of 10 to 15 MPH causing the vehicle to overturn, and his ensuing injury. He was suspended 30 days for his violation of Rule 160 which, inter alia, states:

"Motor vehicles must be operated at a reasonable and prudent speed with due regard to unfavorable conditions, such as water, ice, snow, sleet, fog, rain, mist, dust, smoke, rough terrain, etc. Under slippery conditions, care must be taken against spinning of wheels, with the consequent danger of skidding...."

The Roadmaster testified that in his opinion the accident occurred because Claimant "...got close to the edge of the bank and the bank gave away and turned the truck over." (The truck, which had 19,827 miles on it and cost \$52,258.00, was declared a total loss.) The Roadmaster further testified that Johnson's Fleet Service inspected the vehicle after the wreck and "...found no defects in the steering system or brake system except those caused in the wreck." He further testified that Lundy Road is an 18' wide, one lane public road maintained by the state of North Carolina, and that at the accident site, the road is flat and tangent and afforded good sight distance. He further testified that it was not necessary for Claimant to drive the truck on the shoulder of the road. He testified that as of the day of the Investigation, the State had not repaired the road in that area.

With respect to the accident, Claimant testified:

"I was reporting to the job as I was told to and the road gave away and caused my truck to turn over and that's about the last thing I know I can remember of it."

Regarding his injuries, Claimant further testified as follows:

"The doctor said I had a minor bruise on my spine and I had nerve damage in my right leg and lost some reflexes in my rectum and right foot."

Claimant acknowledged that the mechanical condition of the truck was good, and that he had been driving trucks similar to Truck 75120 for 1 1/2 to 2 years, and drove that particular truck for about two weeks without incident. He had no explanation as to why the accident occurred except as quoted above.

The Organization's February 7, 1991 appeal is based on three procedural grounds. First, it is asserted that it was improper for the Division Engineer to issue the discipline because he was not present at the Investigation to determine witness credibility. This case, however, does not turn on witness credibility. Rather, this Board must render its decision on the basis of whether there exists in the transcript substantial evidence that Claimant was responsible, as charged. In this regard, the Traffic Accident Report prepared by the North Carolina Highway Patrol is pertinent. The investigating Patrolman reported that a "contributing circumstance" was Claimant "exceeding a safe speed." That the evidence adduced by the Carrier is circumstantial does not lessen its probative value. This view was expressed in Third Division Award 21419:

"The mere fact that the evidence is circumstantial, makes it no less convincing and the Board cannot say as a matter of law that the Carrier was not justified in reaching its conclusion following the trial."

The second contention is that the Carrier "prejudged the Claimant guilty because the decision to discipline was rendered by the same officer who felt that the Claimant's personal injury warranted charging him with a violation of the Carrier's Rules."

The instant case is distinguishable from those where the Board has found an "improper overlapping of prosecutorial and judgmental roles, the net effect of which is to deprive Claimant of a fair hearing." See Second Division Award 6795. The Division Engineer who prepared the charge did not serve in a prosecutorial capacity, conduct the Hearing or testify against Claimant, therefore he did not become the primary source of the evidence he utilized to render the disciplinary decision. Inasmuch as arbitral precedent has sanctioned a multiplicity of roles without finding a procedural violation such as permitting the same officer of the Carrier "to serve notice of the discipline, conduct the trial and then issue the discipline," the claim of prejudging the case cannot be sustained. In contrast, the Board held in Third Division Award 27764:

"Since the same Carrier Officer issued the complaint, judged the Claimant, denied the first appeal and, as the record shows, testified against the Claimant at the Investigation, the Board must conclude that due process requirements found in Rule 27, cited under the title of 'fair and impartial trial were not met.' "

As a final matter, the Board concludes that Claimant's right to a fair Hearing was not violated by the admission as evidence of Carrier Rule 160 since the Rule was reasonably related to the initial charge of "responsibility in connection with your personal injury and for damage to CSX Transportation Company Vehicle." Utilizing a balancing test, the Board has, on occasion, found that a charge was vague when it did not provide Claimant with sufficient detail to prepare a defense. Although the initial charge did not contain the level of specificity set forth in Rule 160, it nevertheless alerted Claimant to the probability that the Investigation would encompass his driving performance and the Rules related thereto. Thus, the Board finds that Claimant was afforded sufficient notice to prepare his defense and was not unduly prejudiced by testimonial evidence concerning Rule 160.

AWARD

Claim denied.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 19th day of July 1994.