

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 31101
Docket No. MW-30251
95-3-91-3-716

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 Employees
(
(CSX Transportation Inc. (former
(Clinchfield Railroad Company)

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

- (1) The discipline assessed Trackman T.C. Keplinger, ten (10) days' actual suspension from service, for alleged violation of CSX Transportation Safety Handbook Rule 920, in connection with a personal injury he suffered on October 3, 1990, was without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement [Carrier's File 12 (91-209) 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 31, 1990, the Carrier's Division Engineer directed Claimant to report for a formal Investigation to determine his responsibility, if any, for the lost time due to a personal injury (ruptured disc) he allegedly sustained at 12:30 P.M. on October 3, 1990.

Following the December 5, 1990 Investigation and by letter dated December 17, 1990, the Division Engineer informed the Claimant that he was suspended ten days on account of testimony developed at the Investigation which purportedly proved that he had responsibility in connection with his personal injury, and that he was thereby in violation of CSX Transportation Safety Handbook Rule 920. Rule 920 states in pertinent part:

"(d) Do not lift and twist. Twisting while lifting adds many complicated forces to the lower back."

Claimant, who had 11 years of service, testified that he had recently attended "Pro-back sessions" at which employees were instructed as to proper lifting techniques.

Initially Claimant testified that after he had finished making a new cut on a piece of rail and cleared the saw blade from the rail in preparation for moving it, "he positioned himself with his feet evenly spaced side by side, standing between the rails of the trackage where he was working." He further testified that he "squatted down, bent his knees, kept his back straight and grasped the saw with both hands while picking it up." According to Claimant, he made the lift holding the saw against his body without any jerking or twisting motion, consistent with the instructions he had received in the Pro-back safety session.

Despite these precautions Claimant testified that "when he picked up the saw" and was in the process of "set[ting] it over out of the way. . .I just had to set it down, I had to get rid of it, that's when I got the pain."

Subsequently, however, Claimant in response to the testimony of the Roadmaster that Claimant had told him that he had lifted the saw and turned or twisted at the same time, testified:

"Q. Mr. Keplinger, I believe there has been a question asked you in relation to this accident, did you turn and step to move the saw or did you stand and turn and move the saw?

A. I just spun around on my left foot. Sort of done an about-face and then stepped across the rails...

Q. Did you sort of walk around or did you spin around?

A. Sort of spun around on the bottom of my foot."

The Board is persuaded that although the Roadmaster did not witness the injury, his testimony that Claimant had told him that he twisted while lifting the saw provides sufficient evidence that a violation of Rule 922 occurred. Claimant's testimony that he was turning while placing the 57-pound saw on the ground is tantamount to the twisting motion Rule 922 advises employees to avoid to minimize back injury. Furthermore, Claimant's testimony is an admission against interest and casts doubt on his previous testimony, denying that he had informed the Roadmaster that he lifted the saw and twisted at the same time. The Organization's assertion that the Roadmaster misrepresented Claimant's statement to him was negated by the Claimant's own admission at the Hearing on the property.

The instant case is distinguishable from those where the mere fact of injury has been the basis for finding a Safety Rule violation (Third Division Award 22986). The evidence supporting the Carrier's charge of a Rule violation does not derive from speculation or an assumption that Claimant acted unsafely, but rather is based upon Claimant's description of his actions, corroborated by his account to his supervisor.

Moreover, the instant case is also distinguishable from Third Division Award 30849 where the Board found that despite the fact Claimant was injured, since he was following "normal practice, using good lifting techniques and performing a task in the manner prescribed by supervision," the evidence did not support a violation of Rule 922(I). Unlike the instant case, where Claimant admittedly did not follow proper lifting techniques, the Board in Award 30849 was reluctant to penalize an employee who had "used good lifting techniques," but due to variables beyond his control, sustained a back injury.

By letter dated February 7, 1991, the General Chairman appealed to the Carrier's Director of Labor Relations, contending that the Hearing Officer functioned as "judge, jury and witness." Carrier denied the appeal, stating Claimant admitted he had been properly charged and no exception was taken to the manner in which the Hearing was conducted until after the decision had been rendered on December 17, 1990. In several Awards such as Third Division Award 28726, the principle has been reiterated that "[t]he parties may not participate in the proceeding without objection and then complain for the first time at the end of the proceeding."

The Organization's claim that the charge was insufficiently precise to enable Claimant to prepare a defense cannot be

sustained. The concept that so long as the charge alerts Claimant to the scope of the disciplinary procedure, the Carrier is not required to cite specific Rules in advance of the Hearing, has been reaffirmed in several Awards, among which is Fourth Division Award 4758 which states:

"There is no requirement to cite particular operating rules which might have been violated. See Fourth Division Award 4042. The corollary of this interpretation is that the Carrier is privileged to introduce Rules at the Hearing and discipline the employee on the basis of a violation of such rules."

Given the foregoing, the fact that the Hearing Officer read Safety Rules into the record cannot ipso facto be deemed evidence that the Hearing was not conducted in a fair and impartial manner or that Claimant was denied fundamental due process protection.

In addition, as has been often noted, the Board, in its appellate jurisdiction does not resolve conflicts in the credibility of witnesses, nor substitute its judgment for the Carrier in matters of discipline provided the findings are supported by substantial evidence in the record. In the absence of bad faith or abuse of discretion, the judgment of the Carrier will not be disturbed.

Finally, it is well established that the Carrier has the right to unilaterally establish Safety Rules, expect safe performance from its employees as an integral part of the employee relationship and impose reasonable discipline for Safety Rule infractions. Although Claimant's record indicating no prior discipline could constitute grounds for mitigation of penalty, the fact that he violated the pertinent Safety Rule soon after he had received training in proper lifting instructions, renders the ten day actual suspension appropriate under the circumstances.

AWARD

Claim denied.

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ORDER

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 1st day of September 1995.