

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 31148
Docket No. MW-31850
95-3-94-3-135

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

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

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

- (1) The dismissal of Track Laborer L.D. Carranza for allegedly violating Rules A, B, E, I, 600, 607 and 4004 of Form 7908 'Safety, Radio and General Rules for All Employees' (revised 10/89), in connection with a personal injury occurring on April 1, 1992, and reported on September 21, 1992, was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File D-181/930149).
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be reinstated to service with all benefit provisions allowed as if he had worked, his record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered beginning October 9, 1992, and continuing until he is reinstated to service."

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.

Claimant was served a notice of Investigation and subsequently dismissed from Carrier's service for the alleged act of filing a late injury report.

The Employees' challenge to Carrier's imposition of the discipline of dismissal are many and varied. In addition to the usual charge of failing to establish by substantial evidence Claimant's culpability for which he was charged they also argue that:

- "1 - The notice of charges was late
- 2 - Carrier allowed one Carrier Officer to testify, to review the discipline and to render the decision.
- 3 - Carrier furnished the Board an incomplete transcript of the Investigation as pages 31 through and including 47 are missing from the 359 page transcript."

The notice of charges was not late. They could not have been filed charging Claimant with the untimely filing of an injury report until Claimant did file. There is testimony that Claimant has had a history of back problems prior to the incident now in dispute and there is further testimony that on April 1 Claimant did have a sore back but said before four Carrier witnesses that he did not want to file an injury report. The Employees therefore contend that Carrier knew Claimant suffered an injury on April 1 and should have set up the Investigation within 30 days thereafter. To the contrary, the letter of charges was timely issued after Claimant filed the injury report on September 21.

Regarding the same Carrier Officer issuing the notice of charges, testifying and then issuing the discipline it is the Boards opinion that what did occur was proper and it was not entirely as the Employees argue.

It is fact that the same Carrier Officer signed the notice of charges and testified as a Carrier witness. It is also true that this was a dismissal notice issued over this same Carrier Officer's signature but that notice was withdrawn and a new dismissal letter issued over the signature of the Interrogating Officer. The notice of dismissal over the signature of the Interrogating Officer was timely. The first letter has been nullified.

Regarding Item 3, i.e. Carriers failure to furnish the Board a complete transcript of the Investigation, the Board finds that 18 pages are missing out of 359 pages. In this instance it is not an error of such egregious portions that it nullifies the entire process. There is no apparent chicanery, no apparent attempt at fraud. It is simply an error in assembly. Either the collator was improperly loaded or it malfunctioned, in either case someone failed to double check the submissions.

In is not much different than the Employees' submission in Third Division Award 31140 with exhibits that are of such poor copy quality that more than a few are illegible. It did not detract from their position. Again, no attempt at fraud or chicanery has been found (in either case).

Besides, in the on-property handling both parties had a complete transcript, to refer to and quote from. Of the 18 missing pages, the Employees refer to Pages 31, 32 & 33 and the Carrier to pages 32 and 35. So only four pages of the missing 18 had anything deemed valid by either party. What they said about the testimony resting therein shows only that there existed a conflict in testimony. A not too uncommon occurrence in Investigations.

Four Carrier witnesses testified that on April 1, 1992, when Claimant sought light duty because of his back, he indicated to each that he did not want to file an injury report. Of course Claimant insisted that he did want to file the report but no one would give him the form.

Carrier accepted the four witnesses' testimony over that of Claimant. Claimant was no stranger to the requirements of reporting an injury promptly, having done so on a number of occasions before.

On the other hand, on April 2, when Claimant wanted to file an injury report and didn't because of the threat that if he did, an Investigation would have to be scheduled to determine why he was filing it late. The form should have been furnished him promptly, without threats of an Investigation.

It is known that on April 1, 1992, when Claimant sought light duty and this dispute begun, Claimant was suspended from service pending a complete physical and was later disqualified medically. He may still be unable to work because of a medical condition.

Because of the circumstances of offering the injury form only if Claimant understood that an Investigation would be started to determine why he didn't complete the required form on April 1, 1992, Claimant is reinstated to service with all his seniority rights intact, but there will be no compensation awarded.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 26th day of September 1995.