Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32082
Docket No. MW-32784
97-3-96-3-101

The Third Division consisted of the regular members and in addition Referee Jonathan S. Liebowitz when award was rendered.

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

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The discipline assessed Welder Helper O. P. Johnson for his alleged violation of CSX Safe Way Rules 1, 24 and P-28 in connection with an injury he sustained on March 7, 1995 was without just and sufficient cause, based on an unproven and disproven charge, and in violation of the Agreement [System File 23(12)(95)/12(95-0428) SSY].

(2) The discipline assessed Trackman F. C. Creer for his alleged violation of CSX Safe Way Rules 1, 24 and P-28 in connection with an injury sustained by another employe was without just and sufficient cause, based on an unproven and disproven charge and in violation of the Agreement [System File 23(11)(95)/12(95-0429) SSY].

(3) As a consequence of the violation referred to in Part (1) above, Welder Helper O. P. Johnson shall now have his record cleared and he shall be compensated for all wage loss suffered and credited with forty (40) hours' vacation pay.

(4) As a consequence of the violation referred to in Part (2) above, Trackman F. C. Creer shall now have his record cleared and he shall be compensated for any 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 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 were given due notice of hearing thereon.

By letter dated March 13, 1995 Roadmaster G. L. Phelps advised the Claimants and Trackman C.H. Bennett, Jr., Welder W. M. Wilkins, and Foreman J. B. Hahn as follows:

> "Tuesday, March 7, 1995, O.P. Johnson, Welder Helper, sustained an on-duty injury while making repairs to a bolt machine at Fanshaw Yard, Richmond, VA. Each of you are directed to attend a Formal Investigation to develop the facts and place your responsibility, if any, in connection with this incident.
>
> The investigation will be 10:00 AM, Friday, March 17, 1995, in the Office of Division Engineer, 100 Oakland Avenue, Florence, SC.
>
> You may have representation if you so desire in accordance with the Agreement under which you are employed and you may arrange to have present any witnesses who may have knowledge of this matter."

Following the formal Investigation held on March 17, 1995, the Carrier determined that there was sufficient evidence to find that Claimants Johnson and Creer violated portions of CSX Safe Way, Rules 1, 24 and P-28, which were contributing factors leading to the on-duty injury of Claimant Johnson. As a result, Carrier assessed Claimant Johnson with a 30 day actual suspension via letter dated April 6, 1995, and Claimant Creer a ten day overhead suspension for six months via letter dated the same

date. Those letters state that the transcript of the March 17, 1995 Hearing shows that Claimants were in violation of Rule 1 (Rights and Responsibilities), Rule 24 (Tools and Equipment) and Rule P-28 (Power Tools). The Carrier found that Claimants were guilty of not holding a job briefing concerning a method to deal with the problems posed by a bolt machine which was breaking bolts that were used to hold the chuck in place, working on the bolt machine with the motor running, and putting (or allowing in Claimant Creer's case) a modified steel rod into the bolt machine instead of a proper pin.

The accident occurred while Claimant Johnson was attempting to insert the modified rod into the bolt machine with the bolt machine still running. Claimant Creer leaned over the bolt machine to assist and inadvertently touched the bolt machine causing the gear to engage, to turn the modified rod, lacerating Claimant Johnson's index finger with the jagged edge of the rod. Due to the severity of the finger injury, Claimant Johnson was taken to Richmond Memorial Hospital for medical treatment.

The Organization asserts that Claimants were not charged with failure to hold a job briefing or violating Rules 1, 24 and P-28. The Organization cites Agreement Rule 39, Section 4 which provides among other things that the charges shall be in writing "... and shall clearly specify the charge the Carrier is making or nature of the employee's complaint."

Our review failed to indicate how the language of the Carrier's March 13, 1995 letters places the Claimants on notice of the alleged violations of which the Carrier found them guilty. It merely states that Claimant Johnson sustained an on-duty injury while making repairs to a bolt machine.

The Carrier points out that the March 13, 1995 charge letter clearly stated that each of the principals was directed to attend the Investigation "to develop the facts and place your responsibility, if any, in connection with this incident." The Carrier apparently relies on the transcript of that Investigation to establish the facts which it asserts support its determination.

The Organization cites decisions on the requirement of notice of the exact charge and time and place of trial (Third Division Award 9027) timely and adequate notice of the charge or charges (Fourth Division Award 2270) and the language of the Rule itself, quoted above. Those authorities demonstrate that a mere statement of an injury and

summons to an Investigation is insufficient. Claimants were not given notice of the exact charges against them, nor did the notice "... clearly specify the charge the carrier is making" (Rule 39, Section 4). Accordingly, the Carrier did not place the Claimants upon adequate notice, consistent with the requirements of industrial due process and the cited precedents, of the charges against them and thus give them a full opportunity to prepare their response and defense to the charges prior to the Hearing.

In addition, the Organization cited Third Division Award 31863. The Board found there that the discipline assessed Trackman Bennett and Welder Wilkins for their part in the same incident as now at bar could not stand and sustained in its entirety the claim presented by the Organization. The Board stated as pertinent in that Award:

> "It is quite evident that the responsibility for the injury to Welder Helper Johnson lies with the negligence on the part of the Roadmaster who was permitting employees under his supervision to use a faulty machine which, on more than one occasion, was repaired with improper bolts and/or improvised to run on a self-fabricated bolt that was made from a steel rod. Based on evidence in this record, it is quite clear that ... the fault cannot be properly placed on the Claimants."

In view of that decision, and of the participation in the incident by all of the employees for whom claims are before this Board, Trackman Bennett, Welder Wilkins, Welder Helper Johnson and Trackman Creer, this Board determines that on the issue of the facts and determination of responsibility for the accident and the injury to Claimant Johnson, Award 31863 should be accorded weight here.

The Carrier argues that Award 31863 is not precedential and that it held that the other two employees, Welder Wilkins and Trackman Bennett, were not involved, but that these two Claimants were involved in the injury to Claimant Johnson, and that with a machine that had been problematic in the past, they should have been more cautious and used the proper bolt and pins and should not have done the repair with the machine running and should have conducted a proper job briefing in which they would turn the machine off.

The record does show that Claimants Johnson and Creer were participants in the accident and, by failure to use safe procedures, shared responsibility with the Roadmaster.

But because of the Carrier's failure to give Claimants proper notice of the charges against them, their claims must be sustained rather than directing a modification of the disciplinary actions taken against them.

AWARD

Claim sustained.

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 9th day of July 1997.

CARRIER MEMBERS' DISSENT
TO
THIRD DIVISION AWARD 32082, DOCKET MW-32784
(Referee Liebowitz)

The instant claim, as well as the claim resolved by Third Division Award 31863 (Referee Charles J. Chamberlain) involved the same facts and circumstances. For that reason, the Carrier summoned the two Claimants covered by Award 31863 (Trackman C. H. Bennett and Welder W. M. Wilkins) as well as the two Claimants covered by Award 32082 (Welder Helper O. P. Johnson and Trackman F. C. Creer) to a single Investigation to develop the facts and place their individual responsibility, if any, in connection with Welder Helper Johnson's on-duty injury. For better or for worse, the Organization initiated separate Notices of Intent to the Board and thereby bifurcated its presentations to Referees Chamberlain and Liebowitz.

In the Chamberlain Award, the Board found that the Roadmaster, as opposed to Messrs. Bennett and Wilkins, was at fault and overturned their discipline on that basis.

In the Liebowitz Award, the Board correctly found that Claimants O. P. Johnson and F. C. Creer, unlike Messrs. Bennett and Wilkins, "...were participants in the accident and, by failure to use safe procedures, shared responsibility with the Roadmaster..." for Claimant Johnson's personal injury. For perfectly logical reasons, the Liebowitz Award found that the facts and circumstances as related to the Claimants covered thereby were different from those associated with Messrs. Bennett and Wilkins.

Ironically, however, the Majority opted to overturn the discipline assessed Claimants Johnson and Creer on the basis the charge as set forth in the March 13, 1995 Notice of Investigation was less than precise. As noted above, the Claimants in this case and the Claimants covered by Award 31863 were charged via the same letter. The letter contained language typical of that which has been consistently used in the railroad industry for decades without an objection. Amazingly, the procedural objection raised in the Liebowitz case was addressed neither in the on-property handling, nor in the Organization's Submission which culminated in the Chamberlain Award. Yet in the Liebowitz case, the Organization's flimsy procedural argument provided the sole basis for the Majority's palpably erroneous decision.

The language contained in the charge letter was proper and precise. Not only did Referee Chaimberlain deem that such was so, so too did the Organization in its on-property handling of that case. It, therefore, comes as no surprise as to why the Organization elected to bifurcate its claims. We trust that had both cases

gone to the same Referee the results would have been different. Given all of the above, Award 32082 can only be viewed as an illogical Award which is contrary to the history of handling discipline cases in this industry.

For the reasons set forth above, we respectfully dissent to this palpably erroneous Award.

Michael C. Lesnik

Martin W. Fingerhut

Paul V. Varga

December 10, 1997