

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33491
Docket No. MW-33124
99-3-96-3-560**

The Third Division consisted of the regular members and in addition Referee Sandra Gilbert Pike when award was rendered.

**(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(Burlington Northern Railroad Company**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

(1) The ten (10) day suspension imposed upon employe T. G. Yantzer for alleged responsibility in connection with a personal injury sustained by him on May 19, 1994 was unwarranted, on the basis of unproven charges and in violation of the Agreement (System File T-D-808-H/MWB 94-10-05AQ).

(2) As a consequence of the aforesaid violation, the Claimant’s record shall be cleared of the charge leveled against him and he shall be compensated for all wage loss suffered beginning July 23 through August 1, 1994, including lost overtime opportunity, loss of accreditation for lump sum payments, loss of promotional opportunity and loss of vacation qualification accreditation.”

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.

The facts in this case are not in dispute. On May 19, 1994 Claimant Yantzer was injured while operating the mule BN 10360. Claimant had not removed the side doors. Claimant was holding the door open with his left foot and leg protruding from the vehicle to get more air into the vehicle. While looking to his left at a rail pile, Claimant hit a marker post on the right side of the truck with the door, closing the door on Claimant's foot and breaking it.

By letter dated May 26, 1994, Claimant, a Track Inspector/Laborer at Mandan North Dakota, was instructed to appear on June 24, 1994 for Investigation for the purpose of ascertaining his responsibility, if any, in connection with unsafe operation of Kawasaki Mule BN 10360 resulting in a collision and personal injury.

Following the Investigation which was held on June 24, 1994, a Notice of Discipline was issued on July 19, 1994 notifying Claimant he had been found guilty and assessed discipline suspension for a period of ten days beginning July 23, 1994, through and including August 1, 1994.

The Organization asserts that the charge against the Claimant is not precise. We disagree. The charges specified a date (May 19, 1994), time (1540 hours), location (at Mandan, North Dakota) and asserted misconduct (unsafe operation of BN 10360). We find the charge sufficiently precise concerning the May 19, 1994 incident to put Claimant on notice of the allegations against him and to permit Claimant to adequately prepare his case to defend against those allegations. We do not find any indication that Claimant was surprised or otherwise prejudiced by the nature of the charge as framed.

Secondly, the Organization asserts that a fair and impartial Investigation was not given by virtue of the fact that the letter of discipline relied upon the violation of specific Rules and that Claimant had not been advised that he was charged with violation of those specific Rules. We do not deem the lack of citation to the specific Rule as defective so as to require a different result in this case. Nothing in Rule 91 requires that reference be made to the Rule number allegedly violated. This issue has been previously decided in a similar manner in Awards between the same parties: Public Law Board No. 2206, Award 5; Public Law Board No. 2746, Award 15 ; Third Division Award 24666; Public Law Board No. 2206, Award 5, and Public Law Board No. 2274, Award 15.

The Organization asserts that the Carrier's Investigation was not fair and impartial because the decision was render by Roadmaster W. J. Seeger, who was not present at the Hearing. Nothing in the Agreement itself requires that the Hearing Officer issue the discipline letter. Absent a showing of actual prejudice or deprivation of a fair and impartial Investigation, there is no basis for holding that the Roadmaster's issuance of the discipline letter violated Claimant's contractual procedural rights. There is no such showing is made on this record. It has previously been held that the issuance of the disciplinary letter by an official who was not present at the Investigation does not automatically deprive a Claimant of their due process rights. See Public Law Board No. 4087, Award 4. However, Third Division Award 13180 held that only the Hearing Officer who presided at the Hearing was qualified to make finding as to credibility where conflicting testimony in the transcript of the Hearing existed, relating to material and relevant facts. In this case the materials facts are not in dispute and there has been no showing of actual prejudice or deprivation of a fair and impartial Hearing. See Third Division Award 26276.

We note that although a copy of the body of the transcript was supplied in a timely manner, the exhibits were not furnished to the Organization at the time the written transcript was supplied. The need for timely providing a copy of the entire transcript is fundamental to the Organization's ability to adequately and timely prepare its positions. The missing photographic exhibits were discussed in the transcript, and viewed by the Claimant and the Organization at the Investigation. The Organization filed the appeal in a timely manner. The Organization contends that Roadmaster Seeger who authored the discipline letter may not have received this evidence but offered no support of this contention. The Carrier's records indicate that Roadmaster Seeger viewed all the evidence and that the Organization was furnished with a complete copy of the transcript, although the photographic exhibits were supplied later than the body of the transcript. We find that no prejudice was suffered by the delay in this case. However, similar action in the future or in other cases could be considered as a basis for granting relief.

We find the remaining procedural arguments raised by the Organization to be without merit and thus conclude that the Claimant received a fair and impartial Investigation within the meaning of Rule 91.

Finally, with respect to the merits of the dispute, in our review function we only pass upon the question of whether or not substantial evidence exists in the record to

sustain the Carrier's conclusion that discipline was appropriate. We are not persuaded by the Organization's argument that the marker post was a hazard thus reduced the seriousness of Claimant's fault in the accident. We find substantial evidence in the record to support the Carrier's decision to impose discipline. Where we find such substantial evidence to sustain the Carrier's conclusion, then the penalty imposed is within the discretion of the Carrier, unless we can say that the record demonstrates that the penalty was so discriminatory, unjust, unreasonable capricious or arbitrary so as to constitute the abuse of that discretion. See Third Division Award 16280. With respect to the penalty imposed, we cannot say that a ten day suspension was of a degree to constitute an abuse of discretion.

We find that the Agreement was not violated.

AWARD

Claim denied.

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 22nd day of September 1999.