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NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 38024
Docket No. SG-38480
06-3-04-3-437

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

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(BNSF Railway Company

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Burlington Northern Santa Fe:

Claim on behalf of J. R. Kovar, for any and all lost wages, including overtime, with all rights and benefits unimpaired, and clear his personal record of any mention of this incident, account Carrier violated the current Signalman's Agreement, particularly, Rule 54, when it failed to provide a fair and impartial investigation evident when it unfairly issued the excessive and unwarranted discipline of a Level “S” Fifteen (15) day record suspension and 3 years probation without first proving its charges in connection with an investigation held on July 22, 2003. Carrier's File No. 35 03 0078. General Chairman's File NO. 33-081-BNSF-119-D. BRS File Case No. 13008-BNSF.”

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 Organization's first issue is that the Carrier violated Rule 54 of the Agreement when it failed to provide a fair and impartial Investigation. The Organization argues that the discipline of a Level S – 15 day suspension and probationary period of three years for allegedly violating Rules 1.0, 1.1 and 1.1.1 without first meeting its burden of proof was unreasonable, arbitrary, capricious, and discriminatory. The Organization also argues that the Notice of Investigation failed to specify any particular Rule violation and that the Conducting Officer's reading into the record the Rules that were considered to be violated at the close of the Investigation showed that the Claimant's guilt was predetermined. We find these arguments have no merit.

The Claimant could have properly prepared for his defense with an understanding that the Investigation would center around how he came to be injured on May 22, 2003. Even if there was a requirement to specifically identify the above-referenced Rules, there is no evidence that the Claimant was disadvantaged or harmed by such failure. Had the Notice of Investigation specifically mentioned the Rule(s) alleged to have been violated as the Organization suggests, they could then argue, in the alternative, that identifying the Rules which were violated suggests predetermination of guilt or fault. In fact, the Notice of Investigation stated the Investigation was being held “. . . for the purpose of ascertaining the facts and determining, your responsibility, if any, in connection with your injury which occurred on May 22, 2003, at approximately 1010 hours.” The issue is whether an employee knows why he is being called to participate in or is the subject of an Investigation. Certainly, in a fact finding Investigation, the Conducting Officer cannot predetermine what the evidence, documentation or testimony will reveal. Therefore, the Organization's reliance on Third Division Awards 30492 and 19642 is misplaced because sufficient specificity of the “. . . time, date and nature of the alleged infractions . . .” were provided in this case.

This is a discipline case. Therefore, the burden of proof is on the Carrier. Referencing Third Division Award 32721, the Carrier makes the point that the Board is not to disturb the discipline, but to review the evidentiary record developed by the parties during their handling of the dispute on the property. If the Carrier's disciplinary action is supported by substantial evidence, then its disciplinary decision should not be substituted for that of the Board.

The Board finds that there is little to no, much less substantial, evidence in the record to support a finding that the Claimant was responsible for working in an unsafe manner or that he violated the referenced Rules. The evidence reflects that for at least nine months, the Claimant and his gang successfully worked without incident using the complained of process of pushing the spool, instead of pulling the cable. They were permitted by the Signal Foreman and the General Construction Supervisor to follow a practice of using a backhoe with forks extending from the front to push a wood spool to roll line wire or cable onto the spool. There is no evidence that the Carrier did not know of their process, that it ever attempted to stop such a practice or that it considered it to be an unusually unsafe practice. The testimony revealed that it was the Foreman's discretion to push or pull the cable. The evidence revealed that the Construction Supervisor and Signal Foreman thought the process was a good, safe one and took no exception to it. The transcript simply does not demonstrate compelling evidence that the Claimant's injury was due to a Rule violation by the Claimant, or that he was not alert, attentive or took unnecessary risks. On the contrary, the evidence reflects that the Foreman was inattentive, failed to properly conduct safety briefings, and did not on the record convincingly demonstrate that he advised the crew not to use their feet to arrange the cable or not to adjust the cable when the backhoe was in the motion. The Claimant's slipping and falling cannot in and of itself serve as evidence of a Rule violation based on the evidence in this record. Therefore, we find that the measure of discipline was not reasonable.

Finally, the Board is troubled by the absence in the record of any evidence which would reveal that the Carrier found any fault with the Foreman in this case. Such an absence is inconsistent with the facts in this case.

The Claimant's probation and any reference to it shall be removed from his record. The Organization's claim regarding the alleged Rule 54 violation is denied.

AWARD

Claim sustained in accordance with the Findings.

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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 7th day of December 2006.