Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 39667
Docket No. MW-39943
09-3-NRAB-00003-0070081
(07-3-81)

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Soo Line Railroad Company (former Chicago, Milwaukee,
(St. Paul and Pacific Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The discipline (dismissal by letter dated January 20, 2006) imposed upon Mr. M. S. Volden for alleged filing of a fraudulent injury report on October 21, 2005, was arbitrary, capricious and in violation of the Agreement (System File D-24-05-550-12/D-26-05-550-13/8-00486 CMP).

(2) As a consequence of the violation referred to in Part (1) above, Mr. M. S. Volden shall now be reinstated to service with all reference to the discipline removed from his record, and he shall be compensated for any and all lost wages, and have all rights and benefits restored that may have been lost, as a result of this suspension."

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.

At the time the instant dispute arose in the fall 2005, the Claimant had some 14 years of service with the Carrier. His work record contained a 5-day suspension in May 2002 and a 10-day suspension in March 2004. Both infractions involved late reporting of an injury.

The record developed by the parties is quite unusual in that two distinctly separate Hearings were held in connection with the same injury that the Claimant reported on October 21, 2005. This unusual circumstance led the Organization to object to the Carrier's action on procedural grounds. Distilled to its essence, the Organization contended that the Claimant was denied a fair and impartial Hearing as provided by Rule 18 of the parties' Agreement.

Rule 18 - DISCIPLINE AND GRIEVANCES reads, in pertinent part, as follows:

> "(a) An employe who has been in the service of the Soo Line for sixty (60) days or more, and whose application has been approved will not be disciplined or dismissed without a fair and impartial hearing and shall be advised in writing of the specific charges.
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> * * *
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> (b) The hearing will be held within twenty (20) days of the date of the occurrence or within twenty (20) days from the date information is obtained by the appropriate officer of the Company (excluding company security forces) and the decision shall be rendered within fifteen (15) days from the date the hearing is completed."

The following summary describes the sequence of significant events leading to the instant dispute. In 2003, the Claimant underwent surgery to repair a hernia in his groin area. While he believed that the hernia was work-related, he did not report it as such because he did not think he could prove a work-related connection. He paid approximately $1,600.00 out-of-pocket as his share of the surgery costs. Health insurance covered the remainder of the costs.

According to the testimony of his co-workers, during the one to two weeks prior to Friday, October 21, 2005, the Claimant mentioned that he was experiencing discomfort in his groin area. At approximately 10:00 A.M. on that Friday, the Claimant maintains that he felt a sharp pain while he was up in the bed of the crew's work truck. The evidence shows that the Claimant provided different answers about when he felt the pain. In one account, he claimed that the pain occurred while he was lifting a drill weighing 66 lbs. Another account had him feeling the pain while sitting in the truck. Other evidence shows the Claimant to have been uncertain about what he was doing when he felt the pain.

The evidence from the Claimant's other crew members and his Foreman was to the effect that they were unaware that he suffered an injury on that Friday. They did not hear any complaints of pain from the Claimant. He did not tell any of them that he suffered an injury. He worked the remainder of the day without any apparent signs of injury noticed by the gang members or the Foreman.

During the lunch period that Friday, the Claimant made an appointment to see his doctor. He also claims that he tried to report his injury to his Track Maintenance Supervisor (TMS) during that time frame, but the TMS was not in his office at the time. The Claimant did not try to call the TMS at the cell phone number readily available in the office area.

At the end of the workday, the Claimant did report his injury to the TMS. He was seen by the doctor. The TMS accompanied the Claimant to that examination. The diagnosis was a left groin strain.

Throughout that Friday, the TMS inquired about the details of the injury situation and took notes of the information that he obtained from the Claimant and others. They also began filling out the required injury reports that day. The

Claimant identified certain members of his gang as having been witnesses to his injury.

The TMS requested written statements from the other gang members. He obtained four of them. Two were dated October 24, one was dated October 28, and the final statement is dated November 1, 2005.

According to the notes of the TMS, he discussed with the Claimant on October 24 the fact that three of his co-workers (two of which were the witnesses the Claimant identified in his written report) were unaware of any injury suffered on October 21. The notes of the TMS for October 24 show that the Claimant replied, "BULL SHIT!" and became belligerent and needed to be calmed down. The October 24 notes also show that the Claimant went on to say that he told ". . . all the guys he was working with, but not the foreman."

According to the notes of the TMS, a re-enactment of the injury scenario was conducted on October 25. The notes reflect the details of that event.

On October 27, 2005, the Claimant was removed from service with pay. The Claimant was on paid vacation the following week. He returned to service sometime thereafter and was working without any injury related problems thereafter.

On November 1, 2005, the Carrier issued a notice for a Hearing to be conducted on November 14, 2005. The notice broadly stated its purpose as follows:

> "The purpose of the investigation and hearing is to develop all facts and circumstances and place responsibility, if any, in connection with an alleged injury that was reported to CPR[1] on October 21, 2005."

The Hearing was held as scheduled on November 14, 2005. The TMS testified from the dated information in his notes. The notes are primarily typewritten but contain a few handwritten entries for non-substantive administrative matters for November 7-10. Each of the gang members who provided written statements also read their statements into the record and testified accordingly. All factual

[1] Canadian Pacific Railway

circumstances described previously in this Award were discussed in the testimony. The Claimant also provided explanations to counter each of them. The Hearing Officer closed the Hearing at 2:43 P.M. that day.

It is undisputed that the Carrier did not impose any disciplinary action on the record developed during the November 14 Hearing. Indeed, it later stipulated that no findings were made upon that record. Moreover, the Carrier did not even provide the Organization with a copy of the transcript or exhibits although the General Chairman clearly requested same at the conclusion of his closing statement on that record. In addition, the Carrier did not issue any kind of a decision letter at any time based on that Hearing.

However, by letter dated November 23, 2005, the Carrier issued a new notice of charges. The new notice described its purpose as follows:

> "The purpose of the investigation and hearing is to develop all facts and circumstances and place responsibility, if any, in connection with an alleged filing of a fraudulent injury that was reported on October 21, 2005 for an alleged injury that was reported to have occurred October 21, 2005."

The Hearing on the second notice of charges was convened on December 16, 2005. At the outset, the General Chairman made his objection to the proceeding as being in violation of Rule 18(b). Nonetheless, the Hearing was conducted. The same Hearing notes of the TMS and the same written statements of the other gang members were introduced. The same circumstances discussed in testimony during the first Hearing on November 14, 2005 were again discussed. No new witnesses appeared at this second Hearing. One of the gang members who testified at the first Hearing did not testify at the second Hearing.

On page 4 of the second Hearing transcript, the Hearing Officer responded to the General Chairman's procedural objection by referencing the first Hearing of November 14 and said, ". . . as a result of information learned in that hearing . . ." the second notice of charges was issued. The General Chairman challenged the Hearing Officer to identify what information was learned in the first Hearing. The Hearing Officer, who was the same Officer for the first Hearing, did not identify any specific information that was learned in the first Hearing.

Rule 18(b) uses the words shall and will to show that compliance with its stated time limits is compulsory and not permissive. As written, the Rule clearly provides that the 20-day time limit for holding Hearings runs from the time that information is acquired by the Carrier and not from the time that such previously acquired information is restated at a Hearing. Said differently, the 20-day time limit cannot be restarted anew simply by reiterating previously known information at a Hearing held at a later date.

Accordingly, we carefully read the transcript of the first Hearing held on November 14 and cross-checked the information contained in that record with the content of the dated entries in the notes of the TMS, as well as the content of the written statements submitted by the gang members. The results of that detailed examination did not reveal any information that was new.

The Carrier relies upon several considerations to support its contention that the Claimant fraudulently reported an alleged injury on October 21, 2005. They were listed in the post-hearing correspondence after the second Hearing and in the supplementary portion of the Carrier's Submission. Among them are the facts that no co-workers corroborated the Claimant's contentions and that the Claimant continued working on the day in question without any difficultly that was apparent to his co-workers. Also among them is the fact that the Claimant had been complaining of pain in the two weeks prior to the day in question. However, the record shows that every one of the considerations was reflected as having been known by the TMS in substantial detail several days before the first notice of charges was issued on November 1, 2005. It is not surprising, therefore, that the Hearing Officer was not able to identify any new information that was actually learned for the first time at the first Hearing.

As we read it, nothing in Rule 18(b) prevented the Carrier from amending its notice of charges before the first Hearing was held on November 14, 2005 if it believed the initial broad notice was insufficient. The Carrier clearly had the information to do so. It had nearly two weeks to amend the notice, but it did not. In the alternative, the Carrier could have made findings and issued a decision letter within the Rule 18(b) time limits after the first Hearing on November 14, 2005. Once again, it did not do so.

Given the foregoing discussion, we are compelled to find that the Carrier did not conduct the second Hearing on December 16, 2005 in compliance with Rule 18(b). Therefore, the January 20, 2006 dismissal cannot stand. The Claimant must be provided the remedy requested in the Statement of Claim except as limited by the parties' Agreement and any prevailing practices between the parties.

Because the claim must be partially sustained due to the Carrier's failure to comply with the procedural requirements of the applicable Agreement, we make no findings on the merits of the substantive subject matter involved.

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 22nd day of April 2009.