Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41467
Docket No. MW-41168
12-3-NRAB-00003-100024

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

(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Indiana Harbor Belt Railroad Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The discipline [thirty (30) day actual suspension from February 16, 2009 through March 17, 2009 and a forty-five (45) day suspension held in abeyance for one (1) year] imposed upon Mr. T. Lacefield following a hearing held at 10:00 A.M. on February 10, 2009 for alleged failure to comply with M/W S7C 64.3, FRA and Department of Transportation law (Pre-trip Inspections) in connection with operating Vehicle #801895 on October 29, 2008 was arbitrary, capricious, disparate and in violation of the Agreement (Carrier's File 09-018).

(2) The discipline (dismissal) imposed upon Mr. T. Lacefield following a hearing held at 12:00 P.M. on February 10, 2009 for alleged failure to comply with Indiana Harbor Belt Railroad safety S7C rules and NORAC Rule 'S' in connection with the aforesaid allegations regarding operating Vehicle #801895 on October 29, 2008 and alleged working unsafely or creating an unsafe environment since being employed by the Indiana Harbor Belt Railroad was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (Carrier's File 09-023).

(3) As a consequence of the violation referred to in Part (1) above, Claimant T. Lacefield shall now receive the remedy prescribed by the parties in Rule 25, Section 4.

(4) As a consequence of the violation referred to in Part (2) above, Claimant T. Lacefield shall now receive the remedy prescribed by the parties in Rule 25, Section 4."

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 Claimant was first hired by the Carrier on March 28, 1996. At all times relevant to this dispute, he was employed as a Vehicle Operator. On October 29, 2008, Manager Track Maintenance James C. Majeski issued the Claimant a letter stating as follows:

> "On October 29, 2008, Mr. Markase observed you at your headquarters at the Blue Island Track Department not complying with the Department of Transportation Pre Trip inspection of your assigned vehicles. The law states: 'At the beginning of each tour of duty, the driver must make a pre-trip inspection before driving a motor vehicle.' This also violates the IHB Company Policy for vehicles and S7C rule 64.3, Drivers responsibilities.

> I am sure this was an oversight on your part; however, I must remind you that we all must comply with all rules and regulation [*sic*] that are given to us.
>
> Any further issues will be dealt with through your collective bargaining agreement. If I can be of any assistance please feel free to call me."

Sometime thereafter, the Claimant was directed to attend a formal Investigation at 10:00 A.M. on February 10, 2008, ". . . for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to comply with M/W S7C 64.3, FRA and Department of Transportation law (Pre-trip Inspections) as evidenced by the fact that you allegedly operated vehicle no. 801895, and the last annual inspection expired 2008."

Approximately one-half hour following the conclusion of this Investigation, the Carrier conducted a second Investigation involving the Claimant:

> ". . . for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to comply with Indiana Harbor Belt Railroad safety S7C rules and NORAC Rule 'S', whereas you were disciplined seven (7) times for working unsafely or creating an unsafe environment for your fellow workers since being employed by the Indiana Harbor Belt Railroad."

By notice dated February 12, 2009, the Carrier advised the Claimant that it had determined, by substantial evidence, that he was responsible as charged in the first Investigation. He was, therefore, assessed a 30-day actual suspension and a 45-day suspension held in abeyance for one year. A Notice of Discipline in connection with the second Investigation was issued on February 23, 2009 dismissing the Claimant from service effective March 2, 2009.

Timely appeals of both disciplinary actions were filed by the Organization and denied by the Carrier. While the appeals of the disciplinary actions were handled as separate claims on the property, they were joined upon appeal to the Board.

In its appeal to the Board, the Organization raised issues concerning the fairness and impartiality of the Investigations. The Carrier objected to these arguments, asserting that they had not been raised during the handling of the claims on the property. The Organization acknowledged that they were new arguments. Under the rules governing the Board, we may not give consideration to arguments or evidence that had not been exchanged during the on-property handling. We will consider this case, therefore, based upon the record developed on the property.

With regard to the first Investigation, the Carrier argues before the Board that it established that the Claimant failed to check the fluid levels of his truck prior to operating it. Carrier Rules, as well as Department of Transportation regulations, require this as part of the mandatory pre-trip inspection. The Claimant acknowledged that he failed to do so. It is relevant, argues the Carrier, that the Claimant had been previously disciplined for failing to conduct a pre-trip inspection in 2005, for which he was suspended 270 days. That suspension, notes the Carrier, was subsequently reduced to 180 days.

The problem with the Carrier's argument is that the charge against the Claimant related to his operating a vehicle with an expired annual inspection. The incident to which the Carrier refers was the subject of the letter dated October 29, 2008. The Hearing Officer, during the course of the Investigation, characterized that letter as a disciplinary action. While it was discussed at the Investigation, we cannot consider the October 29, 2008 incident to be the basis for the suspension that is now before the Board. To do so would effectively extend the scope of the Investigation beyond the Notice of Charge, as well as subject the Claimant to double jeopardy.

The Carrier's Submission does not address that portion of the Investigation covered by the Notice of Charge. Neither did the Carrier's denial of the claim. The transcript, at best, is inconclusive as to whether the Claimant violated any Rule. Further, we note that the Organization has asserted that other employees operated the same vehicle, but were not treated in the same manner as the Claimant. The Carrier offered no explanation for this disparate treatment. We must conclude, in the absence of any argument supporting the discipline, that the Carrier has not met its burden of proof. The discipline, therefore, was unwarranted and must be rescinded.

Turning to the Claimant's dismissal, it is evident that the Carrier determined that the Claimant was in violation of its Rules because he had been disciplined seven times for working unsafely or creating an unsafe environment for his fellow workers. In its argument before the Board, the Carrier also noted that the Claimant had incurred eight on-duty injuries during his 11 years of employment. The Carrier compared the Claimant's safety failure rate with the employee above him and the employee below him on the seniority roster. It concluded that they both had significantly lower safety failure rates.

While the Board, as have other arbitral panels in the railroad industry, has regularly upheld a carrier's right to discipline employees for excessive injuries, we must base our findings upon whether the Carrier has proven its charge against the Claimant. That charge referred to seven prior disciplinary actions, not to personal injuries. As we noted above, the Carrier may not expand the scope of the Investigation beyond the Notice of Charge.

Although the Investigation established that the Claimant had been disciplined on seven previous occasions, the record does not show that those actions were related to the Claimant working unsafely or creating an unsafe work environment. Even if they did, we cannot agree that it would be appropriate for the Carrier to discipline an employee based solely upon his having been disciplined too many times. Aside from the obvious double jeopardy implications, such a practice would not be consistent with the principle of progressive discipline, where an employee receives progressively more severe discipline for each violation until the ultimate discipline of dismissal. The assumption is that each disciplinary action is supported by its own proven Rule violation. Here, the Carrier may have proven that the Claimant had violated its Rules in the past, but the disciplinary record itself does not establish a separate Rule violation.

Notwithstanding this, we are troubled by the Carrier's use of the safety records of only two employees as a comparison with the Claimant's record to determine that he was an unsafe employee. The Organization cited numerous decisions of this Division, authored by distinguished Referees, holding such a practice inappropriate. See, for instance, Third Division Awards 28917 (John C. Fletcher) 30559 and 30560 (M. David Vaughn) 30747 (Martin H. Malin) 32430 (Hyman Cohen) 32548 (John H. Abernathy) and 32773 (Richard R. Kasher).

Finding that the Carrier failed to meet its burden of proof in either Investigation, we must sustain the claim herein and direct that the Claimant be reinstated to service pursuant to Rule 25, Section 4 of the parties' Agreement.

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 29th day of November 2012.