

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 42835
Docket No. MW-43615
17-3-NRAB-00003-160380

The Third Division consisted of the regular members and in addition Referee I. B. Helburn when award was rendered.

(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Springfield Terminal Railway Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [fourteen (14) calendar day suspension] imposed upon Mr. S. Dadak by letter dated March 12, 2015 for alleged violation of Safety Rules PGR-A, PGR-D and PGR-J in connection with a vehicle incident that occurred on Monday, August 18, 2014 was unwarranted and without just cause and in violation of the Agreement (Carrier’s File MW-15-09 STR).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant S. Dadak shall have his record cleared of the charges and be compensated for any loss incurred as a result of the Carrier’s improper discipline.”

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.

On August 18, 2014, the Claimant, with five years' seniority, was operating a log truck when a scrap tie broke off from the truck's boom, denting the driver's side door of the truck. An August 22, 2014 hearing notice followed and after a February 27, 2015 hearing, the Claimant was given a 14 calendar day suspension. A timely claim followed.

The Carrier asserts that the Claimant caused the accident by operating the controls at too fast a speed. That the controls possibly were hot and sticky does not prove that the grapple should or would have speed up. This did not happen thereafter that day. The Carrier is not required to list rules allegedly violated in the hearing notice or to engage in discovery. The Claimant was expected to know and comply with relevant rules, the application of which, based on the result of the hearing, does not justify setting aside the suspension. Given the Claimant's responsibility, the discipline was reasonable and appropriate.

The Organization contends that the Claimant was denied due process rights because charges were not indicated in the hearing notice and the rules the Claimant was ultimately found to have violated were not introduced during the hearing. Moreover, the Carrier has not proven the charges as involvement in an accident does not equate to guilt. Scrap ties may break off at any time, thus there is no proof of an unsafe operation. The discipline was arbitrary, excessive, and unwarranted.

For reasons set forth below, the Board has determined that the Claimant was not given a fair hearing, which requires that the claim be sustained without consideration of whether the charges have been proven. The hearing notice issued to the Claimant provided sufficient detail to give him clear notice of the Carrier's concern and the focus of the hearing to follow. The notice did not include rules allegedly violated, nor was the Carrier contractually obligated to do so. No rules were mentioned during the 26 minute hearing and no rules were made a part of the evidentiary record. However, the disciplinary notice levied a fourteen (14) day suspension, finding that the Claimant was "in violation of Safety Rules PGR-A, PGR-D and PGR-J." During the on-property progressing of the appeal, the Organization contended that the Claimant was unjustly accused of "being in violation of the mentioned rules for which were not discussed or investigated during the Hearing process."

The requirement that the Claimant be afforded a fair hearing is not met when the Claimant and the Organization are left to speculate about which rules, if any, the Carrier may find applicable. Two on-property awards provided by the Carrier are relevant. Public Law Board No. 5606, Award No. 2 stated the following: “The Board also finds no reason to hold that the Carrier did not have the right, following the investigation, to set forth in the notice of discipline the specific rules which it found the hearing record to support as having been violated by the Claimant in the performance of his duties . . . numerous past boards have held that an accused employee, upon trial, may be disciplined for any rule violations that are disclosed by the company investigation.”

The Carrier has relied on this Award to support the discipline assessed against Claimant Dadak, but the reliance is misplaced. Public Law Board 5606, Award No. 9, which obviously came after the earlier Award, seemingly abandoned Award No. 2, although the rationale for doing so is unknown. The more recent language follows:

“It does however concern the Board that after having only introduced at the hearing that Safety Rule GR-D had allegedly been violated, that in its subsequent notice of discipline the Carrier would additionally cite Safety Rules GR-A, GR-B and GR-J as having likewise been violated. In the opinion of the Board, since the Carrier determined at the hearing that there was reason to believe that the actions of the Claimant constituted a violation of but one specific rule it thereby foreclosed a right to subsequently determine if support of record existed to conclude that there was a violation of other rules.”

This Board finds the approach taken in Award No. 9 more consistent with the mandate to provide a fair hearing than the approach taken in Award No. 2. Moreover, the more recent on-property approach finds support in Awards involving other parties as well. Public Law Board No. 6993, Case No. 5 states that “a violation cannot be proven if the existence of a rule has not been proven” and that the proof must be presented during the investigation. This was a case in which specific operating rules ultimately said to have been violated were not provided to the Claimant in the charge letter or during the investigation. In First Division Award 26295, a case where the relevant rules were neither quoted during the hearing nor attached to the original transcript, the Board stated that it could not determine if a violation occurred because of the absence of the rules.

Because the Carrier cannot prove a violation in this case, the suspension must be rescinded and the Claimant compensated for any losses incurred in accordance with Articles 26.5 and 26.7. Compensation shall include compensation for overtime that the parties determined would likely have been performed but for the suspension.

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 12th day of December 2017.

CARRIER MEMBERS' DISSENT
to
THIRD DIVISION AWARD 42835 - DOCKET NO. MW-43615

(Referee I.B. Helburn)

The Board has improperly determined that the Claimant was not afforded a fair hearing in this case. More specifically, the Board inaccurately concluded that “*Public Law Board 5606, Award No. 9, which obviously came after the earlier Award, seemingly abandoned Award No. 2, although the rationale for doing so is unknown.*” PLB 5606, Award No. 9 did not “*abandon*” PLB 5606, Award No. 2. The two cases are clearly distinguishable.

In the dispute involved in PLB 5606, Award No. 9, the Carrier cited a specific rule at the hearing investigation. As the Board explained in Award No. 9, based on the fact that the Carrier “*determined at the hearing that there was reason to believe that the actions of the Claimant constituted a violation of but one specific rule it thereby foreclosed a right to subsequently determine if support of record existed to conclude that there was a violation of other rules.*” [Award No. 9] (It should be noted here that PLB 5606, Award No. 9 does not even indicate that the Claimant’s discipline in that case was overturned because of this procedural issue, but rather, the Claimant’s discipline was set aside on account of his twenty-seven (27) years of an unblemished “*...past record, the demeanor displayed at the hearing, and the relative minor nature of the incident...*” [Award No. 9])

PLB 5606, Award No. 2 is distinguishable from PLB 5606, Award No. 9, in that the Carrier in that case did not cite any specific rule(s) in either the notice of hearing or during the hearing investigation itself. Nonetheless, the Board properly concluded, “*The Board also finds no reason to hold that the Carrier did not have the right, following the investigation, to set forth in the notice of discipline the specific rules which it found the hearing record to support as having been violated by the Claimant in the performance of his duties. Although safety and other rules believed to have been violated are often cited in a notice or at an investigation, it is nevertheless to be recognized that awards of numerous past boards have held that an accused employee, upon trial, may be disciplined for any rule violations that are disclosed by the company investigation. After all, the purpose of the investigation is not to prove the correctness of the charge, but for the purpose of determining all facts material to the charge, both those against and those favorable to the employee.*” [Award No. 2]

In the instant dispute, just like in Award No. 2, the Carrier did not cite any specific rules at the hearing investigation, nor did it determine at the hearing that there was reason to believe that the actions of the Claimant constituted a violation of but one specific rule. Consequently, this Board should have determined that the Carrier did not “*foreclos[e] a right to subsequently determine if support of record existed to conclude that there was a*

violation of other rules.” [Award No. 9] Rather, the procedural handling of the present case was consistent with the procedural handling in Award No. 2 and thus, in the instant dispute, the Board should have also recognized that the Carrier had the right “following the investigation, to set forth in the notice of discipline the specific rules which it found the hearing record to support as having been violated by the Claimant in the performance of his duties. [...] After all, the purpose of the investigation is not to prove the correctness of the charge, but for the purpose of determining all facts material to the charge, both those against and those favorable to the employee.” [Award No. 2]

Furthermore, during the on-property handling of the instant case, the Carrier stated that “...the Claimant, like all employees, is responsible for knowing and complying with the rules that govern his condition of employment, which obviously include the Carrier’s Safety Rules PGR-A, PGR-D, and PGR-J.” [Carrier’s Exhibit E, p.2] The Organization did not contest this statement or make request for copies of said rules, which the Claimant had (or reasonably should have had) in his possession at all times during the course of his employment, let alone during the handling of this matter. Please also see Third Division Award No. 42839, which was rendered concurrently with the present Award. In that case, this same Board held, with respect to this Carrier’s Safety Rule PGR-N, that the Claimant in that dispute “...was responsible for knowing and complying with the rule.” The Board should have applied the same principle in the instant dispute with regard to the aforementioned Carrier Safety Rules at issue in this case.

As for the Boards reference to PLB 6993, Award No. 5 and First Division Award 26295, those Awards do not involve disputes on this property and their holding on this procedural issue runs contrary to the sound principle set forth in Public Law Board 5606, Award No. 2, which was not “abandoned” in Award No. 9 and is entirely consistent with “...awards of numerous past boards...” [Award No. 2] It is for these reasons that the Carrier does not concur with the Board’s opinion that the Claimant did not receive a fair hearing and must dissent from this Award.

Anthony Lamanta
Carrier Member

Matthew R. Holt
Carrier Member

December 12, 2017