

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42881
Docket No. MW-43617
18-3-NRAB-00003-160382**

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 [sixty (60) day suspension] imposed upon Mr. S. Dadak by letter dated March 13, 2015 for alleged violation of Safety Rules PGR-A, PGR-D, PGR-J, P334, P339 and P351 in connection with a vehicle incident that occurred on Tuesday, August 19, 2014 was unwarranted and without just cause and in violation of the Agreement (Carrier’s File MW-15-10 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, working as a Chauffeur on a log truck, attempted to set the truck on the tracks without assistance. He backed over a signal flasher, then pulled forward over the flasher, damaging two tires on the log truck. A February 27, 2015 hearing followed and thereafter the Claimant was given a 60 day suspension for violation of the above-noted rules. A timely claim followed.

The Carrier contends that there was no requirement that a second person be in the 1022 swivel dump when signals were cut out. If there were a second man, he would flag at the crossing gates and would not help set the vehicle on the rails. The Claimant's testimony that he asked Foreman Breor for a second man is irrelevant and there is no evidence that the Claimant was given conflicting orders. There is a discrepancy between the Claimant's testimony and his written statement and the contradiction was not resolved. The Claimant was properly held responsible for violating the above-noted rules. The contract does not require the Carrier to list those rules in the hearing notice or to engage in discovery. The Claimant was responsible for knowing and complying with the rules, which were applied to the facts established at the hearing. The suspension was not arbitrary and capricious in light of the Claimant's prior record and this latest violation.

The Organization asserts that the Claimant did not receive a fair and impartial hearing because the hearing notice did not indicate the rules allegedly violated and the rules were not introduced during the hearing. The Carrier did not prove the charges as it provided no evidence and relied only on the Claimant's admission of involvement in an incident. There was no showing of an unsafe or improper operation of the 1022 swivel dump. The Claimant was told by Foreman Breor to put the truck on the track himself contrary to the directive of Supervisor Patterson. There is no evidence that the signal was cut out or that the Claimant was told that it was cut out. Foreman Breor did not testify. An accident does not *per se* mean that a rule was violated. The discipline was arbitrary, excessive and unwarranted, imposed only because of the tire damage and not because of a rule violation.

In its April 7, 2015 appeal of the 60 day suspension considered herein, the Organization contended in part that the hearing notice issued to the Claimant was defective because it did not include rules to be considered during the investigation.

The appeal further contended that the hearing was unfair because the Carrier “unjustly accuses Mr. Dadak as being in violation of the mentioned rules for which (sic) were not discussed or investigated during the hearing process.” Article 26.1 specifies the information that must be included in a fair hearing notice but such information does not require specification of the rules allegedly violated, nor is the Carrier obligated to engage in discovery. The hearing notice was specific as to the incident of concern and thus met contractual requirements.

The hearing itself did not meet the requirement for fairness. A review of the transcript shows no mention by Charging Officer Drew Patterson of any of the rules noted in the Statement of Claim above and ultimately relied on in the suspension letter. Nor are any of the rules attached to the transcript as exhibits. In Third Division Award No. 42293, that Board wrote: “. . . during the course of the Investigation process the accused must know all of the charges and the reason(s) for the charges.” In numerous cases decided by this Board at the time this case was decided, we have written that with rare exception, a fair hearing must appraise the accused of the rules allegedly violated so that the accused has an opportunity to contest all or some of the alleged violations. While it may not be intended, omission of the rules during the hearing that ultimately become the basis for discipline is a form of trial by ambush. Moreover, without the rules allegedly violated in the record, the Board is deprived of the standards against which the accused’s conduct and the evidence of that conduct must be assessed.

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, 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.”

The 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. The claim as set forth above must be sustained without consideration of the merits. Back pay is to be calculated in accordance with Articles 26.5 and 26.7 and is to include overtime that in the judgment of the parties, the Claimant would likely have worked 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 10th day of January 2018.

CARRIER MEMBERS' DISSENT
to
THIRD DIVISION AWARD 42881 - DOCKET NO. MW-43617

(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.*” **(PLB 5606, 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...*” **[PLB 5606, 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.*” **(PLB 5606, Award No.2)**

In the instant dispute, just like in PLB 5606, 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.” (PLB 5606, 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.*”” (PLB 5606, Award No. 2)

Furthermore, during the on-property handling of the 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. Furthermore, the details of the act/occurrence were explored at length and in detail. Thus, it should come as no surprise that the applicable rules were applied to the facts on record and the Claimant was held responsible for not complying with said rules. This does not constitute unfair, deceptive or prejudicial conduct. It does not violate the ST/BMWE Agreement or industry standards and serves as no basis for overturning the discipline issued in this case.*” (Carrier’s Exhibit E, p.3) The Organization did not subsequently contest the foregoing or make any request for copies of the applicable rules, which the Claimant had (or reasonably should have had) in his possession at all times during the course of his employment. 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 rules at issue in this case.

The Board’s holding herein, which is premised entirely on the procedural issue outlined above, runs contrary to the sound principle set forth in Public Law Board 5606, Award No. 2. Public Law Board 5606, Award No. 2 was not “*abandoned*” in Public Law Board 5606, Award No. 9 and is entirely consistent with “*...awards of numerous past boards...*” (PLB 5606, 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 the Carrier dissents.

Anthony Lomanto

Carrier Member

January 10, 2018

Matthew R. Holt

Carrier Member