

PUBLIC LAW BOARD NO. 3445

Award No.: 66

Case No.: 66

PARTIES TO DISPUTE

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

AND

SOUTHERN RAILWAY COMPANY

STATEMENT OF CLAIM

Claim on behalf of T. E. Harris appealing his dismissal assessed as the result of a September 15, 1988 investigation in connection with violation of Norfolk Southern Operating Rule N and falsifying an injury report.

FINDINGS

Claimant entered the Carrier's service on October 6, 1980. He has not been the subject of disciplinary proceedings since he was hired.

Claimant was directed to attend a formal investigation by letter dated August 30, 1988. The formal investigation was conducted September 15, 1988 on charges that he falsified an injury report and violated Rule N. Based on evidence adduced at the investigation, Claimant was dismissed by letter dated September 22, 1988.

At issue in this dispute is whether Claimant was justly dismissed; and if not, what should the remedy be.

Claimant was involved in an accidental collision while operating a bushhog on July 19, 1988. At that time, he was thrown into the windshield injuring his face and jaw. Claimant did not file an injury report. Claimant's face and jaw had been injured in the past. They were the source of ongoing medical problems and he had been treated for them. At the hearing before this Board, the Carrier stated that a foreman was with Claimant at this time and was also hurt; he filed an injury report. On August 24, 1988, the Carrier's claim agent first learned of Claimant's July 19 injury while discussing settlement of an injury to Claimant's chin in 1986.

Rules 40(a) and N state:

Rule 40(a) An employee who has been in service 60 days or more will not be disciplined or dismissed without a fair and impartial investigation, which shall be held within ten (10) days of date of written notice to the employee that such investigation will be held. Such written notice, which will be given as promptly as circumstances will permit, will state the nature of the charge or charges against the employee.

Rule N. When any person is injured as a result of an accident, emergency medical assistance must be called if needed.

Every accident resulting in injury, death or damage to property must be reported to the proper authority by the quickest communication available, and a written report on the prescribed form must be submitted promptly.

The report must include the name and address of each injured person and describe the extent of injury. Names and address of all persons at the scene are required, whether or not they admit knowledge of the accident.

At a crossing accident, the conductor or employee in charge must try to locate witnesses who can testify about engine whistle or bell signals and about the functioning of any crossing gates or flashing light signals. License tag numbers of vehicles observed near the crossing must also be reported.

The Organization's position is that Claimant was unjustly dismissed based on the merits and procedural defects.

On the merits, the Organization maintains that the Carrier has not sustained its burden of proof. The Organization contends that the Carrier was well aware that there was an accident on July 19 and that it was incumbent upon Claimant's foreman and supervisor, who knew of the accident, to make the injury report. The Organization maintains that Claimant made substantial efforts to seek medical attention in the days following the accident but that the Carrier initially denied him the time to do so.

As to the question of improper procedures, the Organization maintains that the notice Claimant received set an investigation in excess of the 10 days in the future and so constituted a violation of Rule 40(a). Moreover, the Organization contends that this and Claimant's lack of understanding of the investigation denied Claimant the fair and impartial hearing to which he is entitled.

The Carrier's position is that Claimant was dismissed for just cause because Claimant admits he never reported the injury he received on July 19 in direct violation of Rule N. Further, the Carrier contends that Claimant's headaches and facial discomfort were all preexisting conditions that were not related to any alleged injury on July 19, 1988, and that for Claimant to allege otherwise is falsification justifying dismissal.

As to the procedural question, the Carrier contends that the August 30,

1988 date on the notice was a typographical error that occurred because of confusion over the scheduling of the hearing. While admitting that the Organization is "factually correct" that the letter was dated in excess of 10 days prior to the investigation, the Carrier maintains that the charge letter was mailed within 10 days of the investigation. Based on that fact, the Carrier contends that it complied with the substantive requirements of Rule 40(a).

After review of the entire record, the Board finds that dismissal was not warranted and modifies the discipline to a suspension for 60 days and awards back pay for the balance of time Claimant was out of service.

The Carrier has sustained the charge that Claimant failed to report the accident on July 19, 1988. However, the record is clear that the Carrier was fully aware of the facts and circumstances surrounding the accident. Nevertheless, it is important for the Carrier to be fully informed of accidents and injuries for its own sake and the protection of employees. Claimant should have advised the Carrier but failed to do so; he is therefore subject to discipline.

However, there is insufficient evidence in the record to prove that Claimant falsified the report of the accident. Indeed, whatever report he made of it and whenever he made it appears to be accurate. The fact that Claimant had been injured in the same or a related part of his body in the past does not preclude a similar, future injury. This appears to be what occurred. In addition, the Carrier's logic is murky here: The Carrier

cannot on the one hand discipline Claimant for not reporting an on-the-job injury and on the other hand maintain that he falsified that injury report.


As to the procedural aspects of the case, there is no dispute that the date of the hearing notice was earlier than 10 days before the hearing and that this is contrary to Rule 40(a). Although the error was a typographical one and may not have affected the date of mailing the notice, the parties must comply with the technical requirements of the rules.

In light of all these circumstances, the more appropriate discipline is a suspension for 60 days and reinstatement with seniority unimpaired, with back pay for the balance of the time Claimant was out of service.

AWARD

Claim disposed of per Findings herein.


Neutral Member


Carrier Member


Organization Member

Date: Dec. 13, 1989