

Award 5

PUBLIC LAW BOARD NO. 4219 Case No. 5
ESTABLISHED UNDER AGREEMENT BETWEEN THE PARTIES

Neutral Member: Lamont E. Stallworth
Case No. 5

PARTIES TO DISPUTE: Brotherhood of Maintenance of Way Employees
and
Union Pacific Railroad Company.

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the provisions of the current Agreement when it failed to accord Carpenter S.L. Yelland a fair and impartial hearing and further violated said rules when on November 14, 1985 it assessed Claimant's personal record with forty-five (45) demerits.
2. The Carrier will now be required to expunge the 45 demerits from Claimant's record and no further reference made thereto in the future.

OPINION OF BOARD: The Claimant, Mr. S.L. Yelland, was employed as a Bridge and Building Carpenter in one of the Carrier's Los Angeles, California facilities at the time this claim arose. At approximately 2:45 p.m. on October 16, 1985 Claimant was helping a co-worker move an empty file cabinet on a handcart up a concrete ramp. The Claimant alleges that he slipped and fell down backwards when he reached the top of the ramp.

Claimant contends that he did not feel any immediate pain or discomfort because of the fall, and continued on with the remainder of his tour of duty, which ended forty-five (45) minutes later. He alleges that that evening when he returned home he began experiencing pain and discomfort. Upon arriving at work the next morning he filled out the Carrier's accident

report, describing the incident.

On October 21, 1985 the Claimant's supervisor ordered him to report for a formal investigation and hearing,

to develop facts and determine your responsibility concerning charges that you failed to promptly report on-duty personal injury to proper authority on prescribed form which allegedly occurred at 2:45 p.m., October 16, 1985, while employed as Carpenter on B&B Gang 5421, Los Angeles; failure to comply with instructions from proper authority; and charges that you have displayed unwillingness or inability to exercise care to prevent injury to yourself after having experienced thirteen (13) personal injuries since August 11, 1978...

The charge went on to cite various rules that the Claimant allegedly had disobeyed. The hearing and investigation were held and on November 14, 1985 the Claimant was notified that the charges against him had been sustained and that therefore the Carrier was assessing 45 demerits against him.

The Organization objected to the investigation on a number of grounds, which will be discussed in more detail below. The Carrier denied all appeals, and the claim eventually was submitted to this Board for resolution.

This Board concludes that the Carrier did violate the contract when it assessed forty-five (45) demerits against the Claimant for the charges listed in the October 21st and November 14th letters. The Board will address the Organization's procedural objections first, followed by its substantive claims.

The Organization objected because the Carrier had failed to attach a copy of the hearing transcript's exhibits to its letter to the Organization on November 14, 1985. The Carrier contends that this was merely a clerical oversight and points out that the Organization's initial appeal of the case after receiving the

decision and transcript did not mention this omission. The Organization contends that to this date the Carrier has refused to give it copies of all the exhibits, most notably Exhibit No. 2, the Claimant's past employment record.

This procedural objection ties in with an even more serious one, i.e. that the claimant did not receive a fair and impartial hearing because his past record of accidents was introduced at the beginning of the hearing. Generally an employee's record is not introduced to determine whether he is guilty of a particular infraction; usually it is entered only after a finding of liability when the tribunal is determining the proper discipline to impose. The Carrier contends that its actions in this case were proper, however, because the investigation concerned in part whether the Claimant should be disciplined for negligence, after having thirteen prior accidents.

The Organization argues, however, that this whole line of investigation was improper, because the contract prohibits the investigation of incidents occurring more than thirty(30) days before the charge. (Rule 48). The Board has examined the transcript of the hearing in this case and concludes that assessing discipline on the basis of this part of the charge was improper.

It is true that several of the Carrier's rules state that an employe must exercise care to prevent injury to himself or others and must not be careless of his own or other's safety. Furthermore, if it is true that the Claimant has had so many accidents, it may appear that he is not obeying these edicts.

Nevertheless, the mere fact that he has been engaged in prior accidents does not prove that he consistently is careless or that he was careless on the day in question. The transcript of the hearing in the instant case does not disclose any examination of whether the Claimant's previous work-related injuries or accidents were due to his own fault, inherently unsafe working conditions, a mixture of the two, or some other reason. The transcript disclose only that a supervisor discussed the Claimant's past work record with him and counseled him against future injuries. This is not sufficient to establish that he failed to display care in preventing an injury to himself or others, after many prior accidents.

In light of Rule 48, the Board concludes that in almost no circumstances is it appropriate for the Carrier to use an employe's past record of injuries as a basis for finding him guilty of not exercising proper care. The time to examine whether the Claimant was negligent in regard to past injuries was when those injuries occurred. Even if Rule 48 did not absolutely prohibit the introduction of the Claimant's past record in this case, the fact that the hearing officer merely took the record at face value, without any examination of the circumstances of any individual incident, means that it was misused in this proceeding.

The Carrier's letter to Mr. Yelland of November 14, 1985 announcing his discipline stated that it was based in part on a finding that the Claimant had displayed an unwillingness or inability to exercise care to prevent injury to himself, after

having experienced thirteen personal injuries since August, 1978. To the extent that the discipline was based on a finding of liability using the Claimant's past record, it was inappropriate.

There is a legitimate use for the Claimant's past record, i.e. in determining what discipline is appropriate once it has been found that he was negligent. However, the Claimant's past record was so prejudicial in this case that it should not have been introduced at the beginning of the hearing to determine his liability, i.e. whether he was negligent on the day in question.

Furthermore, the other evidence concerning his negligence on the day in question is not sufficient. For example, the Carrier's witness Mr. Robert Lee, the foreman on the day in question, testified that the top of the ramp was slippery enough that a person performing normal activities might fall on it. (Transcript, pp. 40). Furthermore, there is no indication that the Claimant was engaged in horseplay or other careless activities at the time of his fall.

The Carrier's remaining charge is that the Claimant failed to promptly report his accident on the day it occurred. The Claimant contends that he did not report it on the day it happened because the accident occurred only forty-five minutes before the end of his tour of duty and he did not feel any pain or other symptoms of injury until after he returned home that night. He filled out the proper form reporting the accident as soon as he reached work the following day. He also contends that he and other fellow workers had been told by Carrier officials not to report every little scratch that occurs on the job.

The main rule at issue here is Rule 4004, which states,

4004.REPORTING: All cases of personal injury, while on duty, or on company property must be promptly reported to proper authority on prescribed form.

Of secondary importance is Rule 621, which states that employes must not withhold information regarding accidents or personal injuries to "those authorized to receive such information." In the circumstances of this case this Board cannot say that these rules have been violated.

Rule 4004 requires the prompt reporting of "all cases of personal injury." It does not require the prompt reporting of all accidents which may result in injury. The Claimant contends that he did not know that he was injured until after he left work on the day the accident occurred. The Carrier has not suggested that the Claimant committed fraud with this statement, or that he was in fact injured after he left work. In the absence of contradictory evidence, therefore, the Board concludes that he was telling the truth and that he did not know he was injured until after he left work. In reaching this conclusion the Board is also persuaded by the relatively short time period between the accident and the end of the Claimant's tour of duty for that day.

If the Claimant did not know that he was injured until after he left work, then his filing of the proper form the next morning was sufficient to constitute "prompt" filing of an injury report. Therefore, there is no basis for imposing discipline based upon the Claimant's failure to file the form promptly.

In reaching these conclusions, the Board wishes to emphasize that it does not condone reckless or negligent behavior on the


part of employees. And the Claimant's past record certainly offers some suggestion that he is either somewhat careless in his safety habits, or extremely unlucky. And Rule 48 does not prohibit the Carrier from making use of this past record to determine an appropriate discipline if the Claimant is found to be negligent on any particular occasion.

The Board merely concludes that on the facts of this case, the Claimant was improperly disciplined. His past record was misused in this case, so as to taint any finding of negligence for the Claimant's actions on the occasion in question. Furthermore, the other evidence of negligence on that occasion is inconclusive. Finally, the Carrier erred in finding that he did not promptly report an injury, under the circumstances of that injury. For these reasons, the claim will be sustained.

AWARD

The claim is sustained. The Carrier violated the contract when it imposed discipline on the Claimant on November 14, 1985. The forty-five (45) demerits added to his record that day should be expunged.

Signed at Chicago, Illinois on

12th of June, 1987


Lamont E. Stallworth
 Neutral Member

E. R. Myers
 Carrier Member

C. J. Fournier
 Organization Member