SPECIAL BOARD OF ADJUSTMENT NO. 1016

AWARD NOS. 130
CASE NO. 130

PARTIES TO
THE DISPUTE: Brotherhood of Maintenance of Way Employes

vs.

Consolidated Rail Corporation

ARBITRATOR: Gerald E. Wallin

DECISIONS: Claim sustained

DATE: April 30, 2000

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The dismissal of employe J. M. Kalwasinski for his alleged violation of Rule 60.5 was without just and sufficient cause and on the basis of unproven charges (System File MW-5314-D).

2. As a consequence of the violation referred to in Part (1) above, 'The Organization maintains that any discipline imposed on Mr. Kalwasinski as a result of this Hearing (and Appeal) should be removed from his record, or at the least, be lessened in its severity.' "

FINDINGS OF THE BOARD:

The Board, upon the whole record and on the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties; that the Board has jurisdiction over the dispute, and that the parties were given due notice of the hearing.

Claimant was dismissed from all service for failing to timely report a work-related injury in accordance with Carrier's Safety Rule 60.5, paragraph 2b, which reads as follows:

1. If you are injured, respond as follows:
   a. Obtain first aid or medical attention if necessary.
   b. *Inform your immediate supervisor.* If your immediate supervisor is not available, inform him or

her as soon as possible, but not later than quitting time on the day you were injured.

At the time of Carrier's action, Claimant had some 20 years of service. His disciplinary record contained only one entry: A 5-day deferred suspension on July 19, 1982 for unauthorized absence. Accordingly, his work record was free of disciplinary action for nearly 16 years prior to the incident in question. Claimant did have four prior work-related injuries. The latest one occurred and was reported by Claimant on November 14, 1990.

According to Claimant's testimony, he was jostled while riding as a lookout on a track machine as it passed over a frog on the way to the tie-up location on May 6, 1998 at approximately 5:15 p.m. The chair in which he was riding was solidly mounted to the machine and did not have any spring-type or other shock absorption suspension. The seat also faced opposite the direction of travel. It was raining heavily. Claimant may have been kneeling on the chair initially but eventually he sat in it and twisted around to maintain a lookout.

Although he felt sore after the ride, Claimant did not report an injury. He said, "At the time, I thought it was a sore muscle, it might have been only an incident. I didn't think it was an injury at that time."

On May 7th, Claimant complained about the seat during the morning meeting. When specifically asked if he was reporting an injury, Claimant declined to do so.

Claimant also worked his full 10-hour day on May 7th. His supervisor did not notice any sign of injury from his movements. However, the supervisor only observed Claimant for a total of approximately 60 minutes when he was in the same area for approximately 2 hours. The time of day of the observation is not specified in the record.

Claimant did not report any injury at the end of May 7th. He said he thought he had muscle soreness that would work itself out with the help of a hot shower. He then drove approximately seven hours to his home.

On Friday morning May 8th, his first rest day, Claimant needed medical attention. He saw his doctor early that day and was prescribed a muscle relaxant or other pain killer that made him drowsy and "... knocked him out.". Although Claimant thought his wife attempted a call to the Carrier on May 8th, his telephone bill does not confirm such a call.

The phone bill does confirm several calls made to the Jordan, NY location on May 11th.

Claimant said he reported the circumstances to a Carrier representative. The record confirms that such a call was received and relayed to Claimant's immediate supervisor. It was not until May 12th, however, that the supervisor formally took Claimant's report of injury.

The Organization challenges the discipline as being unwarranted due to lack of proof as well as excessive. We agree.

The record is devoid of any probative suggestion of fraud or distortion regarding Claimant's injury. While there were leads along these lines that could have been pursued by the hearing officer, they were not. Witnesses who may have had such information were not called to testify. Accordingly, any references to their comments in the record were clearly hearsay and, as such, were entitled to no weight whatsoever. Indeed, the Carrier's failure to call such witnesses, who were apparently known to the supervisor, entitles Claimant to the benefit of an adverse inference that they would not have supported any concerns about fraud or distortion.

In Carrier's denial letter dated December 10, 1998, it maintains "... it is likely that the injury symptoms would have become evident ..." on May 7th. In addition, the letter asserts "... throwing tie plates would have aggravated such an injury and the Appellant would have felt the symptoms by the end of his tour of duty on May 7th, 1998, if not sooner." The evidentiary record is entirely devoid of testimony from a person possessing medical expertise to support these assertions.

Claimant's supervisor acknowledged there are instances where the manifestation of an injury can be delayed. Moreover, Carrier's rule does not explain what should be done when an employee does not realize there has been a reportable injury until after the day of the causative event. Although Carrier contends that Claimant should have then notified the Carrier on May 8th, the rule does not explicitly require this. To the contrary, the rule appears to assume that an injury will always be known on the day it occurs and is thus silent about delayed onset situations. In this case, the record provides Claimant with a reasonable and credible explanation for his delay in reporting the injury until May 11th, which was his next scheduled workday.

Even if we were to find Claimant to have been late in reporting his injury, for the sake of discussion, the penalty of dismissal is entirely inappropriate under the unique circumstances of this record. Contrary to the facts of the two supporting awards cited by the Carrier, there is no evidence here of a fraudulent injury claim or an unreasonable refusal by the employee to file

an injury report despite several requests that he do so. More appropriate is the award cited by the Organization involving this same Carrier. In Second Division Award 7703, the Carrier only imposed a 10-day suspension for two separate violations, one of which was failing to report an injury on the day of its occurrence.

Because of the lack of substantial supporting evidence in the record., we are compelled to sustain the Claim

AWARD:

Claim sustained.

Gerald E. Wallin, Chairman
and Neutral Member

Mark Schappaugh,
Organization Member

Lawrence P. Finnegan
Carrier Member

Dissenting

5-24-00