

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 32383
Docket No. MW-32948
97-3-96-3-333

The Third Division consisted of the regular members and in addition Referee Jonathan S. Liebowitz when award was rendered.

(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(CSX Transportation, Inc. (former Louisville and
(Nashville Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The ten (10) day suspension assessed Bridge Tender G. D. Crain for his alleged late reporting of a personal injury that occurred on January 10, 1995 at the Rigolets Drawbridge on the NO&M Subdivision was without just and sufficient cause and based on an unproven charge [System File 4(29)(95)/12 (95-0693) LNR].
- (2) The claim*, in connection with the ten (10) day suspension referred to in Part (1) above, as presented by General Chairman F. N. Simpson on July 17, 1995 to AVP Employee Relations R. H. Cockerham shall be allowed as presented because said claim was not disallowed by Mr. Cockerham in accordance with Rule 26.
- (3) The dismissal of Bridge Tender G. D. Crain for alleged violation of Operating Rule 501 in that he allegedly gave inconsistent testimony at an investigation held on May 31, 1995 was without just and sufficient cause, based on an unproven charge and in violation of Rule 27 of the Agreement [System File 4(35)(95)/12(95-0940)]
- (4) As a consequence of the violations referred to in Parts (1) and/or (2) above, Bridge Tender G. D. Crain shall be compensated for all wage loss suffered as a result of the ten (10) day suspension and his record shall be cleared of the charge leveled against him.

- (5) As a consequence of the violation referred to in Part (3) above, Bridge Tender G. D. Crain shall be reinstated to service with seniority and all other rights unimpaired, he shall be compensated for all wage loss suffered and his record shall be cleared of the charge leveled against him."

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.

By letter dated February 13, 1995, Bridge Supervisor R. F. Garrett advised Claimant that on January 13 Claimant called and requested a leave of absence due to neck problems, and that on January 16 Claimant claimed a personal injury in connection with his neck problems and attributed the injury to work performed on January 10 as a Bridgetender at Rigolets Drawbridge on the NO&M Subdivision near New Orleans, Louisiana. Carrier's letter states that on January 17 Claimant was taken to a doctor and all applicable injury reports were completed.

The letter advised Claimant of a formal Investigation to be held on February 22, 1995 in the Division Office at Mobile, Alabama.

Following the formal Investigation which was ultimately held on May 31, 1995, Carrier stated in a letter dated June 30 that the facts revealed that at the very least, Claimant failed to report an injury in a timely manner as mandated by CSX Transportation Safety Rule 1.(I) which states:

"We have the right and the responsibility to make decisions based on experience, personal judgment and training. We must make certain that: oral and written reports of accidents and injuries are made as soon as possible to the supervisor or employee in charge."

Carrier's letter further stated:

"... [W]hile there is still uncertainty how and when your condition developed, at the very least you failed to report your physical condition as an on duty job related incident when (you claimed) the incident occurred.

Account of this late reporting, you are hereby issued a 10 day actual suspension. As you are currently out of service due to medical conditions, the suspension will be effective the date you are eligible to return to active service."

The Organization contends that the Carrier failed to deny the July 17, 1995 appeal within 60 days as required by Rule 26, including the provision in Rule 26(a) which provides that if the Carrier does not so notify the employee or representative in writing, the claim or grievance shall be allowed as presented.

Carrier maintains that it did make timely notification of declination of the appeal via its letter dated September 9, 1995.

By letter dated July 10, 1995 Carrier notified Claimant of a second Investigation in connection with charges made with reference to the formal Investigation of May 31, 1995 and stating:

"During your testimony, there were several instances where your statements were not consistent with the facts revealed.

Account of these inconsistencies, you are hereby charged with an alleged violation of CSX Transportation Operating Rule 501 which stated in part:

'Employees must not be disloyal, dishonest, insubordinate, immoral, quarrelsome, vicious, careless or incompetent. They must not willfully neglect their duty, endanger life or property. Employees must not make any false statements or conceal facts concerning matters under investigation.'"

Following the Investigation which took place on August 9 and by letter dated September 9, 1995 Carrier notified Claimant of his dismissal.

In addition to its contention about Carrier's declination, the Organization maintains that contrary to the parties' February 5, 1986 Letter of Understanding, Carrier failed to furnish it with a copy of the August 9, 1995 Investigation transcript with its Letter of Decision within 30 days from the close of the Investigation.

The Organization argues that Claimant was working alone when he sustained the injury and when he received medical treatment from his personal physician, that Claimant was suspended and subsequently dismissed because he sustained a personal injury while performing his assignment, that Claimant did not receive a fair and impartial Investigation, that Carrier did not present substantial evidence to prove its charge(s), and that the discipline was arbitrary and unjust.

The Organization maintains that Carrier leveled no formal charge against Claimant as to the first Investigation and argues that Carrier did not charge Claimant with an alleged violation of its Safety Rule and that it found him guilty of an offense with which he was not charged. The Organization states that this Board and similar tribunals have consistently sustained claims involving discipline resulting from a Carrier's failure to specify [even] a single charge within its letter instructing a charged employee to appear for a Hearing. It cites Fourth Division Award 2270, Second and Third Division Awards and Award 419 of Special Board of Adjustment No. 279.

According to Carrier, as to both suspension and discharge, Claimant was afforded fair and impartial Hearings in accordance with the Agreement, and Carrier sustained its burden of producing substantial evidence of Claimant's guilt in both Investigations, the discipline was fully justified, and the procedural errors alleged by the Organization did not occur.

Carrier maintains that it properly suspended Claimant for delay in making an injury report and cites decisions in support of that position. Carrier disputes the Organization's argument concerning a Letter of Understanding establishing a deadline for furnishing a copy of the transcript and maintains that even if there were a failure to timely provide the transcript, that has been held not to be a fatal error. Carrier maintains that it timely responded to the Organization's appeal of the 10-day suspension.

During the Investigation the Organization timely raised the contention that the Carrier did not provide notice of the charge or charges against Claimant and that the vagueness of the charge letter made it "impossible" to prepare a defense. Fourth Division Award 2270 states that timely and adequate notice of the charge or charges against the accused is a part of due process of law. We are unable to find in Carrier's February 13, 1995 letter to Claimant any allegation of a violation of Rule or Agreement or of any requirement imposed upon employees by Carrier.

In Third Division Award 32082, with this Referee participating, the Board stated:

"Our review failed to indicate how the language of the Carrier's March 13, 1995 letters places the Claimants on notice of the alleged violations of which the Carrier found them guilty. It merely states that Claimant Johnson sustained an on-duty injury from making repairs to a bolt machine ...

'But because of the Carrier's failure to give Claimants proper notice of the charges against them, their claims must be sustained rather than directing a modification of the disciplinary actions taken against them.'"

In this instance, we find that because of Carrier's failure to give Claimant notice of any particular charge(s) being made against him, this claim must be sustained on the basis of a violation of the due process notice to which Claimant was entitled under the applicable precedents. The failure to specify a charge deprived Claimant of knowledge of the misconduct of which he was being accused. See Third Division Award 19642. Claimant was entitled to that notice in order to prepare his defense.

We do not attempt to determine the validity of the Organization's argument that Carrier lacked substantial evidence to sustain the disciplinary action, or of the Organization's other procedural objections. The Organization's claim of lack of a fair and impartial Hearing focused upon the alleged lack of a specific charge.

Carrier's September 9, 1995 letter to Claimant refers to the formal Investigation held on August 9, cites CSX Transportation Operating Rule 501, and contends that statements made by Claimant at the Investigation held on May 31, 1995 were not consistent with the facts revealed regarding incidents during the period January 10-17, 1995 and Claimant's alleged personal injury, and that Carrier's review of the transcript revealed that Claimant falsified his statement of the facts under investigation.

The Organization raises its objection about failure to timely furnish the typewritten transcript and argues that Carrier failed to afford Claimant a fair and impartial Investigation on August 9, 1995. The Organization points out that Carrier declined to permit Claimant's wife, a witness at the first Investigation, to testify at the second Investigation.

The Organization asserts that Conducting Officer K. L. Johnson, Jr. did not act as an impartial fact-finder and demonstrated prejudice against Claimant during the Investigation, denying Claimant his contractual right to a fair and impartial Hearing. The Organization also maintains that Carrier failed to prove the charge and that Carrier's dismissal of Claimant was arbitrary and without just and sufficient cause.

We carefully reviewed the August 9, 1995 transcript of Investigation. In summary, our review indicates that in important respects, Conducting Officer Johnson did fail to afford Claimant a fair and impartial Hearing. The Organization objected to the Conducting Officer's failure to allow Claimant's wife to testify. Carrier's July 10, 1995 letter to Claimant provided that Claimant [might] bring any witness who may give testimony. Conducting Officer Johnson responded to Organization Representative E. R. Brassell:

"Again, Mr. Brassell (sic), prior to coming on formal record with the investigation, I made it clear to you that Mrs. Crain was not present on the normal operating procedures and any testimony that Mr. Crain may have given to Mr. Cumbea [Charging Officer]. Therefore, her knowledge of the subject

has to be minimal. Therefore, your objection is over ruled (sic) and she will not be allowed in the investigation.

Brassel: Mr. Garrett, Mr. Wall and Mr. Henry, none of those folks were present either, when Mr. Cumbea questioned Mr. Crain so therefore we request that you also disallow them as witnesses.

Johnson: Request denied. The investigation will continue. Your objection is noted and stand for whatever it may in the record."

In the opinion of the Board, the above quotation shows a prejudgment of the potential testimony of Mrs. Crain on the part of Conducting Officer Johnson. The Conducting Officer was not in a position to state what Mrs. Crain would have testified to, or the weight, if any, to be accorded that testimony, prior to hearing it. There is no indication that the testimony would have been irrelevant to the issue under investigation. In addition, the above interchange suggests that Carrier was selective as to the witnesses who would be presented, and is contrary to the well-recognized principle that Carrier is to conduct a fair and impartial Investigation.

The Organization attempted to enter into the transcript a copy of a July 14, 1995 letter from Brassell to Cumbea requesting specific charges against Claimant. Conducting Officer Johnson, after reviewing the letter, stated that it contained discrepancies. Upon Brassell's statement that the Organization was attempting to put the letter into evidence and requesting that Johnson make it an exhibit prior to quoting from it, Johnson stated as pertinent:

"I'm not going to enter it as an exhibit due to the fact that it has inconsistencies that certainly are not as you stated in that letter. Therefore I will deny it being presented as an exhibit.

Brassel: We will make it part of this appeal, Mr. Johnson."

In so ruling, the Conducting Officer prejudged the weight, if any, to be given to the exhibit and failed to permit the Organization to make a complete record on a

material issue, that is, that the Organization requested specific charges against Claimant.

Upon Cumbea's explanation of his declination to provide [further] specific information at Brassell's request, Conducting Officer Johnson stated:

"So it's your opinion as a charging officer you don't have the responsibility to answer any questions of the Organization that's trying to represent. A person that's been charged been the Carrier (sic)."

Conducting Officer Johnson appeared to be taking the part of the Carrier in a manner inconsistent with Carrier's obligation to proceed impartially.

With respect to the testimony of Witness Hale, the Organization stated that it did not wish to call Hale at a particular point in the Investigation and wished to call another witness; the Conducting Officer stated that he would not allow that. When asked by Brassell whether he was telling Brassell that he was going to dictate the order in which the Organization called its witnesses, Johnson responded:

"The witnesses are called, the witnesses that will be called, Mr. Brassell, as you are well aware and have been through many times in many proceedings, that if a witness has no pertinent information which is determined in most cases in the proceeding then information bears no relevance on the outcome of the investigation. Now if you want to cloud that issue in some respect, certainly that is your right but I'll continue my questioning of Mr. Hale since you have none at this time."

Although Conducting Officer Johnson stated that he would permit the Organization to call Hale, his comments indicate an adversarial attitude in his statement about "cloud[ing] that issue" to the Organization's representative. The Conducting Officer called Hale as a witness later in the Investigation.

Brassell for the Organization entered an objection on the basis that the Organization had not had an opportunity to review all of the evidence that had been

available for some time, stating that it had "just been pushed on us" and that the Organization would like a postponement of the Hearing to give it an opportunity to review all of the material and prepare an adequate defense. Johnson responded that the objection was noted, but that the Carrier would continue with the Investigation.

When Organization Representative F. N. Simpson was questioning Carrier Witness Garrett, Conducting Officer Johnson interjected to make an observation that Witness Henry was there; the question pertained to Garrett's furnishing a statement from Witness Henry. In response to Brassell's objection to Johnson's answering the question for Carrett, Johnson stated that Henry was present and could be questioned and that "To pursue that line of questioning [of Garrett] is irrelevant to the facts at hand," indicating a prejudgment as to where the questioning might lead.

When Simpson asked that a handwritten note by Garrett be put in the record, Johnson responded:

"Yes, again if it is consistent with the other documents, again the document goes back to having a witness here. You're more than willing to cross-examine and ask him any question you would like but I'm not going to enter this document into the transcript."

That occurred at a point where Simpson was questioning Garrett about the dates in Garrett's notes. Johnson then interposed an answer for Garrett. Simpson objected to his doing so.

While questioning Claimant, upon a response that Johnson's question was not the question that was asked [of Claimant], Johnson responded:

"That is the question you were asked and I'm not interested in your interpretation of my question, Mr. Crain. If you don't like ..."

With respect to Claimant's testimony about returning to the drawbridge and the weather conditions at the time, Conducting Officer Johnson stated:

"Let me interrupt right there. Mr. Crain, your (sic) attempting to illustrate that you are an expert on weather predictions and I can assure you you are not. The testimony that you've indicated [that that was the time of calmest weather typically throughout the year and the safest time to go to the drawbridge in a boat] cannot be validated and it's going to be stricken from the record."

Claimant was then permitted to testify that the weather was "very calm" at the time in question.

In response to testimony about Claimant's ability to conduct work activities, Johnson stated that Claimant said that he could not perform work activities, but could go hunting and fishing and [engage in] those types of activities; Brassell objected that Johnson was putting words in Claimant's mouth, that the testimony was the opposite, and accused Johnson of being "very biased."

In summary, we cannot come away from our review of the transcript of testimony without the view that Conducting Officer Johnson conducted himself at times as though he were a part of the Carrier's determination that Claimant was not a credible witness as charged in the second Investigation. That constitutes a prejudgment of the issues, an improper entanglement of the Conducting Officer with the Carrier's position on the merits of the case, and, overall, a failure to accord the Claimant a fair and impartial Investigation. These conclusions call for sustaining the claim. See First Division Award 20094, Second Division Award 6795, Award 119 of Special Board of Adjustment No. 279.

We need not rule on the admissibility of two post-Hearing depositions proffered by the Organization.

AWARD

Claim sustained.

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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 30th day of December 1997.