

NATIONAL RAILROAD ADJUSTMENT BOARD
FOURTH DIVISION

Award No. 5029
Docket No. 5031
97-496-49

The Fourth Division consisted of the regular members and in addition Referee John M. Livingood when award was rendered.

(Transportation Communications International Union
PARTIES TO DISPUTE: (
(Lake Superior & Ishpeming Railroad Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

Carrier acted in an arbitrary and capricious manner when it failed to issue and prove specific charges, allowed the Hearing Officer to act in a multiplicity of roles and failed to provide Robert Larabee with a fair and impartial hearing on September 14, 1994.

Carrier shall now expunge any record of this hearing from Mr. Larabee's record and compensate him for all lost time during the nine (9) days he was suspended from work as a result of the discipline assessed."

FINDINGS:

The Fourth 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.

Claimant, an employee of the Carrier for approximately 11 years and a "boat loader" for six years, was suspended for nine calendar days, which included five working days, for violating Carrier's Safety Rules Book Basic Rules 1 and 2, in effect, failing to report a personal injury in a timely manner.

On Friday, August 19, 1994, the Claimant was working the night shift loading ore. The following day, the Claimant called his immediate supervisor, a Dock Agent, and informed him that his neck hurt when he woke and that he wanted to take a sick day. The Claimant called again the next day, and explained that he hurt his neck, but he was not sure when and where because he did not have any pain until he awoke. The Claimant worked Monday and Tuesday, August 22 and 23. On Wednesday, August 24, the Claimant's rest day, he called the Dock Agent at 11:00 A.M. to get the day off, stating he wanted to allow his neck to heal. During the conversation he explained he thought the neck injury was from his shift on August 19 and asked whether he should file an accident report. The Dock Agent advised him that due to it being five days after the incident the Claimant should speak to the Transportation Superintendent and that he did not want to advise him. The Claimant was told he could have the day off at 1:00 P.M. At 2:00 P.M., the Claimant presented the Dock Agent with the accident report, five days after the stated injury.

In explanation of the delay in filing the accident report, the Claimant puts forth the period he was unaware of his injury and, after he realized he was hurt, the period he was unsure where and when the cause of the injury occurred. Additionally, the Claimant introduced a note from the Carrier's doctor concerning the Claimant, stating "It is possible for injuries to be delayed in onset."

The Organization presented several Awards specifically dealing with the delay in filing accident reports, Second Division Award 12228, Third Division Award 22201, and Public Law Board No. 2971, Award 92. In Third Division Award 22201, the Claimant did not file an accident report for more than 15 days until the Claimant's surgeon advised her that the discomfort in the Claimant's legs was due to a pinched nerve as a result of a back injury and the Claimant associated a mishap at work with the back injury. In Second Division Award 12228, the period between the incident and the filing of an accident report was more than three months.

The Investigation failed to determine when the Claimant specifically first realized he suspected his operation of Chute 265 on August 19 to be the cause of his injury. On

August 21, he seemed not to have made the association. However, his statements regarding his failure to file the reports on August 22 indicate that at the time he believed the injury to be work related:

"Because I wasn't going to file one. My neck started to feel better, so it's like many injuries up there that, if there's slight little injury, you don't report it."

The Organization established in the transcript that it was not standard Carrier policy to have an Investigation for every employee that failed to comply with the subject Rules and asserts on appeal that the Carrier does not enforce Rules 1 and 2 on an even and consistent basis, stating that singling out the Claimant would be unfair. The Carrier did not respond on these points.

The Carrier relied, in part, on the facts established in the record: an accident report was filed August 24, five calendar days after the stated injury on August 19 and three days after the Claimant returned to work on August 22. The Carrier established that the Claimant knew of the applicable Rules and had prior instances of violating the subject Rules, once in 1991 when a formal Investigation resulted in a warning and once in 1993 which did not result in a formal Investigation. The Carrier did not attempt to address the Claimant's reasons for delay but did, through the words of the Hearing Officer, attempt to ascribe a motive and rationale for the delay:

"I submit, Mr. Larabee, that you were getting forced to work on Wednesday, your assigned day off. August 24th. You did not want to, and furthermore, that is when you produced the injury report . . . I'm submitting that that's how you got out of working on Wednesday, August 24th."

The September 22, 1994 letter assessing discipline relied on the establishment of the Claimant's ulterior motive for filing the accident report as to why the report was filed late: ". . . only after you were going to be forced to work on your assigned day off did you decide to fill out an accident report."

The Organization appealed this case on both procedural grounds and on the merits. At both the Hearing and during the appeal on the property it objected to the "multiplicity" of roles/functions played by the Transportation Superintendent: charging

officer, hearing officer, assessor of discipline, and witness. The Organization offers a number of Awards in support of its position. These Awards deal with the potential prejudicial nature of combining certain roles/functions. Several of the cited Awards involved combining the role of first appeals officer with the role of assessor of discipline; this was avoided in the case at hand. Certain of the Organization's cited Awards specifically address the combining of the roles of Hearing Officer and witness, stating that the Board must "look askance" or with suspicion on the resulting Hearing.

The Carrier must provide the Claimant with a fair Hearing. This Hearing must be carefully reviewed in light of the potentially conflicting roles. Prejudice and impartiality may be evidenced in actions even though they are not consciously intended.

The digression of the focus of the Investigation to the past availability of the Claimant to work on rest days was objected to at the Hearing as not relevant to the charge and prejudicial. It seems this course of inquiry was specifically set to establish a suspected reason/motive for the Claimant's submission of the accident report. The motive was not established. However, alleged actions and conduct of the Claimant regarding rest day work were the clear focus of the Hearing Officer's attention and concern.

In addition to his roles/functions of Charging Officer, Hearing Officer and assessor of discipline, the Transportation Superintendent presented certain evidence. He freely offered testimony in exchanges with the Claimant. He unnecessarily and repeatedly asked leading questions.

During the Hearing, the Hearing Officer accused the Claimant of producing the accident report only to get out of working on August 24, stating that was how he got out of working that day. The September 22, 1994 letter assessing discipline relied on the establishment of the Claimant's ulterior motive for filing the accident report as to why the report was filed late: "... only after you were going to be forced to work on your assigned day off did you decide to fill out an accident report." However, this theory/ulterior motive is not established in the transcript and was specifically contradicted by the Claimant and the Dock Agent to whom the Claimant spoke regarding the matter. Evidently, the Hearing Officer/Assessor of Discipline disregarded the specific testimony of the Claimant and the Dock Agent, both of whom testified that the Claimant was given time off on August 24, prior to his presenting the accident report.

The statement of nonrelevant suspicions in the letter of discipline further supports the prejudicial nature of the Hearing and the decision process.

The principles of fairness and impartiality require the Board to find procedural errors to be sufficient to sustain the claim.

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 Fourth Division

Dated at Chicago, Illinois, this 13th day of November 1997.