

The Third Division consisted of the regular members and in addition Referee Lamont E. Stallworth when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
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(Kansas City Southern Railway Company

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

(1) The five (5) days suspension imposed upon Track Laborer G. W. Christie in connection with an injury on October 3, 1985, was unwarranted, on the basis of unproven charges and in violation of the Agreement (Carrier's File 013.31-348).

(2) The claimant's record shall be cleared of the charge leveled against him and he shall be compensated for all wage loss suffered."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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 waived right of appearance at hearing thereon.

This case involves discipline imposed by the Carrier for the Claimant's alleged responsibility for an injury he contends occurred while working for the Carrier. According to the record, the Claimant was employed as a track laborer and on the day in question was assigned to Section Gang 076 at Vidor, Texas. The crew was assigned to install new railroad ties, a job which involved hauling the ties by hand for a disputed distance, lifting up the track, and placing the new ties under the track.

The Claimant contends that in performing this job he hurt his back on the morning of October 2, 1985. He also contends that he told his Supervisor about the problem on that morning, but the Supervisor denies that he heard the Claimant's complaint.

The Claimant continued to work out his tour of duty on October 2, and on October 3, 1985. On October 4, he reported for work and informed his Supervisor that his back was hurting him so badly that he could not perform certain tasks that day. The Claimant was not allowed to work that day, but filled out an accident report and left to go see a doctor. Apparently the Claimant went on a disability leave as a result of the doctor's examination.

In a letter dated October 30, 1985, the Carrier instructed the Claimant to attend a Hearing at Chaison, Texas, "to ascertain the facts and determine your responsibility in connection with an alleged injury for which you left service on October 3, 1985." The Hearing was held on November 14, 1985, and on January 27, 1986, the Carrier sent a letter to the Claimant suspending him for five days on the basis that the Claimant was responsible for his injury.

The Organization filed a Claim on March 8, 1986, contending that the discipline imposed upon the Claimant was improper because the Carrier had not established or even charged the Claimant with any violations of its rules. The Organization also charged the Carrier and its witnesses with bias. The Carrier denied the Claim, stating that it found the Claimant responsible for the injury.

In its submission before this Board, the Carrier noted that the Claimant moved some ties for his personal use after work on both October 2 and 3, 1985, which the Carrier suggests indicates that he was not injured on the job. In the alternative the Carrier also suggests that if the Claimant was injured on October 2, 1985, he failed to report it immediately to his Supervisor and therefore may have been responsible for exacerbating the injury.

In its submission, the Organization claimed five specific objections to the way in which the Carrier imposed discipline on this Claimant. These are basically procedural objections to the way in which the Claimant was charged, the Investigation was conducted and the discipline was imposed.

In the second of these objections, the Organization contends that the transcript of the Hearing held to ascertain the Claimant's responsibility for his injury is not a complete or accurate copy. In its initial Claim, the Organization contended that its Representative had made an objection at the beginning of the Hearing alleging that the purpose of the Carrier's Investigation was to interfere with the Claimant's exercise of his rights under the Federal Employers' Liability Act (FELA), and that this allegation had been expunged from the record.

The Carrier responded to this allegation in its letter of April 24, 1986, stating that:

"I do not understand your contentions as to Mr. Christie's 'FELA rights.' The conduct of an investigation to determine facts and/or responsibility has nothing at all to do with an employee's

recourse, if he desires, to seek redress under the FELA act's provisions. (Carrier's Exhibit 4, p. 2)."

Thus, the Carrier responded to what it viewed as the substance of the Organization's argument concerning the Claimant's FELA rights, without addressing the procedural issue of its absence from the record.

The Board concludes, however, that the Organization has adequately established that the transcript was incomplete, and the incomplete nature of the transcript leads the Board to conclude that the procedure for imposing discipline upon the Claimant was sufficiently tainted that the discipline should be overturned.

The Organization has alleged that the transcript does not contain its Representative's reference to the Carrier's attempted interference with the Claimant's FELA rights. According to the Organization, its Representative made this objection in his opening remarks. The Board has examined the record and finds that the alleged reference to the Claimant's FELA rights is missing. The Board also notes that there is a gap in the transcript at several places in the Organization's opening remarks which suggests that this reference may have been expunged from the transcript. (Carrier's Exhibit No. 1, p. 3).

The Carrier has not responded at all to the Organization's claims that this reference does not appear in the record. On the basis of the evidence before it, the Board concludes that the Organization has adequately established that the transcript is not complete.

The incompleteness of the transcript is important because, as the Organization points out, the Carrier official who imposed the discipline was not the same Carrier Official who conducted the Hearing. Thus, although the Carrier Official conducting the Hearing assured the Organization Representative that his statement about the FELA rights would be made a part of the record, neither the Organization nor this Board has any assurance that the objection reached the Carrier Official who made the decision to impose the discipline upon the Claimant, and based this decision upon the transcript.

It does not matter whether the Carrier considered the objection concerning FELA rights to be a valid concern. The Organization considered it important enough to raise in its opening statement and the Carrier Official who determined the discipline should have had the opportunity of considering any potential bias on the part of the Carrier in pursuing the investigation.

Furthermore, the incompleteness of the transcript at this point raises the question of whether something else is missing from the record as well. In reviewing the transcript, the Board notes that at several other parts of the transcript there are gaps also, and that these gaps appear at places where they would probably support the Organization's case. For example, at Page 46 of the transcript there is a blank space of about fifteen

lines as the Claimant's answer to a question concerning whether he was facing his Supervisor when he initially reported his alleged injury on October 2nd. (Transcript, Exhibit 1, p. 46). This could be a very crucial bit of information in this case, where an alleged lack of prompt notice to the Carrier of his injury is one of the main complaints against the Claimant. It is also important because the Supervisor to whom the statement's allegedly was addressed stated that although he did not hear the Claimant's complaint, in general "I hear him too much," suggesting possible bias on the part the Supervisor's part against the Claimant, (Transcript, p. 11).

While it is possible that the Claimant simply remained silent in answer to the question, other silences appear to be marked in the transcript with several dashes appearing on one line, or just one blank line. (Transcript, p. 45 bottom). This long blank space in answer to this crucial question at least raises the possibility that the Claimant's answer was initially recorded and later expunged.

The Organization has adequately established that the record is not complete in regard to its Representative raising the issue of FELA rights. On the basis of this evidence, the Board concludes that this objection, and possibly other parts of the record of the Investigative Hearing may not have been presented to the Carrier official responsible for making the decision to impose discipline, before he did so.


The Board finds that this procedural defect is so serious that the discipline was imposed unfairly. Therefore, the Claim must be sustained.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 12th day of June 1992.