

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

**Award No. 13903
Docket No. 13779
06-2-05-2-30**

The Second Division consisted of the regular members and in addition Referee Raymond E. McAlpin when award was rendered.

PARTIES TO DISPUTE: (International Brotherhood of Electrical Workers
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

- "1. That the Union Pacific Railroad Company violated the Controlling Agreement, particularly Rule 37, but not limited to, when Electrician Mark E. Mittermeier was unjustly and arbitrarily dismissed from service on September 9, 2004 following the investigation held on August 5 and 6, 2004.**
- 2. That, accordingly, the Union Pacific Railroad Company make whole Electrician Mittermeier as follows:**
 - a. Reinstate him to service with seniority rights unimpaired;**
 - b. Make him whole for all wages lost at the prevailing rate of pay of electricians and all applicable overtime;**
 - c. Make him whole for all vacation rights;**
 - d. Make him whole for all health and welfare and insurance benefits;**
 - e. Make him whole for any and all other benefits including Railroad Retirement and Unemployment Insurance;**
 - f. Make him whole for any and all other benefits that he would have earned during the time withheld from service, and**
 - g. Any record of this arbitrary and unjust disciplinary action be expunged from his personal record."**

FINDINGS:

The Second 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.

The Claimant, Mark E. Mittermeier, was dismissed from service from his position as an electrician at the Carrier's North Little Rock, Arkansas locomotive facility as a result of an investigation held August 5 and 6, 2004 for allegedly engaging in dishonesty, failure to report an injury in a timely manner, and the acceptance of light duty which was not required.

The Organization argued that the Claimant was injured while on duty on June 8, 2004 as a result of improper use of an overhead crane by another employee. The Organization noted that the Claimant was a 30-year employee of the Carrier. He was deprived of a fair and impartial investigation during which the Carrier failed to satisfy its burden of proof. In addition, the discipline assessed to the Claimant was excessive. Rule 37 requires a fair and impartial hearing together with a precise charge. The Organization would note that the Carrier then corrected its notice of investigation. At the investigation there was no showing or proof that the Claimant was guilty of any of the charges against him.

With respect to the Claimant's injury, the Claimant was able to see his own physician and was then sent to an orthopedic specialist. The video surveillance of the Claimant was overwhelmingly exaggerated. The Claimant was observed for limited periods of time on June 9, and June 10, 2004. This showed the Claimant basically tending to simple errands and performing tasks that were not inconsistent with his injury. Nothing on the video can adequately depict how the Claimant was actually

feeling at the time. The Carrier investigator failed to appear at the investigation. The Claimant has the right to face all of his accusers. The Claimant returned to work on the restricted light duty on June 11, 2004 and performed all instructions by the Carrier. The evidence in the transcript clearly shows that the Claimant is not guilty of any cited rule violations. The Claimant's record is absent of any discipline. Therefore, the punishment in this case is patently excessive. The investigation was neither fair nor impartial. The Carrier failed to justify and discharge its burden of proof on all issues. Therefore, the claim must be sustained.

The Carrier argued that the evidence at the investigation proves that the Claimant violated Rule 1.6 in several ways. In addition there was irrefutable evidence that the Claimant violated Rules 1.13 and 1.15. With respect to the Organization's claim that the investigation was neither thorough nor fair, the record shows that it was both thorough and fair. The Claimant alleged that the notice of investigation was vague. However, it is apparent in the record that the 201 pages of testimony show that the Claimant was vigorously and thoroughly represented. The decision to dismiss the Claimant is consistent with Board precedent. Numerous citations were provided.

The record in this case shows that the Claimant's story doesn't wash. He chose to lie and misrepresent his ability. He has a duty to go back to the job as soon as possible and he did not. In addition to the above, the Claimant stated that the overhead crane was not operating properly. In fact, the crane was operating properly. It was the operator that had a problem. Based on the above, the claim must be denied.

The Board finds the investigation meets the requirements of the rule and the letter of investigation was sufficiently clear for the Claimant to receive a fair and regular investigation and to be properly represented. The Carrier has not proven dishonesty (in the normal understanding of that term) to the level required under the circumstances of this case. Certainly, within the record of this case there is a lot of smoke, but the Carrier must prove in a clear and convincing way that the Claimant intended to deceive the Carrier. The Carrier, however, has proven in a clear and convincing way that the Claimant both failed to report his injury in a timely manner and accepted light duty which was not required given the circumstances of his injury. These are both very serious charges. The Board reviewed the videotapes in this case. These videotapes are conclusive evidence of the correct nature of the last two charges against the Claimant. We come then to the appropriateness of the penalty. The Board

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finds that there is nothing in this record that would allow it to substitute its judgment for that of the Carrier in this matter. The Claim shall be denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 7th day of July 2006.

EMPLOYEES' DISSENT

TO

NRAB Second Division Award No. 13903, Docket No. 13779
(Referee Raymond E. McAlpin)

The majority decision to deny the employees' claim is without authoritative precedent support and in direct conflict with the clear language set forth under the Controlling Agreement. Based on the Board's decision, one might conclude that the Carrier may charge and discipline an employee on one offense, only later to have the Board uphold the imposed discipline based on separate, unrelated and unsubstantiated charges to which the employee was not apprised. That would be a mistake and clearly a breach of the claimant's due process rights. This award is palpably erroneous and a dissent is required.

The Carrier and the Organization are parties to an agreement, specifically Rule 37, which unambiguously states in pertinent part that **"No employee shall be disciplined without a fair hearing...At a reasonable time prior to the hearing, such employee and his duly authorized representative will be apprised of the precise charge..."** The precedent has been well established that a notice of hearing is to assure the employee of a clear statement of the subject matter of the hearing so that he can properly prepare his defense. Such requirements also comport with the larger purpose of guaranteeing him a full, fair and impartial hearing. This is an elementary requirement that must be met, otherwise the employee will be exposed to a denial of due process. The record in this matter establishes that Claimant was served with Carrier's notice to appear for formal investigation on the following charges, quoted in pertinent part:

Please arrange to report to the Shop Director's Office...in connection with the charge that on June 8, 2004, you submitted Form 52032 Union Pacific Railroad Report of Personal Injury or Occupational Illness, Section III, regarding what specifically caused or contributed to the accident/injury, in which you claimed an alleged personal injury to your left arm; and on June 9, 2004, at approximately 5:45 a.m. you stated to a manager that the alleged injury rendered you unfit for railroad duty and other functions, while during the same time period of June 9 through June 13, 2004, you were observed using your left arm to lift objects and perform other routine physical tasks utilizing you alleged injured arm.

Subsequently, the Investigating Officer concluded that the charges against Claimant had been substantiated at the formal hearing, quoting in pertinent part:

"... I have found substantial and conclusive evidence you were dishonest on Section III of Form 52032, Union Pacific Report of Personal Injury or Occupational Illness.

I have also found substantial and conclusive evidence that you were dishonest when you claimed that your alleged injury rendered you unfit for railroad duty and other functions on June 9, 2004, while during the same time period of June 9 through June 13, 2004 you were observed using your injured left arm to lift objects and perform other routine physical tasks.

...You are hereby advised that you have been assessed Level 5 Discipline and effective on this date, September 9, 2004 are hereby dismissed from the service of the Union Pacific Railroad Company."

Finally, Carrier's only correspondence during the handling of this dispute on appeal concludes with the following:

"The record has clearly established that Claimant exaggerated the extent of his condition, an act of dishonesty and the discipline assessed is consistent with the Carrier's UPGRADE Policy"

Based on the foregoing, it is undisputable that Claimant was charged and ultimately dismissed on charges of alleged dishonesty in connection with an on-duty injury. In this regard we point to the Board's initial findings, quoted as follows:

"The Carrier has not proven dishonesty (in the normal understanding of the term) to the level required under the circumstances of this case. Certainly, within the record of this case there is a lot of smoke, but the Carrier must prove in a clear and convincing way that the Claimant intended to deceive the Carrier."

Without reference to any of the fact-bound issues arising in this case, error stands out in the Board's unsighted reasoning and exception is taken to its concluding decision, as follows:

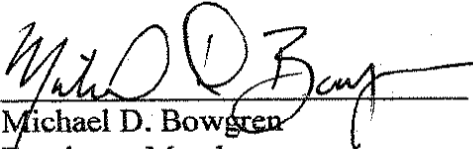
"The Carrier, however, has proven in a clear and convincing way that the Claimant both failed to report his injury in a timely manner and accepted light duty which was not required given the circumstances of his injury. These are both very serious charges. The Board reviewed the videotapes in this case. These videotapes are conclusive evidence of the correct nature of the last two charges against the Claimant."

As apparent in the foregoing decision denying the claim of employees, the Board is completely off-point by unaccountably referring to charges which were neither identified in the notice of investigation or during the handling of the dispute on the property. It is clearly evidenced by the above-quoted Carrier correspondence that the Claimant was charged, tried and dismissed for an alleged, yet unproven violation of dishonesty, not alleged failure to report his injury in a timely manner and accepting so-called light duty as the Board erroneously suggests. The record is paramount to which the Boards have consistently held that evidence not shown at the investigation and not

contained in the record upon which the Carrier Officer made his decision is improper and may not be considered by the Division on appeal.

Finally, the Board failed to take into account or even address the employees' fervent position that Claimant was a thirty (30) year employee with an unblemished work record. It has consistently been held by numerous prior Awards which we need not list here, that credence should be given to the substantial seniority and unblemished work record of an employee prior to the particular circumstances under review when weighing the quantum of discipline issued by the Carrier. The Board failed to take this factor sufficiently into mitigating account.

The Boards decision in Award 13903 is a perversion of the agreement and therefore the Organization dissents to the decision rendered by the Board and cannot consider it as precedent.


Michael D. Bowgren
Employee Member