Award No. 6277
Docket No. 6119
2-RDG-FO-'72

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee John J. McGovern when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 109, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. - C. I. O. (Firemen and Oilers)

READING COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under the controlling agreement, Stationary Engineer Tadeusz Wardencki was improperly and unjustly dismissed from the services of the Reading Company, March 9, 1970.

2. That accordingly, Stationary Engineer T. Wardencki be restored to service with all seniority and service rights unimpaired, and paid for all time lost, including all other benefits attached to his employment plus 6% interest on all monies due him.

EMPLOYES' STATEMENT OF FACTS: Stationary Engineer Tadeusz Wardencki, hereinafter referred to as the Claimant, entered the service of the Reading Company, hereinafter referred to as the Carrier, on January 8, 1951, promoted to Boiler Room Engineer on January 19, 1952, continuing therein to March 9, 1970.

At or about 10:00 A. M. on Sunday, February 15, 1970, while working his regular assigned tour of duty alone, the Claimant, in the normal performance of his assigned duties, slipped and fell sustaining personal injuries. The Claimant completed his tour of duty on that date, entering the incidence of the accident in the Log Book maintained in the Boiler Room in which all incidents of significance occurring on the shift are recorded.

On Monday morning, February 16, 1970, the Claimant reported for duty on a secondary position of Ass't. Pharmacist at the New Jersey State Hospital, Hammonton, New Jersey.

On reporting for work, an Assistant Medical Director, a Doctor Toegel, observed the Claimant showing evidence of injury and advised him to report to a Doctor Caino for examination and x-rays. Examination and x-rays were made and the attending Doctors prescribed medication, sits-baths and bed rest.

The Claimant also visited his own personal physician the same date, who prescribed similarly. The Claimant, on the same date, notified the Port Rich-

addressed one letter to the superintendent of motive power and three letters to Carrier's director of personnel. Your Board, noting the impropriety of the handling of the claim, rendered a dismissal award. Carrier submits that the property Award 3958 governs this claim requiring its dismissal.

Carrier also contends that the organization's letter of May 12, 1970, which was improperly directed to Carrier's highest designated officer to handle disputes, was untimely. Rule 13 of the Agreement as well as Article V, Section 1(a) of the August 21, 1954 Agreement mandate that the claim must be submitted within 60 days of the date of the alleged grievance. The claimant was dismissed on March9, 1970 and no action was taken by the organization until May 12, 1970 or 64 days after the grievance. See Second Division Awards 5247 and 2028.

Carrier submits that a review of the claimant's confusing testimony reveals a thwarted scheme to gain accident benefits from two employers. The claimant contends that within a period of less than 48 hours he suffered identical injuries which conveniently permitted him to report off sick from each of his two jobs. Significantly, the claimant maintained that his injury of the 13th caused him no distress, that he went home immediately after that accident, and that he did not officially report it to the hospital authorities until February 16, 1970. However, the claimant's superior at the hospital reported to the Carrier that the claimant was treated in the hospital's infirmary on Friday, February 13, 1970 and that he had reported off on sick leave due to an injury.

The claimant testified that his Carrier injury occurred at 10:00 A. M. on the 15th. However, his foreman saw him at 10:45 A. M. and no report was made as to the alleged accident. Indeed, the claimant contended that his alleged injury on the 15th caused him discomfort to the extent that he was unable to work after the accident. Nevertheless, he remained on company property for four and one-half hours without reporting the alleged serious injury to his foreman. Carrier also notes that while the claimant maintained his alleged injury on the 15th prevented him from working or returning to company property on the 16th to fill out the required accident report, it did not prevent him going to his employment at the hospital.

Carrier submits that either a dismissal or denial award is appropriate in the instant case. This claim has not been handled on the property in accordance with the agreement rules, established practice, and the Railway Labor Act.

FINDINGS: The Second 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 employe 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.

Claimant in this case was charged with falsifying a personal injury report for an accident allegedly sustained by him on February 15, 1970 while performing his assigned duties for the Carrier.

The facts as evidenced by the record are that the claimant has held two jobs for a considerably long period of time, one being with the Carrier, the other being with a State Hospital. On February 15th, 1970, claimant made an entry in the boiler room log book to the effect that he injured his head and back in a fall at approximately 10:00 A. M. while on duty for the Carrier. He did not inform his supervisor of this accident, nor fill out an accident report until February 23, 1970, although he had called a clerk who in turn notified claimant's supervisor on February 16,1970.

On February 13, 1970, claimant sustained a similar injury in the parking lot of the State Hospital, incurred according to his testimony at the official hearing, by slipping on ice. This accident was not reported to the hospital authorities until February 16, 1970, which upon examination by a physician, was diagnosed as a traumatic injury to the back and head.

From a review of the evidence adduced at the hearing, it appears that claimant, subsequent to his injury sustained in the hospital parking lot on February 13th, reported for his regular assignment with the Carrier at 7:00 A. M. on February 14th, and completed two full tours of duty, or 16 hours, beginning at 7:00 A. M. and ending at 11:00 P. M. He thereupon reported back to Carrier 8 hours later at 7:00 A. M., February 15, 1970, working until approximately 10:00 A. M. when he fell and injured himself. He completed his tour of duty that day but did not make an official report of injury to his supervisor, this being done the next day, February 16th. He did however, as stated previously, make an appropriate entry in the boiler room log book.

Because of claimant, having failed to notify his supervisor of the accident on the day it occurred, and because of the closeness in time of the two injuries and their similarities, Carrier arguendo postulates that claimant is in effect attempting to defraud Carrier. The entire argument presented by the Carrier is that, for some reason or other, it is outside the realm of possibility as well as probability that anyone within a period of 48 hours, could sustain two injuries so similar in pattern, ergo, there must be a fraudulent intent to mislead Carrier.

We have carefully reviewed the evidence of record in this case, and being ever mindful of the original charge, that is, falsifying a personal injury report, we are unable to conclude that Carrier has sustained its burden of proof in this case. In essence, Carrier is requesting this Board to adopt their conclusion that claimant is guilty as charged without presenting a scintilla of direct, positive evidence to support their position. A mere recitation of the factual situation absent corroborative evidence, does not lead us to the same conclusion as Carrier's. The record before us is replete with assumption, conjecture, speculation and suspicion, none of which are sufficient to uphold Carrier's position in this case.

The claim shall be sustained to the extent that claimant shall be restored to service with all seniority and service rights unimpaired, paid for all time lost, including all other benefits attached to his employment, but shall not include the demand of 6% interest on all monies due him. On this latter point, we agree with Awards 6962, 13478, 15709, 18433 inter alia. We further wish to make it abundantly clear that adhering to the "make whole" concept of damages, the earnings of the claimant received from his hospital employment are not be deducted from that sum of money now due and owing to him by Carrier. His hospital employment began in 1955 and has continued uninterruptedly to the present date. The "make whole" concept requires in this case, that claimant receive the full amount of wages from the Carrier due from

the date of the dismissal to the present. This is clearly distinguishable from cases where employes seek and gain outside employment during their period of dismissal.

AWARD

Claim sustained in accord with findings as expressed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 28th day of March 1972.

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