Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 9912
SECOND DIVISION Docket No. 9844
2-C&O-MA-'84

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

Parties to Dispute: (International Association of Machinists and
(Aerospace Workers
(
(Chesapeake and Ohio Railway Company

Dispute: Claim of Employes:

1. The Chesapeake and Ohio Railway Company arbitrarily and capriciously suspended and subsequently dismissed Machinist Paul K. Rice from service on November 7, 1980.

2. Accordingly, Machinist Paul K. Rice should be paid for all time lost from the date of his suspension until reinstated on November 25, 1981.

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 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 dispute involves the following facts and circumstances, the Claimant involved in this dispute is a machinist assigned as such at Carrier's Huntington Locomotive Shops at Huntington, West Virginia. On date of June 13, 1980, Claimant and several other employees were furloughed from Carrier service. Claimant then made application and was accepted by the Carrier for extra work which consists of filling in on a day to day basis any vacancies that were available. On the date on which the incident over which this dispute arose, the Claimant was working in "The Traction Motor Gang" stripping Traction Motor Armatures, a position which, although he had apparently worked it sometime in the past, he does not appear to have been completely familiar with.

On date of August 29, 1980 at approximately one hour and fifty five minutes before quitting time, Claimant having stripped four Traction Motor Armatures (all that were available at the time) left his immediate work area for what is described as "the Green Room" or "the Bearing Room" which is something like twenty five to forty feet away. At approximately the same time or very soon thereafter the Gang Foreman appeared on the scene and inquired as to whether or not the Claimant had more to do. The Claimant apparently answered that he thought "he had performed enough work for tonight." The Gang Foreman informed him that he had not completed his assignment as two more armatures had been delivered to his work

area and allegedly also asked, "Are you refusing to perform your duty?" to which the Claimant replied, "No, I have hurt my back." When asked if he wished to fill out an injury report, receive medical attention, or be sent to the hospital, the Claimant answered, "I'll be O.K." He also asked to see his committeeman, which was denied by the Gang Foreman. Both then left to see the Production Manager, Mr. E. E. Lemaster. In the presence of the Production Manager, Claimant was again asked if he wished to fill out an accident report or receive medical attention, his reply was, "No, I'll be all right." Soon thereafter and upon the advice of his committeeman, who had now appeared on the scene, Claimant did fill out the accident report and then returned to work. Questioned shortly thereafter by the Production Manager and the Gang Foreman as to how he had sustained his injury, he replied that he had strained his back account the proper tool for the work was not available. Later the Gang Foreman alleged that it was available but this information was not made known to the Claimant at the time. At approximately fifty minutes before the close of the shift the Claimant approached the Gang Foreman's desk and requested permission to go home, allegedly because of his back injury, after some discussion this was granted and accordingly Claimant left the job for the remainder of the day.

On date of September 11, 1980 Carrier sent Claimant a directive instructing him to attend investigation at the office of the Plant Manager on Monday, September 22, 1980 at 10:00 a.m. The notice reads in part:

> "You are charged with indifference in the performance of your duties as assigned on August 29, 1980 and for falsely claiming an injury to your back on that date."

The investigation was postponed and began on date of September 24, 1980 and ending on September 26, 1980. On date of November 7, 1980, Claimant was advised that he had been "found guilty as charged, with indifference in the performance of duties in that you failed to perform duties as assigned on August 29, 1980 and for falsely claiming an injury to your back on that date." He was further advised that he was "dismissed from all services...and his name removed from the seniority roster".

The claim for reinstatement and back pay was handled by his Organization and first denied by Carrier, but later an understanding reached between the Carrier and the Union whereby the Claimant was returned to Carrier service without prejudice to the position of either party and with the understanding that a claim for time lost would be processed to this Board.

It is a fact well recognized by all Divisions of this Board that in disciplinary matters the burden of proof rests squarely on the Carrier. In the instant case the Claimant is charged with:

> "Indifference in the performance of duties in that you failed to perform duties as assigned on August 29, 1980, and for falsely claiming an injury to your back on that date."

We shall deal with the alleged false injury report first, and find that: A careful review of the record with particular attention to the transcript of the investigation reveals no proof whatsoever that the injury, although apparently of a minor nature, did not actually occur. In fact in the ninety plus pages of transcript testimony Carrier mentions it only a few times and makes such a superficial attempt at proof that it almost seems that they had dropped that part of the charges. They do make mention of the fact that Claimant did continue working, and did strip another armature after the injury allegedly occurred, but this could well have been a reluctance on the part of the Claimant to lose time from the job as well as the apparently minor nature of the injury. Since Claimant had not long before been in a furlough status, and in view of the uncertainty of his position in the shop (allowed only extra work) a reluctance to lose time is not difficult to understand. Insofar as not wishing to make out an accident report or seek medical attention, this is explained in the Claimant's own words, in the investigation transcript wherein he states:

> "If I fill out an accident report I won't be eligible for the $400.00 bonus."

and

> "Anyone that has done physical labor all their life has pulled muscles before. The best thing I have found when you pull a muscle is to do some more work and it won't get so stiff and also a few weeks before the incident, Mr. Graham gave me a memorandum that told that if you didn't have any accident reports filled out that you would be eligible for $400.00 on a quarterly drawing."

While we do not agree that Claimant was using very good judgment in this reasoning, it is certainly understandable, and is also an indication why he would be very adverse to making a false injury report, thus cutting himself off from any chance at the $400.00 non injury bonus.

In Second Division Award No. 6277 this Board held:

> "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 Carriers."

The record also shows that Claimant as a furloughed employee had volunteered and been accepted for "extra work" meaning filling in for whatever other employee was not available, also meaning that his work assignment could change on a day to day basis. The record shows that the Claimant was not totally familiar with the work to which he was assigned, and in fact had apparently never before stripped a "GE" armature which was somewhat different from a "EMD" armature. The Claimant

also alleges, and this has not been denied by the Carrier, that the previous shift had not "cleaned up their tools" or "put up their bearings" and that the Claimant had to perform this before starting his daily work assignment. The record also shows that the Claimant was furnished the wrong tool for the job and as a result experienced considerable difficulty in stripping at least one armature.

Despite the foregoing we cannot hold the Claimant totally blameless in this instance. He does not have the right to argue with management that he had "performed enough for the day", especially not when one hour and fifty minutes, or about that much, remained of that working day. And he did so argue both with the Gang Foreman and the Production Manager. We also note that the record shows that the Claimant had been dismissed before and returned to Carrier Service on a matter of Managerial leniency. While this cannot be a factor in deciding on a charged employee's guilt or innocence in a later case, it can be a factor in the amount of penalty assessed, and we do note Carrier has entered this factor into the record.

Carrier has not sustained their burden of proof as to Claimant's allegedly "falsely claiming an injury to your back". Insofar as "indifference in the performance of your duties" is concerned, Carrier sustained their burden of proof only to the extent of showing that Claimant had left his immediate work area before completing his work assignment, and that he did argue with both the Gang Foreman and the Production Manager that he had "done enough for the night" a decision that was not his to make. The only issue to be resolved by this board is whether or not the penalty imposed by the Carrier was reasonable and we find it was not. Dismissal, even though returned to Carrier service approximately a year later is far too great a penalty for the relatively minor offences committed by the Claimant. We feel that a hard but appropriate penalty in this case as well as a warning to the Claimant against any further offences even minor ones, would be a ten day suspension and will so rule. We therefore, order the Carrier to reimburse the Claimant for all lost earnings as a result of his suspension and dismissal and until his subsequent reinstatement less ten working days.

A W A R D

Claim sustained in accordance with the findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 16th day of May, 1984