

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD  
SECOND DIVISION

Award No. 11916  
Docket No. 11837  
90-2-89-2-140

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

PARTIES TO DISPUTE: (Sheet Metal Workers' International Association  
(  
(Burlington Northern Railroad Company

STATEMENT OF CLAIM:

1. The Carrier violated the provisions of the current controlling agreement when they improperly suspended Sheet Metal Worker W. T. Smith, commencing May 6, 1988, pending the results of an investigation and subsequently dismissed W. T. Smith on June 6, 1988 as a result of the aforementioned investigation held on May 20, 1988.

2. That accordingly, the Carrier be required to compensate Mr. Smith for all time lost in addition to an amount of 6% per annum compounded annually; remove impairment of his seniority; if any; make Mr. Smith whole for all vacation rights; reimburse Mr. Smith and/or his dependents for all medical and dental expenses incurred while Mr. Smith was improperly held out of service; pay Mr. Smith's estate whatever benefits he has accrued with regard to life insurance for all time he was improperly held out service; pay Mr. Smith for all contractual holidays; pay Mr. Smith for all jury duty and other contractual benefits.

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 employees 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.

The Claimant was employed as a Sheet Metal Worker, with a seniority date of July 30, 1979. Claimant also occasionally performed service as a Supervisor. When he performed service as a Supervisor he was required to complete Form 13101. On May 13, 1988 the General Foreman performed an audit on Claimant's Forms 13101 for the month of April 1988 and the first half of the month of May 1988. The General Foreman found several discrepancies with respect to days that the Claimant showed as having worked and days that the General Foreman knew he had not worked.

The Claimant was notified on May 16, 1988 to attend an investigation on May 20, 1988. The investigation notice read, in part, as follows:

"to ascertain the facts and determine responsibility in connection with your alleged dishonesty when you falsified form 13101 for pay periods ending April 15, April 30 and May 15, 1988\*\*\*."

In the May 16, 1988 notice the Claimant was also advised he was being withheld from service pending results of the investigation.

Investigation was held on May 20, 1988 and on June 6, 1988 Claimant was notified he was dismissed from service.

At the investigation, it turned out that 12 dates were in question. As the investigation progressed it became evident that Carrier's records were neither complete nor accurate. In many cases foremen testified, without benefit of supporting records, that the Claimant did not work on the dates in question. We have reviewed the records, and find they are inaccurate and incomplete. For example, the records reflect that the Claimant worked 13 days between April 1 and May 15, 1988. According to the Claimant's 13101 Forms he worked 20 days during this same period, which were not in question. The Claimant, when questioned about working on the dates in question, made statements, such as, "not certain," "not sure," "recalls working." The Claimant, however, admitted he did not work on April 22, May 6, 7, and 8. The Claimant's explanation for putting in for compensation when not actually working was that he understood that when he was lined up to work he put in for the job whether he was actually there or not. The Claimant could not recall who had told him to submit his pay in that manner.

The employees argue that the Claimant was prejudiced in the instant case and that he was not allowed a fair and impartial investigation, thus denying him due process. The employees contend that:

1. The Claimant was improperly suspended prior to the hearing.
2. Carrier should have complied with the Local Chairman's request to supply any and all pertinent information and a list of witnesses who would be present at the investigation.
3. The investigation notice indicated a pre-determination of guilt.

We believe, in this case, that the Claimant should not have been suspended prior to the investigation. He could have returned to the ranks of Sheet Metal Workers without presenting a hazard to his own safety or to the safety of others. After noting the state of Carrier's records it is difficult to see how gross misconduct could be determined prior to an investigation.

We believe Carrier was in error when they refused to furnish the Local Chairman the records they intended to use at the investigation. The Forms 13101, especially, would have indicated to the Claimant the specific dates for which he was being charged with a wrong doing. Carrier, likewise should have given the Local Chairman the complete list of witnesses; the Carrier listed one witness, seven appeared at the investigation.

We believe the investigation notice indicated a pre-determination of guilt. It reads in part, as follows:

"When you falsified form 13101 for pay periods"

Webster's Dictionary states: "False, in nearly all its senses carries an implication of deceiving." The suspension prior to the investigation and the language of the notice leads us to believe Carrier had determined the Claimant to be guilty prior to the investigation.

It is our conclusion that there were serious shortcomings in this case on the part of both parties to this dispute, (See above). The claim will, therefore, be sustained to the extent that the Claimant shall be restored to service as a Sheet Metal Worker, with seniority rights unimpaired, but without any compensation for time lost while out of service. In addition Claimant shall (if he has not already done so) refund to the Carrier the amount that he was overpaid for days that he did not actually work. In reaching this conclusion we gave consideration to the Findings in NRAB Second Division Awards 8027 and 9587, cited by the employees.

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 1st day of August 1990.



CARRIER MEMBERS' DISSENT  
TO  
AWARD 11916, DOCKET 11837  
(Referee Prover)

Dissent is required in this matter. The Majority contends that Carrier's records were neither complete nor accurate. However, the Claimant testified as follows:

- "Q. Why did you put in for compensation when you were not present on the property?  
A. Cause I was under the understanding that when I worked for...when I was lined up to work for a supervisor, I worked...I put in for that job all of the days that job requested whether I was actually there or not." (Emphasis added)

In addition, Claimant admitted that he was not present on several of the dates due to being sick and attending a funeral. On the other dates that Claimant contended that he did work, there was unrefuted testimony from the other supervisors working on those dates that Claimant was not seen working. Such admissions and testimony without any evidence in rebuttal warrants a conclusion that Carrier has provided sufficient evidence of Claimant's guilt regardless of what the Majority may think of individual record keeping.

The Majority further compounds its error by concluding that Claimant was improperly held out of service; that Claimant was entitled to pre-hearing "discovery"; and that the hearing Notice indicated pre-judgment. First, outright falsification of pay records is a serious charge and a real and legitimate hazard that the Carrier need not endure. In Second Division Award 8934, we find:

"Certainly there is a difference between venial sins and grave ones in a given category of sin. Human nature may be unable to resist cutting a corner, here and there, but that is very different than reporting that one went completely around the course when one did not traverse even any part of it. Consequently, since what Claimant admits having done, in the way of submitting false work reports, seems to involve such a greater magnitude of fraud..."

Second, "Discovery" is neither required by the contract nor is its denial improper. (Second Division Awards 6382, 11124; Third Division Awards 13671, 25021). Furthermore, the Carrier responded to the Organization's request as follows:

"Per your request find attached all pertinent information concerning the alleged rules violations of Sheet Metal Worker, W. T. Smith. Also be advised that Mr. R. D. Amsk will be a witness at this investigation." (Emphasis added)

Finally, the Notice to Claimant stated in full:


"Arrange to attend investigation in the Small Conference Room, Alliance Mechanical Facility at 1:00 p.m., Friday, May 20, 1988 to ascertain the facts and determine responsibility in connection with your alleged dishonesty when you falsified form 13101 for pay periods ending April 15, April 30, and May 15, 1988 and receiving associated pay checks on or about April 29 and May 13, 1988 which resulted in overpayment of wages in which you were not entitled. This information was discovered as a result of an audit on May 13, 1988."

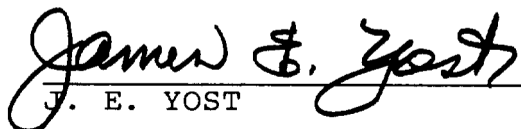
No objection to the Notice was raised upon receipt, or at the Investigation, either by Claimant or his representative. Not until the General Chairman appealed the matter four (4) months later was any objection made to the Notice. What is evident, however, is that those who were directly involved took no exception. More importantly, there is no evidence that Carrier's

discipline was based on anything other than Claimant's admissions and the other testimony of record.


The spurious dicta on Notice, "Discovery" and being held out of service do nothing but highlight a failure to evaluate the record and the Majority's acting on unsubstantiated assertions in rendering its decision. Educating the referee in this regard could have been done in a different manner, but since the Labor Member refused, this Dissent is the only means to set the record straight.

  
P. V. VARGA

  
R. L. HICKS

  
J. E. YOST

  
M. W. FINGERHUT

  
M. C. LESNIK

