

The Second Division consisted of the regular members and in addition Referee Joseph S. Cannavo when award was rendered.

PARTIES TO DISPUTE: (International Brotherhood of Firemen & Oilers  
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(Southern Railway Company

STATEMENT OF CLAIM:

1. That under the current and controlling agreement, Service Attendant D. Smith, Jr., S.S. No. 258-17-4474, was unjustly dismissed from service on August 11, 1989 by Mr. J.D. Edwards after an investigation was held on August 11, 1989.

2. That accordingly, Service Attendant D. Smith, Jr., be restored to his position with Southern Railway System, be made whole for all lost time, with seniority rights unimpaired, vacation, health and welfare, hospital and life insurance benefits be paid effective August 11, 1989, the payment of 10% interest rate added thereto and his personal record expunged of any reference to this discipline.

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.

As the result of an incident that occurred on August 11, 1989, the Claimant was dismissed from service after an Investigation was held on that date. A formal Investigation was held on August 28, 1989, wherein the Claimant was charged with falsification of an injury report. The case was brought pursuant to Rule 34. By letter dated September 5, 1989, the assessed discipline of dismissal from service was reaffirmed.

The Organization claims that the charge of "falsification of injury report" was not specific. The Organization further charges that the Claimant was entrapped by being asked to fill out an injury report for an off-duty injury. It also argues that the burden of proof was not satisfied by credible

evidence and that discipline for this minor infraction, if there was one, was arbitrary, capricious, an abuse of discretion and excessive. The facts of this case establish that the Claimant informed his Supervisor that while on his rest days, he moved heavy furniture and felt a pain in his shoulder thereafter. The record also establishes that the Claimant, when asked by the Supervisor to provide an injury report, stated that the chiropractor related the pain experienced by the Claimant to a previous on-duty injury that occurred in 1984. It was on this basis that the Claimant was dismissed.

The Board has weighed the evidence of this case. On the one hand, the Claimant did nothing detrimental to the Carrier's interest. In fact, he was dismissed prior to having the opportunity to act in a manner detrimental to the Carrier. At no time did the Claimant seek benefits due to an injury that was job related. On the other hand, the Board understands the Supervisor's reasoning in requesting that the Claimant file an injury report for what appeared to be an off-duty injury. It is obvious to the Board that the Claimant was sending mixed signals to the Supervisors as to the cause and origin of his injury. The Claimant made two statements that while inconsistent, could be considered compatible. The Claimant, through his physician, attributed the pain from his off-duty activity to an on-duty injury which occurred five years previous. In satisfying its burden of proof, the Carrier must present credible and the most direct evidence available. It must also establish by a preponderance of the evidence that the facts upon which it bases its actions and discipline are true and correct. The Board finds that in the instant case, enough facts were not available upon which the Carrier could be sustained in dismissing the Claimant. In matters of industrial capital punishment, the benefit of the doubt must be given to the Claimant where practicable. In the instant case, the Claimant was dismissed for entering a hearsay statement on an accident and injury report. The Board finds that this is not sufficient evidence to sustain the Claimant's dismissal.

While the Board finds that the Carrier did not meet its burden of proof, it also finds that the actions and words of the Claimant contributed to the Carrier's belief that the Claimant was falsifying an injury report. To wit: On August 10, 1989, the Claimant asked to be put on vacation the following day; however, he asked his Supervisor to change the vacation to show him as "off" if the doctor said that his shoulder pain was related to his last on the job injury. By these words and actions, the Board concludes that the Claimant was on a "fishing expedition" to relate the pain he incurred immediately after moving furniture with a previous on the job injury. While the Board understands that Supervisors are not competent to assess the cause and effect of previous injuries on future activities, the Board also acknowledges the role of the Supervisor as a custodian of the Rules and Regulations. Although the Board did not find that the Carrier met its burden of proof in this case, it does find that the Claimant's actions and words contributed to his hasty dismissal. For this, the Claimant will be held accountable. This Board does not dispute the findings of the Hearing Officer. However, as noted above, those findings do not sustain dismissal. As such, the dismissal of the Claimant is excessive and the Carrier is ordered to reinstate the Claimant to his former position. The Claimant is also assessed a six month suspension for the reasons stated above. Thereafter, the Carrier is ordered to make the Claimant


made whole for all lost wages and contractual benefits following the six month suspension. The Claimant's claim for wages and benefits shall be without interest and his personal record shall reflect a six month suspension for failure to cooperate with Carrier officials.

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 9th day of October 1991.