

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 Electrical Workers
(Southern Railway Company

STATEMENT OF CLAIM:

1. That the Southern Railway Company violated the controlling Agreement, particularly Rule 12, when they unjustly dismissed Telephone Maintainer M. T. Braswell from service on June 27, 1989.

2. That accordingly, the Southern Railway Company be ordered to reinstate Telephone Maintainer M. T. Braswell to service with all rights and benefits unimpaired and compensated for all monetary losses sustained account of the unjust dismissal in violation of the Agreement.

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 were given due notice of hearing thereon.

As a result of a formal Investigation held on May 24, 1989, the Claimant was found guilty of misrepresentation of the facts concerning an alleged injury and immediately dismissed from all services of the Carrier.

The Claimant was a Telephone Maintainer at the Brosnan Yard in Macon, Georgia. He has an established seniority date of November 3, 1979. During the Claimant's annual DOT physical examination on March 15, 1989 the examining physician discovered that the Claimant had a hernia. Claimant's record indicates that he had hernia surgery twice previously. When the Claimant completed the accident report he was unable to pinpoint a date on which the hernia occurred and the activity in which he was engaged in which caused the hernia but, the Claimant believed that the hernia was job related. The Claimant was told that he would have to use his medical insurance since he was unable to furnish a date, time or how the injury occurred while on duty. On March 20,

1989, the Claimant advised the Carrier that he experienced a stinging sensation on February 28, 1989 while on duty. Upon questioning, the claimant advised the Carrier that he did not really know when he got the hernia but wanted to submit a written statement as to the time and date of the alleged injury. On the basis of the Claimant's conflicting statements an investigation was conducted.

General Safety Rule 1000 states that an employee who sustains a personal injury while on duty must report it before leaving Company premises to his immediate supervisor or to the employee in charge of the work. A review of the Claimant's testimony establishes that he did not know when he received the hernia thus, he was not able to report the date on which the injury occurred. In filling out the report after the doctor determined that the Claimant had a hernia, the Claimant provided the date he recalled a "sting" and "stings" after that date. A review of the claimant's testimony establishes that he erred in judgment. A statement to the physician including the type of pain the Claimant felt, a description of his work, the date the pain was felt and the Claimant's previous history with hernia could have resulted in a statement from that physician that the hernia was job related. What appeared to be the Claimant's random selection of a date on which the hernia occurred is what led the investigation. Thus, the facts generated by the claimant led the Carrier to properly call for an investigation.

It is not for this Board to determine whether or not the Claimant sustained an on the job injury. The only question before the Board is whether or not the claimant misrepresented the facts concerning an alleged injury. The Organization produced no evidence whatsoever establishing that the claimant informed anybody, including co-workers or Carrier officials, of the alleged "stings" that began allegedly on February 28, 1989. It is apparent, however, that the hearing officer did not give adequate weight to the fact that the Claimant had experienced hernia surgery related to on the job injuries in 1983, and in 1984. Adequate weight was also not given to the fact that the Claimant's duties require him to perform heavy lifting in the discharge of his duties. Noting that the Claimant is not charged with failure to comply with General Safety Rule 1000, the only question before the hearing officer to determine was whether or not the claimant knowingly falsified the accident report by stating that the hernia occurred on February 28, 1989. In both his conversations with his supervisors and in his testimony at the investigation, the Claimant was never definitive as to the time and place that the injury occurred. The Claimant's truthfulness is demonstrated by his failure to assign a date to the time of the injury when he initially filled out his accident report.

Questions of falsification and fraud require proof of intent. Proof of intent can be established by circumstantial evidence. Likewise, circumstantial evidence can establish that there was no proof of intent. In the instant case, the Board finds that the Claimant may have created the impression, by his uncertainty, that he was falsifying the accident report. However, the circumstantial evidence creates sufficient doubt that the claimant acted fraudulently. In order for a claim to be sustained in its entirety, in a disciplinary action, a Claimant must have clean hands. The Claimant's uncertainty and his failure to secure a medical determination that his injury was job related belied the fact that he has "clean hands" by the impression that his actions created. Absent proof of intent to falsify or fraudulently

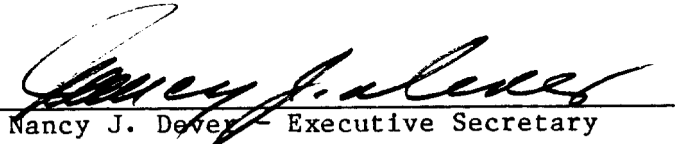
make a claim, and absent clean hands on the part of the Claimant, the Board will sustain the claim, in part. The Claimant will be reinstated to the service with seniority unimpaired, but without pay for time lost. In arriving at this decision, the Board takes into account the following mitigating circumstances: 1) the Claimant did not pursue the claim; and 2) the Claimant maintained an exemplary work record for nine and a half years.

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 October 1991.