

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 12527
Docket No. 12497
93-3-92-2-19

The Second Division consisted of the regular members and in addition Referee Kay McMurray when award was rendered.

PARTIES TO DISPUTE: (International Association of
(Machinists and Aerospace Workers
(Chicago and North Western
(Transportation Company

STATEMENT OF CLAIM:

- "1. That the Chicago and North Western Transportation Company (hereinafter referred to as the "Carrier") violated the applicable provisions of Rule 35 of the July 1, 1921 Joint Agreement as specifically amended by Agreement dated July 1, 1979 when, subsequent to an investigation which was neither fair nor impartial it unjustly and improperly dismissed from service Proviso Diesel Shop Machinist E. Loveless (hereinafter referred to as the "Claimant") from service.
2. That accordingly, the Carrier be ordered to
 - (a) Restore Claimant to service with all seniority and vacation rights unimpaired.
 - (b) Compensate Claimant for all time lost from service commencing November 30, 1990.
 - (c) Make Claimant whole for all health and welfare insurance benefits lost while dismissed from service.
 - (d) Expunge from Claimant's personal record any and all reference to the investigation proceedings and the discipline subsequently imposed."

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 were given notice of hearing thereon.

Claimant was employed as a Machinist at the Carrier's Proviso Diesel Shop facility. His assignment on November 4, 1990, included extracting of oil samples from various locomotives. On the foregoing date, he extracted samples from seventeen (17) locomotives. Each sample was placed in a separate small container, labeled, and placed in a box on the dead side of the shop. The box was then sent to the laboratory by someone for testing of each individual sample. The computer test reports indicated that while most of the tests were normal, three of the read outs were almost identical to the tests on three other locomotives. Specifically, the following list of locomotives had normal profiles. Listed beside them are the three units with abnormal profiles for the unit but with computer read outs almost identical to the locomotives in the left hand column.

NORMAL

6840	6893 Almost identical to 6840
4127	4187 Almost identical to 4127
5075	4103 Almost identical to 5075

From the foregoing the Carrier concluded that the oil samples had been falsified by Claimant. Accordingly, he was directed to attend a formal investigation in connection with the following charge:

Your responsibility for failure to properly perform your duties when you falsified oil samples on November 4, 1990, during the hours of 3 P.M. to 11 P.M. while you were employed as a Machinist, Job 124, at Proviso Diesel facility.

The investigation had two postponements at the request of Claimant and was held on November 27, 1990. Following the investigation, Claimant was dismissed from service with the

Carrier on November 30, 1990. The Organization raises several objections to the manner in which the investigation was conducted and claims that Claimant was not afforded a fair hearing as required by the contract. After a thorough review of the record, this Board concludes that such a claim lacks merit. The hearing was conducted in an appropriate fashion. The parties were fairly allowed to present evidence and question witnesses. Their rights were properly protected.

The claim was progressed on the property through the normal appeal processes and is now before this Board for disposition. The Organization requested and was granted a hearing before the Board. The parties attended and defended their respective positions.

Claimant vigorously maintains his position that he did not deliberately, nor willfully falsify the oil samples. He testified that he had been on the job "over a month and a half" and had also taken oil samples at various time spans during his thirteen years of employment. He had never had any problems taking the samples and had never been accused of falsifying a lab sample. A Carrier witness stated that to the best of his knowledge there had not been any problems with the Claimant's performance on oil jobs. In the Claimant's view some kind of mistake in testing must have taken place. He points out that the Carrier maintains that on the night in question he took oil from unit 4127 and used that oil to falsify unit 4187. Claimant testified that there had to be some kind of error because at the time the 4187 unit came in cold and he tested it before he tested 4127. Consequently, he would not have used 4127 oil as a sample for unit 4187. That testimony was given at the hearing and again at the Referee hearing before this Board. The Carrier did not rebut or acknowledge the testimony.

The Organization takes exception to the fact that custodial control of the oil samples is very lax and could easily be tampered with. Further, they point out that the individuals who did the testing did not appear as witnesses. The Manager of Testing for the Carrier did appear and gave a good description of procedures in the lab, but did not testify regarding personal knowledge of the test under consideration. He relied on the normal procedures and computer print outs for his judgement. There is no evidence in the record regarding the custody of the samples after Claimant placed them in a box on the dead side of the shop. We do not know how the samples were transferred to the laboratory nor when they arrived. The evidence indicates only that the samples were tested on November 6, two days after Claimant placed them in a box, which could easily be tampered with, on the dead side of the shop. The use of laboratory tests in disciplinary matters must be accompanied

by evidence that the tests are accurate and can be relied upon as proof. In this case there is no evidence of proper custodial control of the samples prior to the testing two days after the samples were taken. That fact, coupled with the testimony of the Claimant and the unanswered questions he posed, raises doubt regarding the validity of the Carrier's proof.

Based on the foregoing and the entire record there is insufficient evidence for this Board to conclude that Claimant did in fact falsify the records. The Carrier simply failed to sustain its burden of proof that the Claimant was guilty as charged.

In accordance with the parties Agreement re Rule 35 (j), the payment for wages lost will be reduced by any amount earned by Claimant during the period that the disciplinary action was in effect.

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 - Secretary to the Board

Dated at Chicago, Illinois, this 21st day of April 1993.