

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

**Award No. 14003
Docket No. 13873
09-2-NRAB-00002-080023**

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

**(Brotherhood Railway Carmen Division - TCU
PARTIES TO DISPUTE: (
(Colorado & Wyoming Railroad Company**

STATEMENT OF CLAIM:

- “1. That the Colorado & Wyoming Railroad Company violated the January 1, 1980 agreement, ‘Grievances’, of which the Brotherhood of Railway Carmen on the Colorado & Wyoming Railroad are covered.**
- 2. The Colorado & Wyoming Railroad Company did unjustly, arbitrarily and capriciously withhold Carman Leroy Poindexter from service pending investigation on March 6, 2007, and as a result of disciplinary hearing held on April 4, 2007, subsequently dismissed him from service on April 13, 2007.**
- 3. That the Colorado & Wyoming Railroad Company be ordered to compensate Carman Poindexter as follows:**
 - (A) Returned to service with seniority rights unimpaired and paid for all lost time commencing with March 6, 2007, until returned to service.**
 - (B) Made whole for all vacation rights.**
 - (C) Made whole for all pension benefits, including railroad retirement and unemployment insurance.**
 - (D) Made whole for all health, welfare and insurance benefits.**
 - (E) Pay for all holidays, overtime pay and all other compensation he would have received from time withheld from service until returned to service.**

(F) Pay for all back pay and signing bonus from contract signed on effective date June 1, 2007.

4. Carrier is in violation of time limits in that it exceeded the time limit by failing to respond to original claim within the time limit rule.”

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 employee 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.

The issue before the Board is whether the Carrier proved with substantial evidence of a credible nature that the Claimant was dishonest in providing false information on a personal injury report and, if so, whether the discipline of dismissal was warranted. However, before reviewing the merits of the dispute, the Board must address the Organization's procedural contention that the Carrier violated the time limit provisions during the handling of the appeal on the property.

The Organization has taken the position that the Carrier's response at the final level of appeal was untimely and warrants a sustaining award on that basis. Specifically, the Organization notes that the General Chairman appealed the Claimant's dismissal to the General Manager on August 24, 2007 but that the General Chairman did not receive a response until November 5, 2007, beyond the 60-day time limit set forth in the parties' Agreement.

The Carrier states that the response to the General Chairman was sent on September 27, 2007 via Certified Mail. During the handling of the case on the property, the Carrier furnished the Organization with a copy of the certified mail receipt from the United States Postal Service (USPS) indicating that the letter was placed in the hands of the USPS on September 27. The Carrier also entered into the record the "Track and Confirm" search result which also established that the letter was accepted by the USPS on September 27.

The Board reviewed this evidence and is satisfied that the letter was properly addressed to the General Chairman and was indeed received by the USPS on September 27, 2007, within the 60-day time limit. While it is true that the USPS did not deliver the letter until November 5, 2007, such delay was attributable to the USPS and not the Carrier. Numerous Awards of this Board have held that the Carrier is in compliance with the time limit Rule if it can prove that it mailed the notice within the applicable time limits and that the Carrier cannot be held responsible for the actions of the USPS. (See Second Division Awards 7027 and 8694, among others.) Accordingly, the Board finds that the Carrier demonstrated that it fully complied with the time limits set forth in the Agreement in responding to the General Chairman.

The Claimant was employed as a Carman in Pueblo, Colorado, and was notified to attend a formal Investigation:

" . . . to determine the facts and place responsibility, if any, in connection with your alleged on-duty injury as described according to your personal injury report received by this office on March 6, 2007. It is alleged that you were dishonest when you provided false information that the injury took place on January 25, 2007 or February 7, 2007, which is contrary to information that the injury did not occur while you were working or on company property."

The Claimant was present and represented at the Investigation. Following the Investigation, the Carrier advised the Claimant that he was dismissed from service. The Board was furnished information, which confirmed that after his dismissal, the Claimant retired.

The Carrier entered into the record of the Investigation, a copy of a Personal Injury Report signed by the Claimant and dated March 1, 2007 wherein the Claimant stated that on January 25 and February 7, 2007 he “impacted elbow” while working on cars identified as “TYOX” at the Holland Rail Service. The report also indicated that the Claimant had been treated for this injury by EmergiCare and Parkview Medical Center and listed Dr. Farnworth as the treating physician.

At the Investigation, Claimant’s Manager (Mayo) testified that the Claimant worked on the cars in question on January 24 and 31, 2007, which differed from the dates the Claimant had entered on the Personal Injury Report. The Claimant’s explanation for this discrepancy was that he had been working on these cars during two different weeks and that he was reporting that the injuries occurred during those weeks as opposed to the actual dates. The Board finds that the Carrier proved that the information that the Claimant stated on the report relative to the dates that he reportedly was injured was not a factual representation based on the testimony and information supplied by Manager Mayo. If the Claimant was not sure of the exact dates on which he had been injured, it was incumbent upon him to so note this on the Personal Injury Report as opposed to supplying false dates.

The second part of the charge against the Claimant was that the injuries reported on the Personal Injury Report did not occur while the Claimant was on duty or on the Carrier’s property. In this respect, the Board reviewed the testimony of Dr. Caughfield who appeared at the Investigation, as well as the medical documentation that was entered into the investigatory record. It appears that the Claimant first sought medical attention for a swollen and painful elbow on February 1, 2007 at the EmergiCare Medical Clinic, which was prior to one of the dates (February 7, 2007) that the Claimant had indicated on the Personal Injury Report. The EmergiCare report states that the Claimant was “unaware of having done anything unusual day prior at work or at home” and also “No prior similar episode.” Dr. Caughfield testified that his review of the records indicated that the Claimant’s condition was not consistent with an incident of injury. The doctor based his opinion on the fact that clear fluid was drawn from the Claimant’s elbow on February 1, and that if the condition were due to an injury, he would expect to find blood in the fluid. Dr. Caughfield also reviewed a report of an x-ray taken on February 12, 2007, which found no “fracture or joint effusion” and that the Claimant suffered from “degenerative joint disease” or “bursitis versus contusion.” Dr. Caughfield also

testified that the surgery and treatment that the Claimant received by Dr. Farnworth at the Parkview Medical Center was due to an infection that developed in the Claimant's elbow after his initial treatment on February 1, 2007. In sum, Dr. Caughfield's medical opinion was that the Claimant had developed bursitis that was not injury related.

The Claimant on the other hand insisted that he injured his elbow while on duty and presented witnesses who testified that at different times, the Claimant bumped his elbow. The Organization also pointed out that Manager Mayo testified that on January 31, 2007 (not either of the dates on the Personal Injury Report) the Claimant told him that he had bumped his elbow. The Board finds that the issue is not whether the Claimant bumped his elbow on certain occasions while working but rather, as the Claimant attested to on the Personal Injury Report, that he impacted his elbow to such an extent that he injured himself and required medical treatment. Based on a review of the record, in particular the medical documentation and Dr. Caughfield's testimony, the Board concludes that the condition that the Claimant was treated for was not caused by a work-related injury as the Claimant indicated on the Personal Injury Report.

The Carrier charged the Claimant with being dishonest in providing false information on the Personal Injury Report. The Board finds that in reviewing the record, the information contained on the report was false in several important respects as noted above. Also, based on the timing of the filing of the report, i.e., several weeks after the incidents purportedly occurred and after the Claimant had received medical treatment, leads to the conclusion that the Claimant purposely falsified the report and was therefore, dishonest.

Having found that the charges against the Claimant were proven, the Board must decide whether the discipline of dismissal was warranted in this case, especially in view of the fact that the Claimant was a long-term employee. The Board has long held that dishonesty, in any form, is a serious offense because it impacts the basic tenet of trust that is inherent in the employment relationship. While the Board recognizes that the Claimant has many years of service, the Board cannot find that the Carrier's action in dismissing the Claimant for this dishonest act was arbitrary or capricious. Accordingly, the Board will not disturb the assessment of discipline in this case.

Form 1
Page 6

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AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 8th day of May 2009.