

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD  
SECOND DIVISION

Award No. 12454  
Docket No. 12381  
92-2-91-2-174

The Second Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

PARTIES TO DISPUTE: (International Brotherhood of Firemen & Oilers  
(The Denver and Rio Grande Western Railroad Company

STATEMENT OF CLAIM:

1. That in violation of the current Agreement, Laborer R. Duran, Grand Junction, Colorado, was unfairly dismissed from service of the Denver and Rio Grande Western Railroad Company effective February 13, 1991.

2. That accordingly, The Denver and Rio Grande Western Railroad Company be ordered to make Mr. Duran whole by restoring him to service with seniority rights, vacation rights and all other benefits that are a condition of employment, unimpaired, with compensation for all lost time plus 6% annual interest; with reimbursement of all losses sustained account loss of coverage under Health and Welfare and Life Insurance Agreements during the time held out of service, the mark removed from his record and reimbursement of all lump sum payments and/or back pay as a result of settlement of Articles contained in the Organization's Section 6 Notice dated May 27, 1988. (Mr. Duran was unilaterally reinstated on May 1, 1991).

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.

Claimant was dismissed for allegedly forging his supervisor's signature on insurance claim forms on July 18, 1990, and January 15, 1991. Both forms were from American Health and Life Insurance Company. One is titled, "Progress Report for Disability Benefits;" the other is titled, "Progress Report for Disability Benefits Creditor Insurance." Each form has a section entitled, "Statement of Employer," which asks for the employee's name, dates away from work, original date of employment, whether disability was due to a reoccurrence of an illness, and whether disability was due to employment. On each form, Claimant filled in their information and printed the name of his foreman.

At the Investigation, Carrier presented a written statement from Claimant's doctor's medical records and disability clerk. The clerk's statement indicated that she had been filling out these insurance claim forms for Claimant on a routine basis since January or February 1990. During the week of January 23, 1991, she noticed that a recent letter from Carrier to the doctor indicated that Claimant had been performing all of his job duties for quite sometime. The clerk recalled completing an insurance form the prior day, retrieved the form and compared it to the letter. Observing what she believed to be a contradiction between the employer information on the claim form and the letter, the clerk telephoned Claimant's foreman. The clerk did not testify at the Investigation.

Claimant's foreman testified at the Investigation. He identified the two claim forms, stated that although his name was written on the forms, he had not signed them, and further stated that he had not authorized Claimant to complete the forms or sign his name. Claimant admitted filling in the form and "falsifying" his foreman's signature on the form. When asked to explain his actions, he stated:

"No, sir, there was never a reason, one that I can come up with today, no sir, I can't. I can come up with a hundred excuses but I won't use none. It was never intended to harm anybody, it was never intended to create no problems. I feel very bad for what happened, there's no excuse. I personally, at the time, I didn't think it was wrong at the time. This past week I've talked to a lot of people, professional people, they've explained to me what could have happened. They've also explained that the fact that I didn't forge his name is not all that bad, even though I did put his name is bad enough. It's not my nature to do this kind of thing. I'm not denying anything that I've done, there's no reason for doing it other than I didn't think it was wrong at the time that I done it."

The Organization contends that Claimant was denied a fair Hearing because he was unable to cross-examine the medical records clerk. In the Organization's view, reliance on the clerk's written statement was improper.

The Organization further argues that Carrier failed to prove that Claimant intended to defraud Carrier or the insurance company. The Organization observes that the forms were for private insurance policies which Claimant had purchased independently of his employment and maintains that the insurance company was aware that Claimant was enrolled in Carrier's wage continuation program and did not lose any pay due to his injury, and that Claimant was entitled to the insurance benefits under the terms of his policies. The Organization contends that completion of the employer's part of the claim

forms was a formality which had been handled routinely for many months and that Claimant printed his foreman's name when he was unable to locate the foreman to secure his signature. The Organization argues that under the terms of the insurance policies, Claimant would have been entitled to the benefits regardless of whether the employer portion of the form had been completed.

Carrier argues that the use of the clerk's written statement was proper. Carrier observes that it had no power to subpoena the clerk, who was not a Carrier employee, to testify at the Investigation.

Carrier contends that much of the foundation for the Organization's argument that Claimant did not intend to falsify the insurance forms lies outside the record of the Investigation and cannot be considered by this Board. Carrier argues that Claimant admitted, at the Investigation, that he falsified his foreman's signature and that this admission coupled with the other evidence provides ample proof of the offense with which Claimant was charged.

Carrier characterizes whether Claimant gained anything by falsifying his foreman's signature or was entitled to the insurance benefits anyway as a matter between Claimant and his insurance company. Carrier observes, however, that the language on the insurance forms and Claimant's conduct suggest that Claimant believed that he would not receive the insurance benefits if he did not misrepresent that he was completely out of service, even though he was working in a light duty status and performing almost all of his regular job duties.

Carrier contends that the offense of dishonesty is so serious that the punishment given was not arbitrary and capricious, particularly in light of Carrier's unilateral reinstatement of Claimant. Carrier further argues that Claimant is not entitled to interest or lost health and life benefits as these are not provided for in the Agreement.

We find the Organization's objection to the medical records clerk's written statement unpersuasive. The clerk was not an employee of the Carrier and it is well established that the use of written statements by such individuals who cannot be compelled to testify in an investigation is proper. See, e.g., Third Division Award 25411.

Carrier and the Organization, in their Submissions, make numerous assertions regarding Claimant's intent in writing his foreman's name on the insurance forms. The record developed at the Investigation, however, contains very little evidence regarding Claimant's intent. Claimant admitted that he wrote his foreman's name on the forms but disclaimed any intent or belief at the time that doing so was improper. The medical records clerk indicated in her statement that completion of the forms was routine. Carrier speculates, based on the language on the forms, that Claimant sought to gain an advantage with the insurance company by completing the employer's portion himself and feared that submitting it to his foreman for completion and signature would prejudice his receipt of insurance benefits. There is, however, no evidence in the record of such a motive.

It is also true that Claimant, who chose to proceed with the Investigation without representation, did not develop any evidence that would indicate that the insurance company was aware of Claimant's enrollment in the wage continuation plan and found Claimant entitled to benefits regardless of his wage continuation. The burden of proof, however, is on Carrier. One of the elements that Carrier must prove is that Claimant intended to defraud. In the absence of such intent, Claimant's actions are the product of honest mistake. See Second Division Award 8659.

The essence of Claimant's testimony was that his actions were the product of an honest mistake. Carrier introduced no evidence to the contrary. Carrier's speculations cannot substitute for the substantial evidence required to support the imposition of discipline. The discipline must be set aside.

We emphasize that we do not hold that Claimant's discipline must be rescinded merely because Claimant denied intentional wrong-doing. Rather, the discipline must be rescinded because Carrier failed to offer substantial evidence, either direct or circumstantial, that Claimant acted with fraudulent intent.

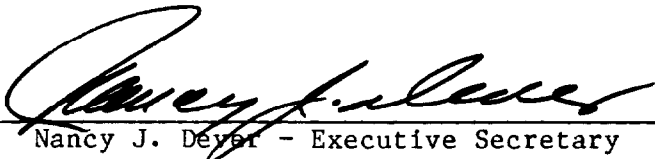
Carrier must rescind Claimant's discipline and compensate Claimant for his lost wages. Claimant is not entitled to damages, such as interest, which are not provided for in the Agreement. See, e.g., Third Division Award 21426; Second Division Award 11769; Second Division Award 11971.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

Attest:

  
Nancy J. Deyer - Executive Secretary

Dated at Chicago, Illinois, this 14th day of October 1992.

CARRIER MEMBERS' DISSENT  
TO  
AWARD 12454, DOCKET 12381  
(Referee Malin)

The only explanation for the disposition made in this case is that it was rendered by a referee new to the arbitration process in this industry who admittedly relied on argument made outside the record. However, while such may tend to explain this referee's action, such does not justify that this decision effectively exonerates an individual who frankly admitted that he did falsify his foreman's signature.

Claimant had been off duty due to an injury and returned to active duty on July 23, 1990. Claimant lost no compensation during the period he was off duty. However, beginning in January of 1990, Claimant began to process insurance forms through his doctor for payment under a policy with American Health and Life Insurance Company. These forms required certification by his employer that he was unable to work which were then completed and processed through his doctor. This continued until January of 1991 or six month after Claimant returned to active duty. When the Carrier investigated, it found that the Claimant had inserted his supervisor's signature in processing these insurance forms.

The charge made against Claimant was that he was dishonest by "falsifying signature of Carrier Official Barry L. Evans on insurance claim forms..." In the investigation Claimant testified as follows:

"Q. Mr. Duran, at this time I would like for you to review Exhibit B and C. Mr. Duran, in reviewing Exhibit B and C did you fill in the spaces and falsify Barry L. Evans signature on American Health and Life Insurance

claim forms in the space designated 'Statement Of Employer - to be completed and signed by employer'?

A. Yes, I did."

\* \* \*

"I realize today that it is wrong. I didn't think at the time that I done it that it was, I knew it wasn't right but I didn't think it was that wrong when I done it."  
(Emphasis added)

Claimant's admission, upheld by this Majority, should have ended the matter.

Third Division Award 28484:

"Where, as here, there is an admission of guilt, there is no need for further proof."

Instead, after properly noting that arguments about Claimant's intent were raised in the Submission to this Board, the Majority then states at page 3:

"The record developed at the Investigation, however, contains very little evidence regarding Claimant's intent."

Obviously, to argue intent presupposes an admission to the charge. And Claimant and his Organization, at the Investigation, were attempting to disprove the charge. Further, to argue intent is an argument in mitigation for the penalty assessed. It has nothing to do with the establishment of guilt in this forum.

The Majority's statements that:

"...Carrier must prove...that Claimant intended to defraud"

"...Carrier failed to offer substantial evidence... that Claimant acted with fraudulent intent"

finds Claimant not guilty of a charge that was never made. They also find Carrier deficient in substantiating something that had nothing to do with the charge.

Even when consideration is given to Claimant's 24 years of service and prior clean discipline record, a 2 1/2 month suspension for "falsifying signature of Carrier Officer..." is neither excessive nor arbitrary.

We Dissent.

P. V. Varga  
P. V. Varga

R. L. Hicks  
R. L. Hicks

J. E. Yost  
J. E. Yost

M. W. Fingerhut  
M. W. Fingerhut

M. C. Lesnik  
M. C. Lesnik

