

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 13865
Docket No. 13734
05-2-03-2-63

The Second Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

(International Machinists and Aerospace Workers and
(Aerospace Workers

PARTIES TO DISPUTE: (

(Union Pacific Railroad Company

STATEMENT OF CLAIM:

"That the Union Pacific Railroad Company (hereinafter referred to as Carrier or Company) violated Rule 32 contained in the Agreement dated June 1, 1960, between the International Association of Machinists and Missouri Pacific Railroad Company when it dismissed Machinist J. L. Dyer, (hereinafter referred to as claimant) from service of the Carrier on March 24, 2003.

That the Union Pacific Railroad Company be ordered to reinstate the Claimant, expunge all information pertaining to this dispute from his personal record and compensate him for all lost pay as well as give him credit for all benefits lost as a result of the dismissal."

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 background for this dispute rests upon the late filing of an injury report on October 22, 2002. On that report, the Claimant indicated he sustained an injury while working in the month of July.

The Carrier notified the Claimant that an investigation would be held over dishonesty and if proven, could result in dismissal. The investigation was completed on February 13, 2003. Subsequently, the Claimant was found guilty of violating Company Rules 1.1.3 – Accidents, Injuries and Defects; Rule 1.13 – Reporting and Complying with Instructions; Rule 1.6 – Conduct, Part 1 – Careless of the Safety of Themselves or Others; Part 4 – Dishonest; and Part 5 –Immoral. He was dismissed from service.

The Organization has argued that the Carrier violated Rule 32, depriving the Claimant of his rights to a fair and impartial investigation. Specific thereto, the Carrier did not provide a precise charge; the hearing officer met and discussed evidence with a witness; and there was an incomplete transcript with inaudible parts. On merits, the Organization argues that the Claimant was neither dishonest nor immoral relative to his injury report. It maintains that a careful review will demonstrate that the Claimant did damage his spine while removing fuel injectors during the month of July and the medical evidence and testimony supports his honesty.

A study of the procedural issues finds them lacking in proof. The notice is precise and there can be no doubt that the Claimant was fully informed of the charges being brought against him, including the incident, Rules and seriousness of the charges. There is no proof in this record that the Hearing Officer and a Carrier witness had previously met and discussed anything related to the investigation. Lastly, the missing information was from a tape recording problem and the Board finds it minor and insubstantial. Therefore, the merits must be considered.

On merits, the Board has carefully reviewed the full testimony and evidence. There is no doubt from this record that the Claimant violated Rules 1.1.3 and 1.13 and he testified to that effect. The Claimant gave testimony that he sustained an injury using a slide hammer in July and thereafter asked for a better tool for removing or replacing nozzles. It is clear from the record that although he is unsure

when this occurred, the likely date for the event is July 12, since the testimony is that he used the new tool ordered thereafter on July 26, the only two dates when he was pulling nozzles. He filed his injury report on October 22, 2002. He failed to comply with Rules and failed to promptly report an injury.

The Carrier also alleged a violation of Rule 1.6, Part 1 in being Careless of his and others' safety. The evidence indicates that the Claimant was advised by his physician on September 30th to remain off work until October 22, 2002. The Claimant testified that he came to work October 1st and continued to work that week until October 5, 2002. He is clearly guilty of the Rule.

This case hinges on the last two charges, of an alleged violation of Rule 1.6, Part 4, dishonesty and Part 5, being immoral. The allegation by the Carrier is that the Claimant is not just involved in a late report of an injury, but also clear dishonesty and immoral actions in claiming the cause of the injury was job related, when it was not. The Carrier points to testimony from his direct Supervisor, that the Claimant reported absolutely nothing to anyone. The record supports the fact that the Claimant never informed any official or fellow employee of his alleged injury. The Carrier argues that the Claimant's injury report listed improper dates. The Carrier further notes that he was asked by his physician if this was a trauma injury and he said no, but the injury report indicates it was caused by trauma. The Carrier is also alleging that the cause could be a degenerative disease and not a work related injury.

We have reviewed the timeline, the Claimant's testimony that if his physicians had asked if it was work related, he would have responded. We have studied the full record with regard to the injury itself, the Claimant's pain and his decision to report it when he finally knew what the injury was. The Claimant testified that the injury occurred on-the-job. He states that following the cause of the injury being a slide hammer tool for removing nozzles, he asked for a better tool and got one. The Claimant testified that he did not know what the medical problem was until he got the results. In seeing a doctor on September 30, he worked the next week and then went on his long awaited vacation from October 8 to the 19, 2002. It was when he returned he made the injury report because he was finally sure that the problem was job related.

There is insufficient probative evidence to conclude that the Claimant was dishonest and immoral. The Carrier advocates that this is similar to a large number

of prior Awards, particularly those that hold that a late report is the equivalent of a false report. There is always that suspicion, but suspicion is not enough. In this case we have a twenty eight (28) year employee with no record of prior discipline. There is no persuasive evidence that his actions were not what he testified to, although there is strong speculation from the Carrier that the degenerative disc disease is what caused the pain and that the on-the-job injury report was dishonest and immoral.

The Board has carefully reviewed the full transcript for substantial probative evidence that this late report was equal to a false report. This is not like Public Law Board 5423, Award No. 5 where the Carrier had previously been told that the injury had not been job related and found that the injury was under treatment for several prior months. Nor is this like Public Law Board 5839 Award 6, where the Claimant said he wasn't injured, and later claimed an on-the-job injury and where the Award states that "... the transcript reveals that the Claimant was guilty of ... falsifying the personal injury ...". In other prior Awards, such as Public Law Board 5093, Award 8, the medical evidence indicated that the injury occurred years earlier. In this record, the Claimant's behavior clearly violated several Rules, but was not persuasively shown to be dishonest or immoral. There is reason to find that the Claimant's injury was job related, that he was confused about dates and that he reasonably explained the late report following an MRI.

Accordingly, given the Claimant's twenty eight year unblemished record and the lack of persuasive evidence of dishonesty and immoral behavior, the Board finds the penalty excessive. The Claimant shall be returned to service if this is medically warranted, but without compensation for any time lost.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 7th day of September 2005.