

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13945
Docket No. 13797
NRAB-00002-060014
(06-2-14)

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

(International Machinists of Machinists and Aerospace
Workers

PARTIES TO DISPUTE: (

(Union Pacific Railroad Company

STATEMENT OF CLAIM:

“Dispute – Claim of Employee:

That the Union Pacific Railroad Company (hereinafter referred to as Carrier or Company) violated Agreement dated October 1, 1993, as amended, between the International Association of Machinists and the Union Pacific Railroad Company when it unjustly dismissed Machinist E. Blanc (hereinafter referred to as claimant) from the service of the Carrier.

Relief Requested:

That the Union Pacific Railroad Company be ordered to reinstate the Claimant, compensate him for all lost wages, and give back to him all lost benefits.”

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 central issue before this tribunal is dishonesty in reporting an injury. The Claimant is a long term employee who reports that he was first aware of an on-property injury twenty seven days after it occurred. The history of this dispute begins December 15, 2005, when the Claimant testifies that he stepped off an engine and his right foot landed wrong with all of his weight falling on the knee. The Claimant thereafter continued to work, reported to a doctor for tests and on January 11, 2006 submitted an injury report to the Carrier.

By letter dated January 13, 2006, the Claimant was notified to attend an investigation to determine the facts over the allegation that:

“ . . . at approximately 0700 hours on December 16, 2005, you allegedly failed to properly report to an on duty personal injury and were dishonest when questioned by your first line supervisor. This is a possible violation of Rule 1.6 Conduct, Part 4 Dishonest, Rule 1.1.3 Accidents Injuries and Defects, Rule 1.2.7 which is Furnishing Information and Rule 1.13 Replying and Complying With Instructions as contained the General Code of Operating Rules effective April 3rd, 2005.”

An Investigation was conducted February 7, 2006 following one postponement. By date of February 15, 2006 the Carrier determined that proof had been obtained to substantiate the charges. The Claimant was assessed a Level 5 discipline and dismissed from the Carrier's service.

The Organization argues both procedural error and a failure of the Carrier to prove the charges. On procedure, the Organization maintains that the charges were imprecise; that the Claimant was not given a proper notice to such a degree that the Organization was unsure how the Claimant was dishonest; that the

conducting officer met with Carrier witnesses; and that in total disregard of the Claimant's rights, Superintendent Florence prepared and dismissed the Claimant a full day before he received the transcript.

In addition to the serious violations of Rule 39 wherein the Claimant was denied his Agreement rights to a fair and impartial Investigation, the Organization argues on merits that the Claimant acted appropriately. The Claimant was fully honest, telling his Supervisors and others on December 15, 2005 that he had hurt himself. Unsure of what it was that had physically occurred when he stepped down and believing that it was nothing serious, he went about working and looking into the problem. The Organization asserts that there is conflicting testimony. It asserts that the Claimant attempted to support the Carrier, reporting the injury only when he was told by a physician that he had an injury. In fact, when told it was a fracture where he could no longer work, he made an immediate injury report. The Organization argues that there is no proof of dishonesty. At worst, this is a late report and dismissal is not appropriate.

The Carrier argues that there were no procedural errors and this case relates to clear dishonesty. The Claimant was issued a proper notice with a precise charge. The conducting officer did not meet with witnesses and the determination of dismissal followed a review of the transcript. On merits, the transcript contained proof that the Claimant told everyone on December 15th and thereafter that he hurt his knee, but had no idea how. Suddenly, when he found out that he could no longer work twenty seven days later, he knew exactly when and how he was injured and that it took place on the Carrier's property. The Carrier holds that the Claimant was dishonest and dismissal appropriate.

This Board has fully considered the procedural issues and the merits by review of the full record and transcript. On procedural issues, the Board finds no support in this record for error in precise charge or proper notice. Both were in full compliance with Rule 39. The evidence of record does not support discussion between the conducting officer and Carrier witnesses and testimony discounting its occurrence. As for Superintendent Florence preparing and mailing the dismissal letter the day before he received the transcript, the record only supports that it was sent before he received the mailed transcript. The Board finds rebuttal and proof

that he received the e-mail transcript on February 13th, reviewed it on February 14th and issued his decision on February 15, 2006, the day prior to receipt of the hard copy of the transcript. There is nothing in this record to find any procedural error.

On merits, the Board has studied the testimony of Supervisor Rosales. He unmistakably states that on the date of the injury he asked the Claimant why he was limping and most importantly, if it was an on-the-job injury. Specifically, in response to a question asking what the Claimant said when he was confronted by Supervisor Rosales as to why he had a limp;

“Answer: And his response was, well, I’ve been having knee problems. And my next question was did you get hurt at work?”

Question: And his answer was?

Answer: No”

The Board finds also that Machinist Garza testified that the Claimant was “hobbling” and he asked the Claimant how he had been injured. The Claimant told Mr. Garza that “he really didn’t know”. Machinist Garza testified the Claimant never informed him that he was injured at work. Similarly, Electrician Aguilar testified he also noticed limping and that the Claimant was moving “real slow” on some date after December 15, 2005 and when asked what had happened, the Claimant stated that he didn’t know.

The Board notes that the Claimant reports he didn’t know how he was hurt at the time he discussed the issue with these three Carrier witnesses. However, twenty seven days later, on January 11, 2006, after the results of the MRI, the Claimant found out that he had a fracture and immediately filed an injury report stating that on December 15, 2005 at approximately 11 a.m. at the El Paso Shop while torch cutting he “slipped off step” and fractured his knee.

The Board has carefully studied the testimony and facts, in light of the Rules alleged violated. There is substantial evidence to support the Carrier's findings of guilt. Unfortunately, the record supports the Carrier's findings that this is more than a late report. The credibility assessments can not be deemed questionable in this case. Credibility decisions rest with those who observe testimony, unless clearly prejudiced or capricious; which is not the case here. The evidence indicates no support for the Claimant's lack of knowledge that he had an injury on the property. He was seeing a doctor, taking x-rays and was prescribed pain medication. The record does not support the Claimant's lack of knowledge that he had injured himself until he filed the report.

The Board must find that the Carrier's decision on guilt is substantiated by the testimony and evidence. The Carrier's decision to dismiss the Claimant for the dishonesty will not be disturbed under these circumstances wherein the Claimant told his co-workers that he had no idea how he had been injured; and never suggested that it was an on-duty injury until he filed his injury report wherein he knew full details. This is clearly a violation of the Rules cited and the Board has no valid grounds to modify the Carrier's dismissal for such actions. The Board is constrained to deny the claim.

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.

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NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 15th day of July 2008.