

Award No. 16313
Docket No. MW-17008

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Nathan Engelstein, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

**THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY
and**

THE LAKE ERIE & EASTERN RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Car Loader George E. Robinson on September 23, 1966, was capricious, without just and sufficient cause and based upon unproven and disproven charges.

(2) Car Loader George E. Robinson be restored to service with seniority, vacation and all other rights unimpaired, the charge be stricken from his record and he be paid for the net wage loss suffered by him in accordance with Rule 34(d).

OPINION OF BOARD: After an investigation, George E. Robinson, who was in Carrier's employ as a Car Loader since 1953, was dismissed from service on September 23, 1966, for conduct unbecoming an employee. The dismissal was based upon testimony given by Mr. Robinson at a jury trial on March 8, 1966, which Carrier contended was contrary in certain material respects to his recorded statement given to the Claim Agent of Carrier on January 21, 1965. This testimony offered in Wamsley v. Pittsburgh and Lake Erie Railroad Company in the United States District Court, Western District, Pennsylvania, concerned an accident in which Mr. Wamsley, an Assistant Boat Spotter, sustained an injury while spotting a loaded barge at the unloading facility at the River-Rail Transport Plant on June 5, 1964. Mr. Wamsley's suit was to recover damages for a disabling heart attack which, he alleged, resulted from the accident five days after it occurred. A jury awarded Mr. Wamsley \$145,000.00. Mr. Robinson was present when the accident occurred.

Claimant Robinson contends that he is entitled to be reinstated to service and to be compensated for monetary loss resulting from his dismissal from service because the investigation did not sustain the charges that he was guilty of conduct unbecoming an employee since the testimony he gave in court was not materially contrary to his earlier statement to Carrier's Claim Department.

Carrier denies the claim, pointing out that Petitioner was given a fair and impartial hearing. To support its position that the testimony given by Mr. Robinson in court contradicted the statement he previously made to Carrier, it submits a transcript of the statement given by Mr. Robinson to Claim Agent Richard M. Weinzel, and a transcript of the testimony given by Mr. Robinson at the court trial. It maintains that Mr. Robinson's earlier statement led Carrier to believe that the impact of the broken line was minor. He reported that he saw Mr. Wamsley struck, but that employe gave no indication of being injured, for he just tightened up the line and came off the river. On the other hand, at the trial Mr. Robinson said he saw and knew nothing of the seriousness of the injury Mr. Wamsley sustained. Thus, in resolving the important controversy at the trial of whether or not the injury was responsible for the heart attack which left Mr. Wamsley permanently unable to work, the jury had for consideration in determining the force with which Mr. Wamsley was struck, only the testimony of Mr. Wamsley himself. Mr. Wamsley testified that he was hit with such force that he was thrown half-way across the barge. Carrier maintains that if Mr. Robinson had given his original version that there was no severe injury, the opinion of Mr. Wamsley's physician, who related the heart attack to the impact of the blow, based upon Mr. Wamsley's testimony, would have been of little consequence to the jury. Carrier regards Mr. Robinson's court testimony as of crucial importance in the verdict against it and of sufficient reason to dismiss him from service for disloyalty.

A review of the statement of Mr. Robinson to Carrier and of his testimony in the court trial indicates some differences, but not enough material conflict to be determinative in the verdict of the jury. The variance that does appear in the two transcripts may be attributed to the long intervals between the accident, the statement to Carrier, and the testimony in court. Carrier did not obtain a statement from Mr. Robinson concerning the accident until seven and one-half months after that occurrence, and the testimony in court was given one year and nine months after the accident. There is no evidence that Mr. Robinson was aware that Carrier intended to use him as its witness in the trial or that Carrier gave him an opportunity to refresh his recollection of the statement that he made to the Claim Agent more than a year before he testified in court.

The record, furthermore, does not give evidence that Mr. Robinson deliberately withheld information, or gave false testimony. It gives no motive that would lead to the conclusion that he would profit personally from the testimony he gave, or that he was hostile to Carrier. He appeared in court to testify in behalf of Mr. Wamsley in response to a subpoena.

In addition to the lapse of time, the nature of the questioning in the court trial may also account for some of the difference in testimony. For example, when Mr. Robinson made his statement to Carrier, he was not asked to describe his observations of Mr. Wamsley after that employe came to shore following the accident. Under detailed questioning in court, however, Mr. Robinson testified that he saw a severe red mark on the chest when Mr. Wamsley lifted his shirt to show the foreman where he had been hit. In his testimony, Mr. Robinson did not misrepresent or contradict what he had first said in any material way, but stated what he recollected about the incident at the time he was questioned.

The contention that the verdict in favor of Mr. Wamsley would have been different if Mr. Robinson had not given the testimony he did in court

cannot be supported. This position minimizes the importance of the medical testimony of Mr. Wamsley's physician that the force of the injury brought on the heart attack. It also fails to give consideration to the testimony of Mr. Wamsley that he was thrown half-way across the barge. Moreover, it overlooks the fact that the jury did have an opportunity to weigh the credibility of both Mr. Robinson's statements, for it heard a recording of excerpts of the transcript of what Carrier deemed pertinent and contradictory in the statement made to the Claim Agent. There is no objective way of determining what the verdict of the jury would have been had Mr. Robinson testified differently in court. Nor is there an objective way of determining the basis upon which the jury rendered its verdict.

For the foregoing reasons, we hold the disciplinary action of dismissal of Mr. Robinson for conduct unbecoming an employe because of material changes in his testimony was without just and sufficient cause. Accordingly, the claim is sustained.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated by the Carrier.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 17th day of May 1968.