

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25271  
Docket Number MW-25301

James Robert Cox, Referee

(Brotherhood of Maintenance of Way Employees  
PARTIES TO DISPUTE: (  
(National Railroad Passenger Corporation

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

(1) The dismissal of **Trackman** R. Rice for alleged "Violation of NRPC General Rules I and J" was arbitrary, without just and reasonable cause, in violation of the Agreement and on the basis of unproven charges (System Docket 3650).

(2) The claimant shall be reinstated with seniority and all other rights unimpaired, his record cleared and he shall be compensated for all wage loss suffered.

OPINION OF BOARD: Claimant R. Rice was hurt while at work as a **Trackman** November 10, 1981 suffering a strain to the right shoulder, an injury to his front teeth and a left knee laceration. Claimant was terminated for horseplay resulting in a personal injury and for falsification of the Accident Report concerning the accident.

Mr. Rice had signed an Accident Report November 10, 1981 which read:

"while installing ties, the tie tong slipped and Mr. Rice was falling (guys in the gang were still installing the tie) He could not release the tong from his hands and he went face down, onto ballast"

A Workman's Compensation Commission Report dated 12/8/81 quoted his description of the accident.

"I was at work and I was carrying a tie, the tongs slipped out of it, I tripped. fell on my face, knocked out two teeth, fell out and two other teeth were pushed out of place, I also injured my right shoulder and I injured my left knee, my face was scarred on my chin and a busted lip."

Claim Agent Hassinger investigated the occurrence and notified the Division Engineer of her findings December 2, 1981. Claim Agent Hassinger had interviewed Mr. Rice November 13th who told her that he was injured while in the process of moving a tie together with Baylor, Walls and Morris when his tie tongs slipped.

November 30th he repeated, during a recorded statement, that he had injured himself as a result of tie tongs slipping from a tie while in the process of moving it with the other three men. That same day, Hassinger interviewed Walls who told her that at the time of the injury, he and Morris were taking a break and on the C track while Baylor and Rice remained together near B track.

December 1st Hassinger contacted Morris who corroborated Walls' statement, adding that he and Walls had seen Baylor and Rice gripping each other by their shoulders, told them to stop fooling around, but shortly thereafter, he had heard Rice hit the ground.

Project Engineer Albert took formal statements from Walls and Morris December 9th. Morris repeated that Baylor and Rice had been fooling around before going to work and had been warned to stop by Walls. Rice had had a seizure in early September and Walls was concerned that Baylor not bother him. Morris also said that at the time of the occurrence, the four men were not engaged together in performing tie work. December 9th, in his statement, Walls recited that he and Morris were fifteen to twenty feet away when Baylor and Rice "were just coming up from where we had just dropped the tie off. we were standing over by C and D tracks".

December 29, 1981 was the date of a Preliminary Investigation in this matter. After this fact finding Hearing conducted by the Division Hearing Officer, Morris approached and told him that Baylor had thrown Rice to the ground and was assisting in helping to pick him up and 'that was how the injury occurred. It did not happen while they were working with the tie tongs".

At the formal Hearing Morris testified inconsistently but said that he saw Rice fall on his face, not when lifting a tie with Baylor, but when Baylor and he were in physical contact. He reiterated that Rice had not been in the process of installing a tie when injured and that he was not actually working with Rice at that time.

When asked about earlier statements at the Preliminary Hearing, Walls admitted that he did say that Morris and he were standing apart next to the C track when the injury occurred and also conceded that when he told Claim Agent Hassinger these facts, "...that was off the record, and it was supposed to be held in strict confidence, no comment".

Walls testified at the formal Hearing. however, that he did not see Rice fall and he denied that he had given any verbal warning to Baylor concerning horseplay.

Rice admitted that his Accident Report of November 10, 1981 was not correct, attributing the inaccuracy to the difficulty he had concentrating so soon after the accident. At the Hearing, Rice indicated that only Baylor and he were trying to shift the tie into place, had picked it up facing each other and, when he turned around. both hands "underhanded like this and grabbed the tie tongs and when I went to go like this I was standing in two feet of ballast that we had just dropped off the ballast car, when I went to go like this right the tongs slipped, if I had been on a solid surface I might have been able to stop myself from falling, when it slipped the weight dropped down, that's bringing me down and I'm going forward and I'm trying to bring myself up as I run forward and I just went into the ground, I couldn't get my hands up fast enough...".

While Rice contends that he told the Agent that he was working alone with Baylor when the accident occurred and that four men would carry the ties over to the rail but only two would adjust **or** pull it, his initial statements read that all four were working together when the accident occurred with he and Baylor at the front of the tie and Morris and Walls behind. He stated at the Hearing that they were carrying ties from the stacks, putting them under the rail and spacing them. He described pulling through the rail and explained that two men would assist the other two pulling the tie through until it was lined up. **He** was pulling the tie at the time of the occurrence, he said.

The statements of Morris and Walls to the Claim **Agent**, considering the timing and circumstance of these statements, as well as Morris' unsolicited admission after the Preliminary Hearing provide sufficient credible evidence to support the finding that Carrier had cause to terminate Claimant for falsification of an Accident Report -- a falsification in which he persisted in subsequent statements on November 13th and 30th. Not only was Claimant's version contradicted by two fellow workers, but conflicting changes in his implausible story of how the fall occurred adversely affect his credibility.

Claimant, his Attorney and the Organization **argue** that the Carrier violated Rule 71(a) by failing to charge the Claimant within fifteen days of the injury or, at the latest, fifteen days following **December 2nd** (the date the Claim Agent filed ~~her~~ Report which contained the statements of the witnesses and a further statement from Claimant). Considering the internal inconsistencies and ~~the~~ conflict between the various statements of occurrence witnesses, it was reasonable and proper **to schedule and** conduct the December 29th preliminary fact-finding investigation preliminary to the Charge. The fifteen day period does not commence until the Carrier knows or should know the elements of the offense. Here, Carrier knowledge of the **offense was** obstructed by the Claimant's incorrect report as well as what the record shows to be devious responses of Carrier witnesses.

The Notice of Trial was dated January 8, 1982. The Charge was timely served within the fifteen day period following the December 29th clarification of the elements of the Charges.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the **Employees** involved in this dispute are respectively Carrier and **Employees** 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** not violated.

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Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

  
Nancy J. Dover - Executive Secretary

Dated at Chicago, Illinois, this 28th day of February 1985