

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26244
Docket Number X-26709

James R. Johnson, Referee

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(Southern Pacific Transportation Company
(Western Lines)

STATEMENT OF CLAIM: "Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Southern Pacific Transportation Company (Western Lines):

On behalf of T. L. **Spangler** who was dismissed from service for alleged violation of Carrier Rule 801 on August 6, 1984. carrier file E-A-0-4-18."

OPINION OF BOARD: Claimant had been a " **employee** of the Carrier for thirteen years, and was employed as a Signal Maintainer at the time of his discharge.

Claimant was injured on July 7, 1984, one of his rest days, and he came to the Carrier's Yard Office for assistance. He asserted that he had been performing work on Company property when he was assaulted by several vagrants. Shortly **thereafter**, he lost consciousness and was taken to the Hospital.

A search was made by Carrier's Police, and representatives of other law enforcement agencies, but no sign of the assailants was discovered. The Claimant was treated and released by the Hospital, but he was unfit for duty for some time. After preliminary investigation, the Carrier advised the Claimant that it had been unable to confirm that he had been called for service, as he alleged, or that he had been injured while on Company property. The Claimant was asked to contact the individuals who allegedly called him for the overtime work, but he was unable to produce any confirming evidence that he had been called.

Claimant was contacted on July 10, 1984, and was asked by his Supervisor if he still contended that he had been injured while on duty. Claimant indicated that he could not produce witnesses to the assault, or his being called to perform service and that, under the circumstances, he "didn't have a leg to stand on." The Supervisor asked if he wished to file an Accident Report, but felt that it was his "duty" to advise the Claimant that if he did so, he would be removed from service pending a formal Investigation. The Claimant declined to file an Accident Report, and indicated that he was willing to consider the injury "off-duty," and forego any compensation.

Notwithstanding the Claimant's retraction of his original claim that the injury was on duty, and the fact that he did not file a " Accident Report, he was notified to attend a formal Investigation for his alleged dishonesty. He was discharged as a result of the Investigation.

The Carrier contends that the Claim before this Board is vague and different from the Claim handled on the property, that it is not in compliance with the Rules of the Division, and that it seeks no remedy. The Board disagrees, and finds that the Claim was properly handled on the property, and is properly before this Board.

There is no dispute that the Claimant was injured; in fact, several witnesses support the conclusion that he was the victim of an assault. The issue is whether he was on duty, as he alleged, or whether the assault occurred elsewhere. There is no evidence in the record to support the contention that Claimant was injured on duty and, in fact, the testimony of several witnesses leads to the conclusion that he was not on duty as he alleged. Claimant's refusal to sign the Accident Report, and his willingness to forego compensation also seem to support the conclusion that he was not telling the truth.

However, the Board does not agree that permanent discharge was an appropriate penalty for the offense. First, the record clearly indicates that the Claimant had sustained a head injury, and his subsequent actions were not those of a responsible individual. It is our belief that his injuries serve to mitigate his responsibility for lying. His refusal to file the Accident Report further **mitigates** his offense. This Board has often held that if an employee files a false Report of a personal injury, discharge would be appropriate; however, Claimant did not do so. To uphold permanent discharge, whether or not he filed the Report, would do violence to the principle of fairness.

Considering the fact that Claimant had long and faithful service, with a clear prior record: that he was functioning with a head injury when he alleged that he was on duty; and, that he did not file an Accident Report, the penalty of discharge is excessive. Claimant shall be restored to duty with seniority rights unimpaired, but without pay for time lost.

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 discipline was excessive.

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Claimant sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 27th day of February 1987.