

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26280
Docket Number MW-26603

James R. Johnson, Referee

(Brotherhood of Maintenance of Way **Employes**

PARTIES TO DISPUTE: (

(Richmond, Fredericksburg and Potomac Railroad Company

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

(1) The dismissal of Backhoe Operator T. R. Burruss for allegedly **'making** false statements concerning matters under investigation on June 5, 1984' was without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement (System File R-D-2602).

(2) The claimant shall be reinstated with seniority and all other rights unimpaired, his record shall be cleared of the charge leveled against him and he shall be compensated for all wage loss suffered."

OPINION OF BOARD: The Claimant failed to return to work on the date specified, following a medical leave of absence. He was charged with willful neglect of duty, and testified at the Investigation that he failed to report because he was seeking a release from his personal physician, and was unable to receive said release until the day after he was expected to return.

Based upon this testimony, the Claimant was assessed a five day **suspension**. Subsequently, the Carrier had cause to investigate the circumstances in connection with another matter, and determined that the Claimant had lied in that earlier Investigation. Charges were filed, and a formal Investigation was held, at which the Carrier produced evidence that the Claimant had lied, and he was discharged following the Investigation.

The Organization contends that the Notice of the Investigation was not timely, and that the discharge should be set aside for that reason. The Carrier contends that the Notice was timely served following its knowledge of the offense. We have reviewed the evidence and arguments, and find that the Notice was timely.

With respect to the merits of the case, the principal evidence is in the form of a written statement from the Doctor who signed the statement used by Claimant in the earlier Investigation, and the original release provided by that Doctor. The Doctor **was** not available at the Investigation, because he had retired and moved away. The Doctor avers that he saw the Claimant once, and once only, on June 2, 1984, while the Claimant had testified that he **saw** the Doctor repeatedly, ending with May 21, 1984 (the date he was to have reported for duty in the earlier case).

The Organization contends that the Doctor erred in his statement, most probably because of faulty records. The Carrier contends that the Doctor's written statement **is** clear and unequivocal, and that it is supported by careful scrutiny of the earlier release for duty.

The case involves a conflict in evidence, and turns solely on the credibility of the witnesses. We ordinarily, reserve such matters to the Hearing Officer, because he is in a better position to observe their demeanor; however, in this case, he was unable to do so, because the Doctor was not present at the Investigation. In this case, it is appropriate that the Board resolve the conflict in evidence.

An examination of the record and the evidence reveals that the Claimant testified that he saw the Doctor on May 21, 1984, and secured a return for duty on May 22, 1984. The Doctor asserts that he saw the Claimant on June 2, 1984, and that the Claimant advised him that he needed a release that he was fit for duty as of May 22, 1984 - eleven days earlier. The Carrier urges the Board's attention to the release itself, and contends that it is clear that the date has been altered. The Board is unable to make such a determination from the quality of the copy provided in the record; however, the language used in the release does provide the basis to resolve the dispute.

Doctor Beirne asserts the release for duty was signed on June 2, 1984, and Claimant asserts that it was signed on May 21, 1984. The document bears a date which appears to be "5/21/84." However, the "Remarks" read as follows:

"Examined today - has recovered well from hernia surgery, and he was able to return to work as of May 22, 1984.

(Emphasis added)

If the Form was signed on May 21, 1984, as Claimant asserts, it would not use the past tense to describe the following day. The use of the past tense is appropriate, however, if the Form was signed on June 2, 1984, as Doctor Beirne asserts. The Board finds that the evidence supports the fact that the Claimant lied in the Investigation, and **falsified** the evidence.

In view of the seriousness of the offense, the penalty of discharge was warranted.

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 **Employee** involved in this dispute are respectively Carrier and Employee 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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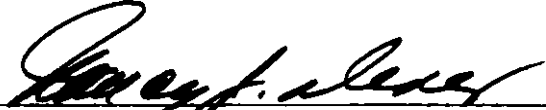
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Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest::


Nancy J. Bever - Executive Secretary

Dated at Chicago, Illinois, this 24th day of April 1987.