

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31102
Docket No. MW-30360
95-3-92-3-103

The Third Division consisted of the regular members and in addition Referee Robert T. Simmelkjaer when the award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(The Kansas City Southern Railway Company

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

- (1) The dismissal of Apprentice Foreman L. Richardson on August 31, 1990, for alleged filing of a false injury report, was without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement (Carrier's File 013.31-424).
- (2) The dismissal of Apprentice Foreman L. Richardson on September 17, 1990, for alleged false testimony given in the investigation of May 14, 1990, was in violation of the Agreement (Carrier's File 013.31-423)."
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, the Claimant shall be reinstated to service with all rights and benefits unimpaired, his record cleared of the charges leveled against him and he shall be compensated for all wage loss suffered.

FINDINGS:

The Third 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 waived right of appearance at hearing thereon.

By letter dated July 27, 1990, the Carrier directed Claimant to report for a formal Investigation on August 3, 1990 to ascertain the facts and to determine his responsibility, if any,

"..in connection with your personal injury allegedly sustained by you on May 14, 1990, at approximately 1045 hours while you were on duty as an Apprentice Foreman on Section 115, and submitted Form 68-D No. 537030."

The Investigation was postponed and eventually held on August 17, 1990. Following the Investigation, Claimant was notified by letter dated August 31, 1990 that:

"After a careful review of the transcript of this Investigation, it is my determination that evidence presented during the Investigation indicated that you filed a false injury report wherein you alleged to have been injured on May 14, 1990. Accordingly you are hereby dismissed from the service of The Kansas City Southern Railway Company, effective date."

Following the initial Investigation and subsequent termination, Claimant was notified by letter dated August 31, 1990 that a second Investigation would be conducted on September 10, 1990 "...to determine your responsibility, if any, in connection with reports that you gave false testimony in the investigation held on August 17, 1990 in connection with the injury allegedly sustained by you on May 14, 1990."

The Organization maintains that the Carrier violated Claimant's Agreement due process rights when: 1) it charged him with one violation and disciplined him for another; 2) it charged him with a rule violation after his employment relationship had been terminated.

According to the Organization, Claimant "successfully answered" the charges in connection with his alleged responsibility for the personal injury he sustained on May 14, 1990. Having deemed the testimony of Claimant and Sectionman R.E. Peters credible with respect to the circumstances of Claimant's injury, the Organization argues that the Carrier after failing to carry its burden of proof regarding the charge stated in the Notice of Investigation, namely, Claimant's responsibility for the personal injury, introduced and ultimately dismissed him for the unrelated charge of allegedly submitting a false injury report.

The Board cannot sustain the Organization's claim on the grounds that Claimant was insufficiently apprised of the "exact"

nature of the charges for which he should have been prepared to offer a defense. Although the notice specifically addressed Claimant's role with respect to an alleged personal injury, an inextricable connection existed between that injury and his submission of an injury report describing the treatment he sought thereafter. This Board has previously found that so long as the notice of charges is sufficiently clear to inform Claimant of the scope of the Investigation and thus enable him to prepare a defense, the specificity requirement is substantially satisfied.

With respect to the Organization's assertion that Claimant was charged with one violation and dismissed for another, there is extensive authority to support the use of evidence developed in one Investigation as the basis for conducting a second Investigation. There is precedent for the Carrier's utilization of the findings of a prior Investigation which contributed to the termination of the Claimant as grounds to conduct a subsequent Investigation reinforcing the original result. In Third Division Award 29126, a similar process evolved as follows:

"...On the basis of this result he was cited for an Investigation, which was held on March 16, 1989. Following the conclusion of the Investigation, on March 31, 1989, Claimant was notified that he was terminated. However, one day before Carrier's termination letter was issued, on March 30, 1989, Claimant was cited for another Investigation. The second Investigation was conducted on May 16, 1989. Under date of May 26, 1989, Carrier issued its decision reaffirming its previous dismissal."

Therefore, although Claimant was advised of his dismissal on the same date he was advised of the second Investigation, this time frame does not constitute grounds for invalidating the second Investigation.

More pertinent to the instant case is Second Division Award 12241 where Claimant was subject to two Investigations and terminated a second time for testifying falsely during the first Investigation as follows:

"...On July 27, 1988, an Investigation was held pertaining to a charge of theft of company property by Claimant on July 18, 1988. Following that Investigation, the Carrier concluded that Claimant was guilty of the charge and dismissed him from service on August 9, 1988.

On August 4, 1988, the Claimant was charged with being dishonest at the July 27, 1988 Investigation. Following

an Investigation on September 1, 1988, the Carrier concluded the Claimant was guilty of the charge and dismissed him from service a second time on October 12, 1988."

Inasmuch as the claim for reinstatement following the initial dismissal was being processed on the property, Claimant retained a tangible relationship with the Carrier sufficient for disciplinary purposes.

Assuming arguendo Claimant was unprepared to defend on the charge of filing a false injury report in connection with his alleged personal injury during the August 17, 1990 Investigation and was thereby denied procedural due process, Claimant was given a second opportunity to refute the Carrier's allegation at the September 17, 1990 Investigation which he failed to attend or provide an adequate explanation for his non-appearance. Notwithstanding Claimant's dismissal for filing a false injury report, the Board draws an adverse inference from Claimant's failure to appear at the second Investigation and avail himself of the forum for reconciling the conflicting documentary evidence.

The Organization has focused on the conflicting testimony contained in the transcript, particularly the hospital records submitted by the Carrier, indicating that Claimant was admitted to the Jackson Parish Emergency Room at 2215 hours on May 11, 1990 as distinguished from Claimant's testimony at the August 17, 1990 Investigation and his injury report alleging that he had been treated on May 15, 1990. Absent any medical record supporting Claimant's assertion that he was attended in the emergency room after his alleged injury on May 14, 1990, the Board is compelled to sustained the Carrier's credibility findings as based upon substantial evidence in the record.

Were the Carrier confined to a literal reading of the initial Notice of Investigation, namely Claimant's responsibility, if any, for his alleged personal injury, its burden of proof would have been problematic since the testimony of the two disinterested witnesses is inapposite. On the one hand, Sectionman Peters testified as follows:

"Q. Did you know that Mr. Richardson was allegedly injured on May 14th?

A. I know a limb fell on him.

Q. Did you see a limb fall on Mr. Richardson on May 14th?

A. Yes, I saw it hit him. He cut one limb and another rolled over on him.

Q. Did Mr. Richardson make any comments to you about being injured at that time?

A. Yes, he made a statement that it hit him. I think he said 'a limb rapped me up side of the head,' something of that nature."

On the other hand, Section Foreman G. S. Miller testified as follows:

"Q. Did you see a limb or branch of substantial nature strike Mr. Richardson?

A. No.

Q. But you did see limbs and vines fall on him?

A. Not fall on him but around him.

Q. I thought you previously said you seen [sic] Mr. Richardson being struck by said vines or limbs?

A. The ends of limbs and vines was falling as he was cutting. A limb would fall, and he just kept cutting."

Despite the Organization's conclusion that the Carrier failed to prove the stated charge that Claimant bore some responsibility in connection with his alleged injury, evidence that the injury did not occur was dispositive of the matter. While the Board concurs with the Organization that the foregoing testimony of the eye witnesses was inconclusive concerning the circumstances of the alleged injury, their testimony, given the documentary revelations, was rendered moot.

The Organization further maintains that the Carrier failed to substantiate the charges leveled against Claimant at the September 10, 1990 investigatory hearing because it relied exclusively on a hearsay document, namely, the emergency room report. The Carrier obtained documentation that purportedly confirmed that Claimant had received treatment for a neck injury on May 11 prior to May 14 date claimed on his injury report. According to the Organization, the Carrier, having failed to prove the charge in its first Investigation, attempted to reconvene the August 17, 1990

Investigation on September 10, 1990 on the pretense that new information was forthcoming.

Without reviewing the limitations of hearsay evidence, such testimony has been routinely deemed admissible in these proceedings and were it necessary a hospital record kept in the ordinary course of business would constitute an exception to the hearsay rule. Unlike the accusatory letter from a passenger discussed in Third Division Award 2637, the Board finds the instant hospital record to be reliable and probative of the issues at bar.

In addition, the accuracy of that record was enhanced by Claimant's dubious testimony regarding his medical treatment. Given the prima facie case established by the Carrier, other than his assertion of "computer misprint," Claimant was unable to explain how his alleged visit to the emergency room on May 15 was unrecorded or how the doctor who presumably treated him on May 15 "noted that he had neck pain for a week prior to this visit."

Moreover, medical documentation similar to that admitted in the instant case, has been pivotal in other Third Division cases. Although the doctor, as here, was not available, the admissibility of such evidence was sanctioned in Third Division Award 26880 where it was held:

"With respect to the merits of the case, the principal evidence is in the form of a written 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 Claimant once, and only once, on June 2, 1984, while the Claimant had testified that he saw the Doctor repeatedly, ending 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."

Numerous Awards have established that the Board in its appellate jurisdiction defers the determination of witness credibility, including demeanor, etc., to the Hearing Officer. Although the unavailability of the doctor precluded such assessment in the instant case, to the extent that credibility is critical, as noted, supra, the Carrier's view must prevail that Claimant

testified falsely in an attempt to perpetrate a fraud upon the carrier.

Finally, the Board finds that filing a fraudulent report compounded by false testimony at the Investigation is misconduct for which dismissal is the appropriate discipline. This Board cannot find that the action taken by the Carrier to have been unreasonable, arbitrary or disproportionate to the offense.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 1st day of September 1995.