

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35952
Docket No. MW-36162
02-3-00-3-361**

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Port Terminal Railroad Association**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (withheld from service and subsequent dismissal) imposed upon Mr. I. Powell for alleged violation of Port Terminal Railroad Association Safety and General Rules 21 and 31 in connection with a personal injury on March 18, 1999 while working as a laborer-torchman at the north end of American Yard was without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement.**
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be reinstated to service with seniority and all other rights unimpaired 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 were given due notice of hearing thereon.

By letter dated March 19, 1999, the Claimant was notified that he was charged with alleged dishonesty in connection with information furnished related to a purported injury. Following postponements, a Hearing was held on April 8, 1999. The Claimant was subsequently found guilty of violating General Rule 21 which states in part that "Employees must not be: . . . Dishonest . . ." and Rule 31 which states that:

"Furnishing Information: Employees must not withhold information, or fail to give all the facts, regarding irregularities, accidents, personal injuries or rule violations to those authorized to receive such information."

The Claimant was dismissed from the Carrier's service effective April 19, 1999.

The Organization's contention is that the claim should be sustained because there was no proof of either dishonesty or the furnishing of false information. The Claimant was working with other employees when he injured himself. He notified and accompanied the Company Official to the doctor and no proof was ever presented that the Claimant acted inappropriately. The Organization also protested the fact that prior to the issuance of dismissal, two Carrier Officials discussed the discipline, which in fact, negates any argument of a fair and impartial decision.

The Carrier takes exception arguing that the Investigation proves the Claimant was guilty as charged. It argues that the Claimant was clearly shown to be dishonest in the information he provided over his alleged injury. The Organization's assertion of two Carrier Officers discussing the case prior to the disciplinary decision was rejected with a request to identify them and a denial that the facts demonstrate a failure to provide a fair and impartial Hearing. The Carrier argues that its discipline was proper and should not be disturbed.

As a preliminary point, this record is replete with evidence and argument introduced by the Carrier that was not presented on the property. The Board is obligated to ignore all material not properly introduced on the property. In this case, that includes numerous Carrier Exhibits (parts of Exhibits B, D and E through L) and

discussions of the Claimant's personal record, as well as new argument on Rules test allegations. We can find no evidence that any of these issues were ever raised on the property and they are therefore not properly before the Board.

A full reading of the transcript finds the following. The Claimant testified that on March 18, 1999 his gang was assigned to work America Yard. Specifically, he was to pull spikes and knock anchors off the rails. At 11:16 A.M., while working on the second pallet, he knocked the anchor off and it ricocheted into his foot, causing the injury. The Claimant reported that after lunch the injury began to cause pain. He notified his Foreman, who notified the Roadmaster. A medical exam and X-ray indicated it was bruised.

The Carrier is the moving party in all discipline cases. The Carrier is required to provide substantial probative evidence to sustain its position that the disciplinary decision is merited and reasonable. That is, the Carrier must put forth proof that a reasonable mind would conclude substantiates guilt.

The Board fully and completely studied the record to determine if the testimony supports a conclusion of dishonesty and furnishing incomplete or false information about an injury. The Carrier's allegation that the Claimant's injury was false seems to rest on the fact that no other employee observed the alleged accident. The testimony of record does not prove that employees work in continuous proximity to each other or that the Claimant could not have been injured knocking off a third anchor. There is no proof that the Claimant could not have obtained the tool or performed the task as reported.

We studied the full testimony of the work performed. The Claimant said he worked the second pallet, while full testimony indicates it was the first pallet. The testimony on passing the Rules test is insufficient to prove feigned injury. The Claimant's own testimony is that he was injured and the Board finds no contradictory account. The Claimant's initial failure to inform of the injury because no one would "have believed me" does not prove guilt, dishonesty or a violation of Rule 31. In fact, the full testimony shows no proof in this record of dishonest reporting. The testimony of record is that a physician informed the Roadmaster that he would "diagnose it possibly as an internal bruise." The physician informed the Roadmaster that the Claimant was to go home, take "Advil and put some ice on it." The Claimant filled out the appropriate accident reports and was driven home, rather than to his headquarters where his car had been parked. The Board notes that testimony indicates the

physician's report was with the Safety Director. It was not introduced into the record. Nor is it shown that information was withheld from the Carrier when the Claimant perceived no initial injury. Actions in the Claimant's behavior are not proven to be unreasonable and certainly not to a level of withholding information on an injury.

What is in this record is suspicion, conjecture and speculation which are not proof. The Board cannot find factual evidence to reach a conclusion of guilt. The Claimant reported an injury and no proof exists that it did not occur. Minor inconsistencies in testimony do not rise to a level to prove guilt. Safety is a serious issue to the railroad industry, and dishonesty is a cause for dismissal. It must be based on facts establishing commission of a Rule violation. Such facts are not in this record. No proof exists that the Claimant feigned his injury or presented incorrect information on what occurred. Speculation to the contrary does not pass as fact. We cannot conclude that the Carrier met its burden of proof that the Claimant was dishonest about the injury or furnished dishonest information concerning his injury. The claim must be sustained.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 20th day of February, 2002.