

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 36837
Docket No. MW-36560
04-3-01-3-67

The Third Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(The Burlington Northern and Santa Fe Railway Company
(former Burlington Northern Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of Track Inspector J. B. Hammitt for his alleged dishonest behavior and failure to provide factual information on Monday, October 4, 1999 was without just and sufficient cause, based on an unproven charge and in violation of the Agreement. [System File C-00-D070-2/10-00-0148-D(MW) BNR].**
- (2) As a consequence of the violation referred to in Part (1) above, Track Inspector J. B. Hammitt shall now be returned to service with pay for all lost wages and benefits and have his record cleared of any mention of this incident."**

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.

The Claimant began his railroad service in the Maintenance of Way Department on September 28, 1993. At the time of his dismissal, the Claimant was a Track Inspector on the Louisville Line on the Nebraska Division. On or about August 27, 1999, the Claimant allegedly sustained a back injury while at work. On December 8, 1999, following a formal Investigation conducted on November 23, 1999, the Claimant was informed by certified letter that he was dismissed as a result of his dishonesty and failure to provide factual information concerning the injury to the Division Engineer.

According to the record, on August 30, 1999, Dr. Shepard, a physician at the Center for Occupational Health, recommended that the Claimant perform "modified duty" and placed work restrictions on the Claimant including no lifting over five pounds, no pushing or pulling over 15 pounds, and no overtime. Dr. Shepard recommended that the Claimant perform "sedentary work with frequent stretch breaks" and stated that he should perform "no driving or working with heavy machinery."

On September 7, 1999, Dr. Brown at the Omaha Orthopedic Clinic arrived at a diagnosis of "lumbar strain," and recommended that the Claimant be assigned "light duty" and to avoid bending, stooping and lifting in excess of 10 pounds. The record indicates that on October 13, 1999, the lifting restriction was modified to no lifting beyond 30 pounds. On November 9, 1999, the 30-pound lifting restriction was reaffirmed, with an additional restriction of "no bending."

Because there were no assignments available to the Claimant given his medical restrictions, the Claimant did not perform any service subsequent to the alleged injury and prior to his dismissal. On September 3, 1999, Claim Agent L. Savidge interviewed the Claimant about the cause of his alleged injury and his medical status. According to the record, the Claimant told Savidge that his first physical therapy appointment was scheduled for that afternoon, and that he had difficulty setting up an appointment because of his wife's work schedule and because he could not drive. At the conclusion

of the interview, the Carrier placed the Claimant under videotape surveillance, which began that afternoon.

On October 4, 1999, after having viewed a videotape depicting the Claimant engaged in various activities, including driving his van on September 3 (after completing his therapy) getting into the driver's seat of a car on September 7 and on September 17 loading an upholstered chair (recliner) into a van, and then unloading it alone, Division Engineer W. J. Seeger and Safety Manager J. Portz telephoned the Claimant and questioned him about his medical situation. According to the Carrier, the Claimant told Seeger that he was undergoing physical therapy and that, on September 22, 1999, he had experienced another episode with his back. The Claimant also told Seeger that his back had bothered him for the last five years and that he was taking medication for back pain. The Claimant stated that he had been following the restrictions, and that "the heaviest thing he had lifted was a cup of coffee."

The Carrier argues that it sustained its evidentiary burden of proof because the evidence conclusively shows that the Claimant intentionally misled it about the nature and extent of his back injuries, as evidenced by the content of the videotape described above. The Carrier also argues that there was sufficient, credible evidence to establish the Claimant's dishonesty, in violation of Rule 1.6 which states:

"Employees must not be: Careless of the safety of themselves or otherwise, negligent, insubordinate, dishonest, immoral, quarrelsome or discourteous."

Given the severity of the offense and prior arbitral precedent supporting dismissal in cases such as this, where an employee's intent to mislead or defraud the Carrier has been proven, the Carrier argued that the Board should uphold its findings and level of discipline assessed in this case.

The Carrier also maintains that this case is procedurally sound. The Claimant was properly apprised of specific charges, i.e., dishonest behavior, and the Carrier conducted a fair and impartial Investigation, it submits. The Carrier emphasizes that the Claimant remembered without difficulty the telephone conversation he had with Seeger. Based on the volume of evidence introduced during the Investigation, the

Claimant's discharge was clearly warranted on the merits, it contends. The Carrier urges that the Board uphold its procedural handling of this case.

The Organization argues that the Carrier's charge, quoted above, was "vague and non-specific" and that the Carrier improperly ignored the Organization's request for written clarification. Furthermore, the Carrier failed to cite any Rule in support of the proffered charge. In addition, the Organization asserts that the Carrier refused to comply with its request for a copy of the videotape and any documentary evidence prior to the Investigation. According to the Organization, the Carrier's failure to clarify the charge, cite a Rule, and provide requested documentation before the Investigation deprived the Claimant of a fair and impartial Investigation, in violation of Rule 40, paragraphs (A) and (C) of the Agreement.

The Organization also maintains that the Carrier failed to produce all pertinent witnesses in violation of the Claimant's Agreement due process rights. For example, the investigator who made the videotape and took the photographs was not made available for questioning.

Regarding the merits of the case, the Organization stresses that the Carrier failed to present any credible or substantial evidence in support of its disciplinary action against the Claimant. In the Organization's opinion, the Claimant complied with Rule 1.6 by telling Seeger the truth, which the Carrier has not disproved. Furthermore, the physical functions the Claimant was observed performing on the videotape were consistent with the medical restrictions and instructions given by his doctors. Therefore, the Carrier did not sustain its burden of proof.

In sum, the Organization charges that the Carrier's assessment of discipline against the Claimant was arbitrary, capricious, unjust, unwarranted, and excessive. Based on the above, the Organization requests that the Board sustain this claim and reinstate the Claimant to service with payment for lost wages and benefits, and with his seniority unimpaired.

The Board reviewed the evidence of record and carefully considered the Organization's arguments with respect to both procedure and substantive merit. For the following reasons, the Board finds that the Organization's appeal must be denied.

The instant case stands on sound procedural footing. The lack of a specific Rule citation does not automatically invalidate the charge. Additionally, the Organization mounted a well-prepared and thorough defense of the Claimant, which in itself is evidence that the Claimant and the Organization understood the particulars regarding the charge.

Additionally, the Claimant clearly testified about his October 4, 1999 conversation with the Division Engineer, and did not appear to have any difficulty remembering what they discussed on that date. Furthermore, during his testimony, the Claimant neither stated nor implied that he was confused or unsure about the purpose of the Investigation. Indeed, the Claimant testified that during their phone conversation, he told Seeger that he was "still on restrictions," which he recollected as being a 10-pound lifting limitation, was taking medication, and that the heaviest thing he had lifted since his injury was "a cup of coffee." See Second Division Award 8928 issued on this property.

From our review of the entire record with respect to procedure, the Board thus concludes that the Investigation was not procedurally deficient. Throughout the Investigation, both the Organization's representative and the Claimant were permitted to question the Carrier's witness, review all documentary evidence, including the videotape and even recess the proceedings, if necessary. Rule 40 contains no provision for advance discovery procedures. Therefore, the Carrier was not required to provide the Organization with any documentation prior to the Investigation. See Third Division Awards 32384, 34082 and 35305.

Likewise, the Organization's objection regarding the admissibility of the videotape on the basis that the preparer of that tape was not available for questioning is without merit for the following reasons.

First, the Board notes that both in this industry and on this property in particular, surveillance videotapes may be entered in evidence and given weight without the accompanying testimony of the individual who made the tape. Second, in arbitration hearings conducted in both this industry and beyond, unlike in a court of law, technical requirements of a full foundation for introduction of such items as videotapes are not strictly followed, as long as authenticity of the evidence is established. Third, the Claimant did not dispute that the videotape at issue accurately

portrayed his activities, but instead sought to explain how his actions recorded on the tape comported with his medical restrictions. The reviewing Board is thus faced only with the task of properly weighing such evidence in light of all the evidence of record compiled in the case, and not the accuracy of the tape itself, to which neither the Claimant nor his representative took exception. See Public Law Board No. 4998, Award 428.

Based on the circumstances of this case, the Board thus finds that the videotape evidence adduced during the Investigation carries substantial weight. The information the Claimant gave to the Division Engineer regarding his current medical condition and inability to work was highly inconsistent with his physical activities as captured on the videotape. For example, the Board finds that despite the lifting restrictions in effect at the time of the taped segments, the Claimant was engaging in activities that, to a reasonable person, would be incompatible with both his purported back condition, restrictions and doctor's instructions. On September 3, 1999, the date he told the Claim Agent that he was not physically able to drive, he is seen on tape driving a van after leaving his therapy appointment. On September 7, 1999, he is seen getting into the driver's seat of a car with no apparent physical difficulty.

What the Board views as the most damaging of evidence is the segment of videotape where, on September 17, 1999, the Claimant is seen carrying an upholstered recliner with the help of a store employee and loading it into the back of a van. In conjunction with this activity, the Claimant is seen bending, climbing into the back of the van, and pushing the chair into the van before reaching up and closing the hatch. Approximately one hour later, the Claimant is seen bending and lifting a garage door, unloading the recliner by sliding it from the van to the driveway, bending and dragging the recliner into the garage, and then closing the door.

Based on the above, the Board is compelled to find that by engaging in the above activities, and subsequently telling the Carrier that he was complying with the restrictions and could not work, the Claimant was dishonest about his medical condition and about his ability to return to work. The Organization's contention that the Claimant was merely following doctor's orders by continuing with the activities of everyday life is unpersuasive, especially in view of the Claimant's statement to Seeger that he had suffered a setback on September 22, 1999, just five days after being seen on tape hauling and maneuvering the chair.

Finally, as the Carrier points out, the Board has upheld dismissal actions in cases such as this, where an employee's dishonesty has been proven through the Carrier's submission of substantial evidence. Here, given the Claimant's proven failure to provide factual information to the Division Engineer concerning his medical condition and his medical fitness for duty, the Board finds that dismissal is an appropriate disciplinary penalty. See on-property Second Division Awards 13041 and 13709, Third Division Awards 31539 and 35870, and on-property Award 52 of Special Board of Adjustment No. 1112.

AWARD

Claim denied.

ORDER

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

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 28th day of January 2004.