Award No. 11741
Docket No. CL-12619

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Donald A. Rock, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

THE PENNSYLVANIA RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (CL-4937) that:

The discipline of dismissal imposed upon Patrick H. Marlett, Laboratory Assistant, South Altoona Shops, Heavy Repair Shops, Altoona, Pennsylvania, should be removed and the Claimant returned to service with all rights unimpaired. (Docket 708.)

OPINION OF BOARD: This is a discipline case in which Claimant was charged as follows:

(1) Falsely claiming personal injury allegedly sustained south end of iron foundry building at 2:52 P. M., May 25, 1959.

(2) Attempting to subject the Pennsylvania Railroad to fraudulent liability.

Following the trial he was found guilty of both charges and on July 10, 1959, was dismissed from the services. Appeal from this discipline was made to the Superintendent of Personnel and was denied. The claim was then progressed by means of a Joint Submission to the Manager of Labor Relations, the chief operating officer of the Carrier designated to handle such disputes, and was by him denied. The claim is now properly before this Division of the Board for decision.

The Claimant was employed at the Oil Mixing Plant as a Laboratory Assistant. His tour of duty on the day in question was from 3:00 to 11:00 P. M. He arrived on the Company property before 3:00 P. M., stopped briefly at the Company Cafeteria where employes frequently stopped before going "up to work," and from there proceeded along an authorized path to the Mixing Plant which was several blocks beyond the Cafeteria. The path was intersected by a Railroad Crossing about midway between the Cafeteria and the Mixing Plant.

The trial record clearly established the fact that Claimant had a "sprained ankle" when he arrived at the Mixing Plant. The injury was diagnosed a few hours later as an "incomplete fracture." The testimony with respect to whether Claimant sustained the injury on the Company property was in sharp dispute.

Claimant testified substantially as follows: That no one was with him when he left the Cafeteria; he walked up the path by himself and while he was walking across the crossing he turned his ankle and fell to one knee, but "got right back up again;" that he continued walking up the path by himself and that Mr. DeRubies caught up to him about a block from the crossing; that DeRubies asked him what was wrong with his foot and Claimant said, "I hurt it down there on our crossing;" that Claimant had no other discussion with Mr. DeRubies concerning the accident; that when he reached the plant he reported for work, but made no immediate report of the accident because he was "scared to tell Mr. Hoover." Mr. Hoover was the foreman.

The testimony of two fellow employes who were called by Carrier was in direct contradiction to that of Claimant. Mr. DeRubies testified that he walked up to work with Claimant; that they left the Cafeteria together and walked up the path together. This was confirmed by Mr. Hughes who testified that he saw DeRubies and Claimant walking together when he came out of the Cafeteria; that they were some distance ahead of him; and that they were walking side by side. DeRubies testified that he noticed that Claimant was limping and asked him, "What seems to be your trouble?" and that Claimant said, "I stepped on a stone and sprained my ankle." DeRubies testified, further, that Claimant was limping when he came out of the Cafeteria and was limping "pretty good" before they reached the crossing which was about three blocks from the Cafeteria; that he was walking next to Claimant and did not see him fall. Mr. DeRubies also testified that Claimant asked him "to lie for him" about his "falling and getting hurt at the crossing," and that DeRubies refused; that "he asked me again, and I says I wouldn't do it for anybody;" that later on, when they were at work, Claimant told DeRubies, "Don't you say anything."

The record shows that Mr. Hoover first learned of Claimant's injury from Mr. Settlemyer; that he sent for Claimant immediately; that Claimant came to the foreman's office and made an Accident Investigation Statement to Mr. Hoover concerning the accident.

Claimant appeared at the Appeal Hearing before the Superintendent of Personnel after being dismissed from the service and admitted that he had not been hurt on the Company property. He also made the following statement:

> "He contended he has no intention of suing the railroad or of asking for any settlement respecting his leg. He merely wishes to continue work without losing time."

The full text of Claimant's admission is set forth in the Joint Submission as follows:

> "During appeal hearing Mr. Marlett (Claimant) openly admitted, with his own representative acknowledging it to be so, that he had not hurt himself on Company property but had actually sustained his injury while walking through a field near his home. Mr. Marlett, together with his representative, supported this testimony by written

statement to the effect that he had not received an injury on Company property. In addition, this statement waived all rights to any monetary loss if reinstated to service."

The Organization takes the position that since the discipline imposed was based upon a finding that Claimant was guilty of both charges it should be set aside or modified because, it is contended, that the record contains no evidence of Claimant's guilt as to the second charge.

We cannot agree with such contention. Both of the offenses charged grew out of the same transaction and were tried together. In our opinion the nature of the testimony and the inferences which may be legitimately drawn therefrom constitute sufficient evidence to sustain the conclusion that Claimant was guilty of attempting to subject the Carrier to fraudulent liability.

The Joint Submission shows that Claimant had been in the Carrier's employ for approximately eighteen years, including his last nine years as a Laboratory Assistant; that he had a good record of employment, which included a citation from the Superintendent for saving the Diesel Oil Mixing Plant from burning down in 1957 when a machine in the plant caught on fire, and that he had to be hospitalized because of inhalation of fumes and smoke from the fire. However, in view of the serious nature of Claimant's conduct as disclosed by the record, we do not feel justified in making any change in the discipline as imposed. The claim is denied.

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 Employes involved in this dispute are respectively Carrier and Employes 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.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 26th day of September 1963.