

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24579
Docket Number MW-24338

Herbert L. Marx, Jr., Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(The Chesapeake and Ohio Railway Company
(Southern Region (and Hocking Division)

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

(1) The discipline imposed upon Machine Operator O. R. Estep for allegedly "giving false testimony in the hearing held May 2, 1980, at Columbus, Ohio" was arbitrary, unwarranted, without just and sufficient cause and on the basis of unproven charges (System File C-D-985/-MG-2862).

(2) The claimant's record be cleared and he shall be compensated for all wage loss suffered.

OPINION OF BOARD: This dispute involves a ten-day overhead suspension imposed by the Carrier, which discipline triggered the serving of a five-day suspension imposed as a result of an earlier investigation.

The Claimant gave testimony in a hearing on May 2, 1980. The matter under review here involves the Carrier's charge that he gave "false testimony" therein. An investigation, conducted in a fair and proper manner, was held in reference to this charge, and the Carrier determined that the Claimant was guilty. The alleged "false testimony" involved the following testimony at the May 2, 1980 hearing:

Q - 212 "Mr. Estep, when the rail is wet are you capable of stopping your tie handler as quickly as you can when the rail is dry?"

A - 212 "No, sir, two reasons. The rail is slick to start with and the machine that I was running didn't have any brakes on it."

A - 213 "Did you say the machine you run didn't have any brakes?"

A - 213 "No, sir. The only way of stopping it was to put it into reverse, and that's the condition of most machines on that force."

Q - 214 "had you reported this condition to your foreman?

A - 214 "Foreman and mechanics."

Q - 215 "How long had this condition existed?

A - 215 "It didn't have any brakes on it the day they brought it out there."

Q - 216 "Which was April 1?

A - 216 "April 1. Let me retrack that last question - I don't know if I told the foreman or not, but I told the mechanics, because I don't work around the foreman."

Q - 217 "To your knowledge, did the machine behind you have any brakes?

A - 217 "Scarifier behind me is run by Mick Christy's brother Mark and it didn't have any brakes on it either. They did fix those a couple days later and I fixed my own."

The gist of the Claimant's statements is that his machine "didn't have any brakes" (i.e., inoperable brakes); that he reported it to "the mechanics"; and that he later "fixed my own" brakes.

Testimony by various witnesses called by the Carrier offered considerable support that the Claimant's statements were not true. Mechanics testified that they did not recall being informed on the problem by the Claimant and/or denied being told. Mechanics expressed no awareness that their tools had been used by the Claimant to repair the brakes. There was no declared knowledge by others that the brakes were inoperative.

In a matter involving determination of responsibility to fix a disciplinary penalty, a hearing officer is granted considerable discretion in weighing conflicting testimony. Resolution of such conflicts must be made to decide if charges against an employe have been sufficiently proven to warrant discipline.

Here, however, there is something more. The Claimant is not being charged with any alleged dereliction of duty but with something narrower -- the giving of "false" testimony. Such a charge necessarily implies that the accused is knowingly telling an untruth. To prove this, it is not enough to show that the testimony is improbable or even contradicted by others (whose probity must also be weighed). Did the Claimant here perceive that he had "no brakes"? Can it be proven that he did not make a brake repair? Only if these can be positively resolved through uncontroverted evidence (not simply the testimony of others) can a charge of "false testimony" be sustained.

On this basis, the Board finds the accusation against the Claimant a most serious one which requires a degree of proof not reached through the investigative hearing.

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 Employes involved in this dispute are respectively Carrier and Employe 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 violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois this 15th day of December 1983.