NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 25532
THIRD DIVISION Docket Number MW-25374

Frances Penn, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
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(The Chesapeake and Ohio Railway Company

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

(1) The thirty (30) days of suspension imposed upon B&B Mechanic D. M. McDowell for "alleged fraudulent injury report" was without just and sufficient cause and on the basis of unproven charges (System File C-D-1395/-MG-3579).

(2) The claimant's record shall be cleared of the charge leveled against him and he shall be compensated for all wage loss suffered.

OPINION OF BOARD: The Claimant, B&B Mechanic D. M. McDowell, was assessed a thirty (30) day suspension by the Carrier following an investigation for filing a fraudulent Personal Injury Report. The Report was filed by the Claimant at 1:00 P.M. on June 2, 1981, at the Carrier's office. The Report stated that the Claimant received a "broken foot" on June 1, 1981, at 4:00 P.M. when he "was walking toward md cabin on ground next to tool cars when my foot went into concrete with reinforcement rod stick out and hit the top of my boot causing injury." The Carrier contends that the Injury Report was fraudulent and that the 30-day suspension was warranted because of the seriousness of the offense. The Organization contends that the evidence on which the Carrier based its disciplinary action did not prove the Claimant guilty of the charge and that the discipline imposed was harsh and unjust.

The X-ray taken on June 2, 1981, shows that the Claimant chipped the first metatarsal bone of his foot. The Claimant maintains that he hurt his foot when he went to retrieve his keys and rule which he had forgotten on the wheel stop near the system bolt car after he had finished fueling the air compressor car and before he went to the camp car at the end of his shift. The Claimant testified that he believed that he had bruised his foot and, therefore, did not make a report or mention the incident to other employes. After he got home, his foot began to swell and he began to have pain. His wife drove him to the Doctor early the next morning, June 2nd. The Doctor told him that he could not tell if the foot was broken without an X-ray. The X-ray showed that he had fractured the bone. The foot was put in a cast, and the Claimant proceeded directly from the hospital to the Carrier's office and filled out the Report.

After careful evaluation of the entire record, the Board finds that the Carrier has not produced the substantial evidence required to show that the Claimant did, in fact, file a faudulent Report. This is not an issue of credibility which it is not this Board's province to judge. This is a question of burden of proof. Previous Awards make it clear that the Carrier must provide convincing proof that the Claimant was guilty of the misconduct with which he was charged. (See Third Division Award No. 18817 and First Division Award No. 20834.) It is also clear from prior Awards that in cases in which the Carrier accuses a Claimant of dishonesty and intent to defraud, as it has done in this instance, the Carrier has the burden of proof to show that the Claimant intended to defraud the Carrier. As stated in Second Division Award 9530: "***The charge of dishonesty...requires that the Carrier bear the burden of proof and show by substantial evidence that claimant intentionally attempted to deceive the Company." (See also Third Division Award No. 16064 and Fourth Division Award No. 3552.) The Carrier has not produced substantial evidence that the Claimant was dishonest in filing the Report nor has it showed through any of the evidence that the Claimant had any intent to defraud the Carrier.

The Board finds no conclusive evidence that the Claimant's statement about where and when the accident took place is untrue. The Claimant's Foreman, and the two B&B Mechanics with whom the Claimant was working on the air compressor, testified that they did not know for certain whether the Claimant went directly from the compressor to the camp car. Mr. Brock, a B&B Mechanic, testified that while he thought that the Claimant might have gone past the bolt car to get his keys and then met him at the camp car. The testimony of Mr. Isaacs, the other B&B Mechanic, changed during the hearing. He first said, "He might have after we got the fuel. I do not know,". In answer to whether it would have been possible for the Claimant to go to the bolt car before he went to the camp car. He then changed his testimony and said that the Claimant went directly to the bunk car. The fact is that none of the witnesses is certain that the Claimant went directly to the camp car without detouring on his way. There are also no witnesses who were present at the wheel stop who could testify as to whether or not the Claimant was there when he says he was. Similarly, the Carrier cannot depend on the testimony of witnesses who said that the Claimant could not have gone to get his keys when he went from the bridge to the air compressor, since this was prior to the time that the Claimant says the accident occurred. Thus, there is no substantial evidence which shows that the Claimant did not go to the wheel stop near the bolt car to get his keys and his rule after he completed fueling the air compressor.

The Hearing Officer asked each witness about whether he knew of any reason why the Claimant would have gone to the area near the bolt car and each witness said he did not, but this testimony does not prove whether or not the Claimant did in fact go there. The opinions of witnesses about whether the Claimant had a reason which was known to them for being where he states the accident occurred has no weight.

Furthermore, the testimony from other employes about whether it is the usual practice for employes to mention bumps and bruises to each other does not show whether the Report filed by the Claimant was fradulent. The Carrier has no rule or policy which requires employes to tell each other about injuries, and the Claimant was not disciplined for failure to report an injury. He admits that he knew that injuries were supposed to be reported. However, he thought he had just bruised himself, and he did not realize that he had actually injured himself until the foot began to hurt and swell after he got home. The Doctor could not tell if the foot was broken without having an X-ray taken, so it is unreasonable to assume that the Claimant should have been able to assess the seriousness of the injury himself. Since he immediately informed the Carrier after the foot was casted, the delay in making the Report the day after the injury occurred in no way constitutes proof of fraud. Thus, for all the reasons detailed above, the Carrier has failed to produce evidence which provides substantial proof that the Report filed by the Claimant was fraudulent. In addition, there is absolutely no evidence in the record of any intent on the part of the Claimant to defraud the Carrier.

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 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 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 28th day of June 1985.