

The Third Division consisted of the regular members and in addition Referee Thomas J. DiLauro when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Southern Pacific Transportation Company (Eastern Lines)

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

(1) The dismissal of Laborer Driver L. X. Cantu for alleged violation of Rules 806 and 607 was harsh, unreasonable, excessive and in violation of the Agreement (System File MW-90-79/493-33-A SPE).

(2) The Claimant shall be restored to his former position as laborer driver, with seniority and all other rights unimpaired, he shall have his record cleared of the charges leveled against him and he shall be paid for all wage loss suffered beginning May 25, 1990 and continuing until he is restored to service."

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 employees 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 waived right of appearance at hearing thereon.

Prior to his dismissal, Claimant served 11 years for the Carrier, and worked as a laborer-driver. On March 22, 1990, the Claimant was assigned to operate a PBA air (pneumatic) hammer to perform "high spiking."

On Thursday, March 22, 1990, the Claimant sustained a personal injury to his left ring finger. The Roadmaster transported the Claimant to the Gateway Medical Clinic. The Claimant was diagnosed as having a small cyst, but he was released for duty with a 20 pound lifting restriction.

The Claimant contended he was unable to sleep on the night of March 22, 1990. At approximately 7:45 A.M. on Friday, March 23, 1990, the Claimant

contacted the Foreman and requested permission to absent himself from work because his back pain prevented him from obtaining sufficient sleep. The Claimant also discussed this situation with the Roadmaster, and the Claimant indicated he would report for duty on March 26, 1990. The Roadmaster recorded the Claimant as absent from work on March 23, 1990, due to personal illness.

On Sunday, March 25, 1990, the Claimant allegedly contacted the Foreman, and the Claimant reported he would be unable to work on Monday, March 26, 1990, because his back ailment prevented him from driving. The Foreman failed to record Claimant's absence and failed to report the cause of Claimant's absence to the Roadmaster.

On March 27, 1990, the Senior Claims Representative contacted the Claimant, and the Claimant made him aware of his inability to report to work due his severe back pain. The Claims Representative arranged for the Claimant to be examined for his back pain. On March 29, 1990, a doctor diagnosed acute lumbar strain as the etiology of the Claimant's back pain.

By letter dated April 4, 1990, the Carrier requested information addressing the cause of the Claimant's absence from work, and the Claimant responded by providing the Carrier with statements from the doctor.

By Notice dated May 1, 1990, the Carrier instructed the Claimant to attend an Investigation in connection with alleged violation of General Rules 806 and 607. General Rule 806 provides:

"REPORTING: All cases of personal injury, while on duty or on Company property, must be promptly reported to proper officer on prescribed form. Employer and his immediate superior must thereafter, without delay, and prior to completion of tour of duty, complete required reports on prescribed forms and furnish other required statements to proper authority.

Personal injury occurring while off duty that will in any way impair the performance of the duties of an employee must be reported to the proper authority as soon as possible and prescribed written form completed upon return to service."

General Rule 607 provides in pertinent part:

"CONDUCT: Employees must not be:

- (2) Negligent;
- (4) Dishonest;"

As a result of the Hearing, the Carrier determined the Claimant to be guilty of the charges. By letter dated May 25, 1990, the Claimant was dismissed from the service of the Carrier.

The Organization contends the Claimant was denied his Agreement due process rights under Article 14. Article 14, Section 1, in relevant part, reads:

"Section 1 - An employee who has been in service sixty (60) days or more shall not be dismissed or disciplined except as provided in this agreement without a fair and impartial investigation. They may, however, in serious cases, be held from service pending such investigation."

The Carrier asserts Article 14 of the Agreement permits reinstatement and pay for lost time only by reason of unsustained charges, and in this case, the charges were sustained. In addition, the Carrier notes that Claimant is still under a physician's care for the personal injury he sustained on May 22, 1990. Therefore, the Claimant suffered no loss of earnings, because he remains physically unable to work.

The Organization alleges the Carrier prejudged the Claimant's guilt. The Organization notes the Superintendent dismissed the Claimant from service by letter dated May 25, 1990, prior to the certification of the Investigation transcript which occurred on or after June 1, 1990. Therefore, the Superintendent failed to consider the evidence from the Investigation in rendering his decision to dismiss the Claimant.

The Organization alleges the Carrier failed to have a witness present at the Investigation on whose knowledge the finding of guilt was based. The Organization objects to the admission into the record of a letter from the Claims Representative wherein he attempted to refute some of the testimony Claimant presented during the Investigation.

The Organization maintains the Carrier's attempt to flood the record with superfluous documents following the Organization's filing of its intent with the Board was untimely and in error. The Organization objects to the Carrier's attempt to introduce the Claimant's petition filed in the District Court of Maverick County, Texas, 365th Judicial District, wherein the Claimant claimed he suffered permanent injuries to his left hand, back and other parts of his body. Because the document is a public record, the Carrier asserts it had the right to admit it before this Board.

The Organization argues the Carrier failed to prove the charges for which the Claimant was dismissed from service. The Organization noted the Carrier leveled charges in conjunction with the Claimant's finger injury but dismissed him for his back injury. The Organization indicates the Claimant was neither dishonest nor negligent in failing to report his back injury. The Organization submitted the Claimant provided sufficient information to the Roadmaster and to the Foreman for them to infer his absence was due to his back pain.

The Carrier argues it sustained its burden of proof. The Carrier notes both the Roadmaster and the Foreman testified the Claimant never advised them that he had sustained a back injury on March 22, 1990. The first knowledge of the Claimant's alleged back injury occurred when the Claims Representative contacted the Claimant concerning his finger injury. Further, the Claimant testified he was familiar with Carrier procedures regarding the Employee's Report of Accident Form, but he admitted he failed to complete an Employee's Report of Accident Form for his back injury.

The Organization characterizes the dismissal of the Claimant as harsh and unreasonable. The Organization cites the Claimant's 11 years of unblemished service. The Organization notes the Claimant lacked any intent to be dishonest in failing to complete the Employee Report of Accident Form.

With respect to the substantive charge, this Board finds that there is sufficient probative evidence in the record to establish that the Claimant is guilty of the charge against him.

The Claimant, the Foreman, and the Roadmaster, each testified the Claimant reported an injury to his finger on March 22, 1990, but he failed to report an injury to his back at that time. Beyond this testimony, the reports of the three witnesses conflict as to when the Claimant informed the Carrier of his back injury. The Carrier cites Board precedent that the Board does not weigh evidence, attempt to resolve conflicts therein, or pass upon the credibility of witnesses because these functions are reserved to the Hearing Officer. Third Division Awards 21921, 25134, 25102, 24991, 25306, 24470.

The Board recognizes the Board precedent that credibility issues are reserved to the Hearing Officer. Therefore, the Board adopts the finding of the Hearing Officer in this case. The Board finds the Carrier fulfilled its burden to prove the Claimant failed to timely or correctly report his back injury alleged to have occurred on March 22, 1990.

Although falsification of an on-duty injury is a dismissal offense (Third Division Awards 25162, 25157, 24990, 26526, 26282), the penalty of dismissal is too harsh in this case. The Board notes the Claimant has an unblemished record of 11 years of service. Further, the record lacks proof that the Claimant formed the specific intent to dishonestly fail to inform the Carrier of his back injury.

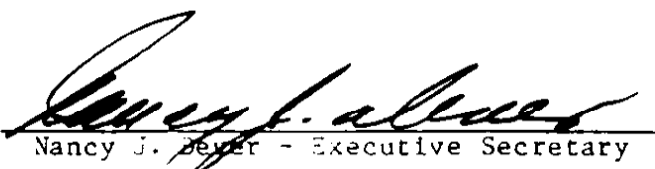
The Claim is denied in part and sustained in part. The Claimant is to be reinstated, but he must pass a return to work physical examination. The reinstatement is without backpay but with seniority unimpaired.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Beyer - Executive Secretary

Dated at Chicago, Illinois, this 21st day of October 1992.