

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30760
Docket No. MW-31143
95-3-93-3-44

The Third Division consisted of the regular members and in addition Referee M. David Vaughn when the Award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(Elgin, Joliet and Eastern Railway Company)

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

(1) The dismissal of IETO D. Tretter for allegedly dishonest [sic] and thereby in violation of Rule D on August 29, 1991 in connection with testimony and statements given concerning an injury he sustained while on duty, was arbitrary, capricious and on the basis of unproven charges (System File SAC-10-91/MM-16-91).

(2) As a consequence of the violation referred to in Part (1) above, Claimant shall be reinstated with seniority unimpaired, his record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered."

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 waived right of appearance at hearing thereon.

Claimant was employed as an Industrial Elevating Transporter Operator. He had 12 years of service.

According to Claimant's testimony, he was operating a CTEC machine on November 23, 1988. He injured his left knee while

dismounting from the machine. He was examined by a physician, who reported damage to the cartilage and the accumulation of fluid in the joint. Claimant was off work as an apparent result of the injury.

In January 1989, while Claimant was still off work, the Carrier's Claim Agent took a statement from Claimant in which Claimant described the manner in which he had been injured: that he had twisted his knee on the stairs as he dismounted. He denied to the Agent that he had "slipped". Claimant represented his explanation to be the complete truth.

Claimant filed a lawsuit for damages under FELA. During discovery in connection with that action, Claimant was deposed by the Carrier's attorney on August 9, 1991. In that deposition, Claimant acknowledged that several points in the 1989 statement were inaccurate or incomplete, including the date he had received medical treatment (the 26th vice the 27th) and the fact that his knee, rather than his leg, had been swollen. Claimant acknowledged the discrepancies, which Carrier's attorney characterized repeatedly as "untruthful" and "lies".

Claimant stated that the statement he had given to the Claim Agent was "... truthful . . . but not complete. Getting out, my knee slipped out from under me". He testified in the deposition that he had not told the Agent the entire truth because he thought he would be able to return to service shortly and that he would get in trouble with the railroad if he told the whole truth - although exactly why he would get in more trouble by saying that he had "slipped" than that he had "twisted" his knee is unclear. Indeed, there is nothing obvious in the impact of those two alternatives on either Claimant's culpability in the accident or his possible recovery in the lawsuit.

The Carrier convened an investigation, which was held on October 4, 1991, to ascertain his responsibility for making false statements to the Claim Agent in 1989, in violation of Rule D, which forbids, in part, "dishonest behavior".

At the Investigation, the Carrier cited excerpts from the 1991 Deposition to prove the offense. Claimant testified that he had not lied in his 1989 statement, although he was apparently mistaken as to the date he received medical attention for the injury, that he had not intended to say that he had lied, and that, in the 1991 deposition, he was trapped into making incorrect and misleading statements and effectively denied opportunity to set the record straight.

Following presentation of evidence, the Carrier found Claimant guilty as charged and dismissed him from service.

The Organization protested the Carrier's action and appealed the Carrier's denial. The claim was progressed in the usual manner.

The Carrier argues that the evidence clearly establishes that Claimant furnished the Carrier with false information concerning an alleged on-duty injury for which he later sued the Carrier. The Carrier asserts that Claimant denied to the Claim Agent having suffered any injury and, at the investigation, denied any recollection of the injury. It points out that Claimant admitted several times in the Deposition that he had lied in the earlier statement to the Carrier and that he gave his reason - that he did not want trouble with the railroad. The Carrier denies that Claimant was misled or entrapped by its attorney. It asserts, instead, that the attorney was simply impeaching Claimant's credibility - successfully. It argues that false statements in connection with personal injury accidents is a dismissible offense. The Carrier urges that the claim be denied.

The Organization argues, as initial matters, that the Carrier failed to produce the Claim Agent to testify about the 1989 statement and improperly based its decision on testimony of a witness who had read, and used, only selective portions of the transcript of the deposition. It urges that, in that deposition, made 31 months after the statement to the Claim Agent, Claimant was misled by a wily lawyer into answers he did not intend and was, through clever questioning, effectively denied the opportunity to clarify his purpose, which was not to lie or mislead. Since proof of dishonesty requires intent, which the Organization contends the Carrier did not prove, it urges that the Carrier failed to prove its charge. However, the Organization also contends that, even if Claimant's conduct warranted discipline, dismissal was far too severe a penalty. It urges that the claim be sustained.

It is established beyond doubt that the burden to prove misconduct rests with the Carrier and that proof of dishonesty includes proof of intent. Dishonesty by an employee toward his employer is properly prohibited and subjects the employee to discipline. Dishonesty in connection with the reporting of personal injuries is a serious offense for which dismissal is a frequent penalty. See, e.g., Third Division Award 25133. There are, however, degrees of dishonesty and the potential for mitigating circumstances which must be considered.

Of the Organization's argument that Rule 4 does not apply to proceedings outside of Claimant's employment, the Board is not persuaded. Claimant's 1989 statement to the Claim Agent and his lawsuit were related to his employment and are subject to the Rule.

In the instant case, both Claimant's 1989 original statement to the Claim Agent and his 1991 deposition confirm that Claimant was alleging an on-duty injury; his apparent denial of such an injury in the investigation appears to be a misunderstanding of the question and not consistent with the remainder of the record.

In the deposition, the Carrier's attorney first threatened Claimant, by implication, in connection with testimony in a previous case, elicited admissions from Claimant which the Board is persuaded were the product of innocent mistake, lack of sufficient detail in the questions and responses in the earlier statement, and/or faulty memory, characterized those admissions as establishing the untruthfulness of his earlier statements, and then "mousetrapped" Claimant by asking him whether anything else he had said was untrue. There is, of course, no satisfactory answer to such a question. Claimant appears to be easily confused, equally so whether confusion helps or hurts him; and his confusion played into the attorney's hands.

Even a Claimant's answer in the deposition that he had not told the truth in his earlier statement in order to avoid getting in trouble with the Carrier was "set up" by the attorney. Claimant's explanation at the Investigation was plausible and innocent. Without holding that the failure of the Carrier's main witness in the Investigation to read the entire transcript before determining Claimant's guilt is a separate basis upon which to reverse the Carrier's action, it is apparent from review of the entirety of the three documents - the 1989 statement, the 1991 deposition, and the transcript of the Investigation - that even Claimant's stated "admissions" of "dishonesty" are much less than they seem. A complete review of those documents might have led the Carrier to the same conclusion.

While the Board is not persuaded that Claimant was guilty of actual, material dishonesty in his statements, it is the case that Claimant did make a number of statements in the deposition which appear, on their face, to be dishonest - materially and purposefully false. How far was the Carrier obligated to look beyond Claimant's own statements? Should Claimant be exonerated and the Carrier be held financially liable for the inaccuracy of his statements? The Board is persuaded that, as between Claimant and the Carrier, Claimant should bear the responsibility for his statements and the conclusions the Carrier drew from them, even though, at the same time, we are not persuaded that they meant what they said, for purposes of establishing Claimant's culpability. The Award reflects our allocation in this regard.

The Claim is sustained in part and denied in part. Claimant made statements which, on their face, violated Rule 4. However, the circumstances and mitigation make the penalty of dismissal arbitrary and excessive. Claimant's dismissal shall be rescinded.

His record shall be amended to reflect the change. Claimant shall be reinstated to service with seniority unimpaired. However, Claimant shall not receive pay or benefits for the period of his absence. In addition, he shall be subject to examination for fitness for duty and his reinstatement shall be subject to passing such an examination.

AWARD

Claim sustained in accordance with the Findings.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 24th day of February 1995.