

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32048
Docket No. MW-32502
97-3-95-3-365**

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

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of Sectionman A. R. Andersen for allegedly violating General Rules A, B, E and I and Rules 4000, 4004, 607 and 621 of Form 7908, Safety, Radio and General Rules for All Employees, in connection with the February 4, 1994 notice of hearing and charges of alleged falsification of a personal injury and the failure to promptly report a personal injury, was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File D-215/940475).**
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant shall receive the benefit of the remedy prescribed by the parties in Rule 48(h).”**

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 were given due notice of hearing thereon.

This dispute involves Sectionman A. R. Andersen who has worked for the Carrier since June 10, 1971.

The Claimant, prior to his dismissal was employed on the Idaho Division working under the supervision of Section Foreman C. O. Eggleston at Sage, Wyoming.

On January 12, 1994, the Claimant met with the Carrier's Casualty Management Representation Mr. Greg Howard and advised Mr. Howard that he had injured his back on August 11, 1993, while pulling spikes on a bridge.

On January 28, 1994, the Claimant met with Manager Track Maintenance Mr. D. O. Humphreys and completed an accident report alleging that he had injured his lower back on June 9, 1992, at M.P. 79 during a collision involving track equipment.

Subsequently, the Claimant received a Notice of Investigation which read as follows:

"At approximately 2:00 p.m. on January 12, 1994, at your residence at Beckwith, WY, you advised Casualty Management Representative Mr. Greg Howard that you allegedly injured your lower back on August 11, 1993 at Cokeville, WY, pulling spikes on a bridge.

At approximately 8:00 a.m. on January 28, 1994, at your residence at Beckwith, WY, you completed an accident report, in the presence of Deland Humpherys. In this report you alleged that you injured your lower back on June 9, 1992 at MP. 79 during an collision involving on track equipment.

This indicates a possible violation of General Rules A, B, E, and I and Rules 4000, 4004, 607, and 621 of Form 7908 'Safety, Radio and General Rules for all employees' (Rev 10/89).

Please report to the Kemmerer Office, 199 Park Loop, Kemmerer, WY, on February 10, 1994 at 9:00 a.m., for investigation and hearing to determine the facts and place responsibility if any, in connection with alleged falsification of a personal injury and the alleged failure by you to promptly report your alleged personal injury.

The hearing will be conducted in conformity with Rule 37 of the current agreement between the Company and the BMW, and you are entitled to representation as provided in that rule.

You may provide such witnesses as you desire at your own expense."

The Hearing was postponed until Tuesday, March 1, 1994.

Prior to the March 1, 1994, Hearing the Organization representative requested the Carrier to produce three individuals who they considered important to the June 9, 1992, track vehicle collision accident. The letter read as follows:

"We recently advised by Manager Track Programs A. E. Rivera via telephone that there is a hearing scheduled for March 1, 1994, in Kemmerer, Wyoming, regarding a late accident report filed by Sectionman Allen R. Andersen SSN. 508-42-7611.

In order to investigate all the facts regarding the accident report we request that the Carrier produce the following witnesses:

- 1. Mr. Arthur W. Hess SSN. 518-48-6930 who witnessed the accident while working as a TMO on June 9, 1992.**
- 2. Mr. Chris Henderson a signal maintainer who witness the accident and has information about the reporting of the accident.**
- 3. Mr. Deland O. Humpherys SSN. 541-64-2137 who was the MTM at the time of the accident.**

The witnesses are needed to investigate the facts regarding the accident reporting. Mr. Anderson is not be able to produce the witnesses

named above so as an expression of fairness we request the Carrier to produce the witness named to investigate all the facts at the March 1, 1994, hearing.

Thank you in advance for this consideration."

The Hearing was again postponed until March 29, 1994, by a letter dated March 4, 1994, from the Organization to the Carrier Hearing Officer. The letter read as follows:

"This letter is written to confirm our conversation on February 28, 1994, regarding the Organizations request for a postponement of the hearing scheduled in behalf of Mr. A. R. Anderson SSN. 508-42-6711. Postponement was requested because you refused to produce the witnesses requested by Mr. Anderson.

Reflecting back on our conversation I assume you intend to be conducting officer at Mr. Anderson's hearing, this would not be fair as you are Mr. Anderson's accuser also. We request someone other than yourself be conducting officer.

It was mutually agreed that the hearing would be postponed until March 29, 1992, at 9:00 a.m. in the Kemmerer Office, 199 Park Loop, Kemmerer, Wyoming.

We still request that Carrier produce Witnesses Arthur Hess, Chris Henderson and Deland Humpherys as stated in my letter dated February 10, 1994, at the March 29th hearing. They have knowledge of the occurrence to be investigated.

Thank you for the postponement. Favorable consideration to our requests would be greatly appreciated."

Following the Investigation the Claimant received a letter dated April 12, 1994, from Mr. A.E. Rivera, Manager Track Programs dismissing him from the service of the Company.

The letter read as follows:

"Referring to Notice of Hearing hand delivered to you on February 6, 1994. After carefully considering the evidence adduced at the hearing held at Kemmerer, Wyoming, on March 29, 1994 the following charges against you have been sustained:

While you were employed as a sectionman you were responsible for falsification of a personal injury and the failure to promptly report your personal injury in violation of General Rules A, B, E, and I and Rules 4000, 4004, 607, and 621 of Form 7908 'Safety, Radio and General Rules for all employees, Revised 10/89.

You are, therefore, dismissed from the service of the Company. Please deliver all passes and Company property in your possession to the office of Phil Torres, Manager Track Maintenance at Kemmerer, Wyoming."

A claim in behalf of the Claimant was progressed by the Organization on the property up to and including the highest officer of the Carrier without satisfactory resolution of the dispute.

During the handling on the property the Organization contended that the Claimant was denied due process because of several procedural errors.

Our review of the record reveals that the only procedure matter that could be considered prejudicial to the Claimant's interest was the failure of the Hearing Officer to arrange for the presence of all witnesses to the incidents involved in this dispute as requested by the Organization.

If there is to be a fair and impartial Hearing, the Carrier has the responsibility to have all employees who were involved in any incident to be present at the Hearing to ensure that the facts of what transpired can be fully developed and considered.

The transcript of the Investigation clearly reveals that an accident did occur in 1992 which involved the collision of track machines which resulted in the Claimant being thrown off one of the track machines on which he was riding. The transcript also reveals

that there were questionable tactics used by Carrier officials in the matter of filing a personal injury report. There is sufficient evidence in the record to reveal that the Claimant was easily intimidated and afraid to speak out for fear of reprisal by his supervisor if he filled out a personal injury report.

The testimony of one of the witnesses, Mr. David Henderson, clearly points out that the employees were led to believe by supervisory personnel that some of the employees could get fired if a personal injury report was filed.

The record also shows that the Claimant because of his being unable to communicate or understand what was involved with the filing of a personal injury report, on one occasion simply signed it and left it with his supervisor to complete.

There are numerous incidents in the record to reveal that the Claimant was clearly an employee who was conscientious, eager to please his employer even to the point of being persuaded to file an off-duty injury report when there was evidence that his injury may have stemmed from an on-duty injury.

This case is rampant with error and confusion caused primarily by questionable tactics against an employee who was easily intimidated. While there may be questions concerning actual dates that the incidents occurred, there is no question that they did occur and there is no doubt that the Claimant did sustain an injury.

We cannot find any basis for the charge that there was deliberate intent on the part of the Claimant to falsify the reporting of a personal injury. Nor can we find any basis for the charge of violation of Rules as cited by the Carrier.

Accordingly, it is the decision of this Board that the Claimant was first denied due process when the Carrier did not produce all relevant witnesses as requested by the Organization. Secondly, with respect to the events it is crystal clear that the Claimant was a victim of intimidation by supervisory personnel which led to his confusion in accurate reporting of events that transpired.

The facts in this dispute clearly reveal that the penalty of dismissal is excessive and an abuse of discretion.

Accordingly, it is our decision that the Claimant should be immediately returned to service with seniority and all other rights unimpaired but with no pay for time lost.

This Award shall serve notice to the Claimant that he should not in any instance succumb to any pressure to alter the facts for fear of reprisal by supervisory personnel. It should also serve notice to supervisory personnel that personal injury reports serve a very useful purpose for protecting the interests of both the employee and Carrier and should always be filled out accurately and promptly. We find that the discipline of dismissal from the service of the Carrier was excessive.

AWARD

Claim sustained in accordance with the Findings.

ORDER

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 10th day of June 1997.

Carrier Members' Dissent
to Award 32048 (Docket MW-32502)
Referee Charles J. Chamberlain

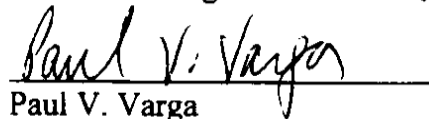
The Majority in Award 32048 erroneously found that "If there is to be a fair and impartial Hearing, the Carrier has the responsibility to have all employees who were involved in any incident to be present at the Hearing to ensure that the facts of what transpired can be fully developed and considered." The Majority makes this assertion despite the clear, specific and unambiguous language of Rule 48(C). The language of this rule was bargained for by the parties and is not open to reformation or dilution by this Board.

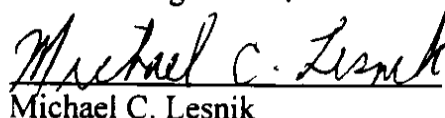
In the Carrier's Submission, **Third Division Award 26435** (on-property) was cited as support for the intent of Rule 48(C) to place responsibility on the employee to arrange for the presence of witnesses on his behalf at the Hearing. Furthermore, the employee's failure to act in his best interests in securing his witnesses "does not render the Hearing unfair or arbitrary." The language of Award 32048 seeks to destroy the intent of the negotiated language and reinvent the definition of a fair and impartial hearing. This re-writing of the Agreement language clearly exceeds the Board's authority.

Additionally, the Board again overstepped its bounds when it stated that "with respect to the events it is crystal clear that the Claimant was a victim of intimidation by supervisory personnel which led to his confusion in accurate reporting of events that transpired." The Carrier is mystified as to how the Majority can find that the Claimant was so intimidated that he reported an accident that never happened more than 18 months after its alleged occurrence. The record in this matter does not lead to a "crystal clear" revelation that any intimidation occurred, or that the Claimant was intimidated into the late reporting of a falsified injury.

We dissent.


Martin W. Fingerhut


Paul V. Varga


Michael C. Lesnik