

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40083
Docket No. MW-39938
09-3-NRAB-00003-070112
(07-3-112)**

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference**

PARTIES TO DISPUTE: (

(Florida East Coast Railway

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of Track Foreman A. J. Flagg for his allegedly withholding information and/or failing to promptly report and inaccurate reporting of circumstances surrounding the incident that occurred on February 14, 2005, by way of submitting Form 284, Report of Personal Injury, dated April 17, 2005 was without just and sufficient cause, not supported by the record and excessive and undue punishment.**
- (2) As a consequence of the violation referred to in Part (1) above, Track Foreman A. J. Flagg shall now be reinstated to service with seniority and all other rights unimpaired, be compensated for all wage loss and expenses suffered and have his record cleared of the charges and results therefrom.”**

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.

Prior to his dismissal, Claimant A. J. Flagg had accumulated more than 32 years of service and had established and held seniority in various classes, including Track Foreman. At the time of the incident leading to his dismissal, the Claimant was regularly assigned to a Surfacing Gang Foreman position headquartered at Bowen Yard. He worked under the direction of Roadmaster Clegg.

The instant case deals with the alleged failure of the Claimant to promptly and properly report an injury. The Claimant contends that he was injured on February 14 while removing buggies from a tamper, but did not report his injury until two months later on April 17, 2005 when he submitted Form 284, Report of Personal Injury.

By letter dated April 22, the Claimant was given notice that a formal Investigation would be held on May 9, 2005 “. . . to develop facts and [determine] responsibilities, if any, in connection with the following charges:

- 1. Withholding information and/or failing to promptly report an incident you allege occurred while removing buggies from the tamper on Monday, February 14, 2005.**
- 2. Inaccurate reporting of circumstances surrounding the incident of February 14, 2005 by way of you submitting Form 284, Report of Personal Injury, dated April 17, 2005.”**

The Hearing convened on August 2, 2005. By letter dated August 15, the Claimant was advised that there was sufficient evidence adduced at the Hearing to

sustain the charges. The Claimant was immediately dismissed from service. By letter dated September 6, 2005, the Organization appealed the dismissal claiming that the record on the property did not substantiate the charge. In addition, the Organization contended that the penalty of dismissal was too severe. On November 3, 2005, the Carrier responded and indicated that the Claimant had violated the Carrier's Rules and the penalty imposed was appropriate.

The Organization claims that the discipline was unwarranted. It claims that the burden of proof in a discipline matter such as this is on the Carrier and that burden of proof has not been met. It indicates that the Claimant did report the injury promptly as soon as he realized that he had sustained an injury on the job on February 14, 2005. Finally, it claims that based on the Claimant's 32 years of service, the punishment of dismissal was too severe. It contends that the claim must be sustained and the Claimant be made whole.

Conversely, the Carrier takes the position that it met its burden of proof. The Claimant was afforded a fair and impartial Investigation in accordance with the requirements of the Agreement. It considers the Claimant guilty as charged. According to the Carrier, a review of the transcript as developed during the Investigation reveals that the Claimant admitted to a number of individuals that he had not sustained an on-duty injury on February 14, 2005 and that he was simply filing a Form 284 to obtain superior benefits. This was improper and is an extremely serious offense and the discipline imposed was appropriate under the circumstances. In addition, the Claimant has had a number of prior disciplines which further contribute to the dismissal.

In discipline cases, the Board sits as an appellate forum. We do not weigh the evidence de novo. As such, our function is not to substitute our judgment for that of the Carrier, nor to decide the matter in accord with what we might or might not have done had it been ours to determine, but to pass upon the question of whether there is substantial evidence to sustain a finding of guilty. If the question is decided in the affirmative, we are not warranted in disturbing the penalty unless we can say it appears from the record that the Carrier's actions were unjust, unreasonable or arbitrary, so as to constitute an abuse of the Carrier's discretion. (See Second Division Award 7325 and Third Division Award 16166.)

After a thorough review of the record evidence, the Board concludes that there was substantial evidence in the record to uphold the Carrier's position. The evidence shows that the Claimant indicated to a number of individuals that he was not injured on the job on February 14 and that he filed Form 284 to obtain superior benefits. While there is no doubt that the penalty of dismissal was severe, the Claimant's offense is a serious offense that deserves a significant penalty. In addition, it is clear that the Claimant had prior disciplines.

Based on the record in the instant case, the Board concludes that it was proper for the Carrier to discharge the Claimant for his actions.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 19th day of November 2009.