

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40219
Docket No. MW-40573
09-3-NRAB-00003-080392**

The Third Division consisted of the regular members and in addition Referee Brian Clauss when award was rendered.

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

PARTIES TO DISPUTE: (

(The Alton and Southern Railway Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed upon Mr. K. Wilkinson under letter dated April 2, 2007 for alleged violation of Rule 1.6 of the General Code of Operating Rules in connection with charges of allegedly falsifying an injury on Thursday, January 25, 2007 when he reported that he had slipped while on the back of Truck 23, falling to the ground and landing on his head, causing injury to head, neck, shoulder and throat, was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (Carrier's File 1474205).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant K. Wilkinson shall now ‘. . . be reinstated immediately, with all rights, seniority, and pay for all lost time. ***’”**

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.

The Claimant had been employed by the Carrier for seven years at the time of the events in the instant matter.

The Carrier advised the Claimant in a letter dated January 31, 2007, to attend a formal Investigation to develop facts and determine responsibility, if any, in connection with allegedly falsifying an injury on January 25, 2007. Following agreed postponements, the Hearing was held on March 26, 2007. On April 2, the Carrier notified the Claimant that the charge of dishonesty had been sustained and he was dismissed from service.

The Organization claims that (1) the Carrier did not meet its burden of proof (2) the decision to discipline was based on speculation and conjecture and (3) the discipline was arbitrary and capricious. Furthermore, the re-enactment was problematic and the Carrier's reliance upon it was misplaced.

The Carrier contends that the Claimant received a fair and impartial Hearing consistent with the Agreement. It further contends that there was substantial evidence in the record to support the finding that the Claimant falsified a personal injury. Further, the imposed discipline was not in error where the offense was serious and the discipline was appropriate.

The Board sits as an appellate forum in discipline cases. As such, it does not weigh the evidence de novo. Thus, it is not our function to substitute our judgment for the Carrier's and decide the matter according to what we might have done had the decision been ours. Rather, our inquiry is whether substantial evidence exists to sustain the finding against the Claimant. If the question is decided in the affirmative, we are not warranted in disturbing the penalty absent a showing that the Carrier's actions were an abuse of its discretion.

After a review of the evidence, the Board finds that there were no procedural defects which would void the discipline. The inquiry then turns to whether there is substantial evidence in the record to support the findings. The Board finds that there is not substantial evidence in the record to sustain the finding of dishonesty.

The Claimant was at the rear of a one-ton Company truck that had a utility bed on the back. He and the Foreman were cleaning the truck. The Claimant's statement and testimony discuss how he removed a pallet from the utility bed by climbing on the side and lifting it over the side and into a dumpster. The Foreman testified that he saw the Claimant pull it from the back of the truck and throw it into the dumpster. The Claimant was at the rear of the truck and the Foreman went to the cab to remove debris.

The Foreman was in the cab, bent over, picking up water bottles and other debris from the passenger compartment. He could not see where the Claimant was located. According to the Foreman, he heard the Claimant cry out and went to see what had happened. The Claimant was on the ground with his cell phone in hand. The Claimant was talking with somebody that he later identified as a co-worker. The Foreman inquired whether the Claimant was injured and the Claimant replied that he was okay. The Foreman assisted the Claimant to his feet and they resumed cleaning the vehicle. While moving an impact tool from the truck to another company vehicle, the Claimant requested assistance. A short time later, they returned to the locker room and the Foreman left for home. The Claimant told a Manager that he was injured and was taken for medical attention. He returned to work the following day and completed an injury report. The Foreman was ordered back to work to speak with Managers who were investigating the injury.

The Investigation consisted of the truck being returned to the scene of the occurrence, alongside a dumpster, and a re-enactment being performed. The Managers inspected the back of the truck. The Foreman was told to bend over on one arm inside the truck's passenger compartment – as he had been doing when cleaning debris. He was waiting in that position to see if he could feel the Manager get onto the back of the truck. A Manager climbed onto the rear bumper and the Foreman felt the truck move. The Foreman stated that he did not feel the truck move when he was cleaning it and heard the Claimant cry out.

The Manager noted that there was no imprint on the soft ground that would indicate that the Claimant had fallen from the truck. The Manager also noted a gritty mark on the rear bumper. He was not sure if it was a footprint and asked the Foreman about it. The Foreman said the footprint was from where he got into the truck. The Foreman also said that he also stepped out of it in the same spot. The re-enactment did not consider the Claimant's version of events because he was still

at the Emergency Room and had not yet written a report. No additional re-enactment was done after receipt of the Claimant's injury report.

There is nothing in the record to show that the Claimant was dishonest about how the injury occurred when he fell from the truck. Disagreeing with the Claimant's version of the occurrence, absent more, does not equal the Claimant being dishonest in his injury report.

The Manager found the ground not to have a sufficient indication that the Claimant fell, yet the Claimant was on the ground when the Foreman discovered him. The truck was moved from the original scene after the injury and prior to the re-enactment. The Claimant and the Foreman were in the back cleaning the truck afterwards. The Foreman sat in the truck waiting to see if he could feel somebody climb onto the tailgate – much different than noticing whether somebody climbed on the back while the Foreman was cleaning the cab. The gritty mark on the bumper, that the Foreman stated was the exact spot he got into and out of the truck, does not establish that the Claimant was not on the bumper or in the utility box. The Claimant and the Foreman cleaned the utility box after the Claimant got up.

The Claimant testified that he began to feel the injury before returning to the locker room, and asked for assistance moving the impact tool. The Foreman moved the impact tool rather than assist. The Claimant then reported his injury.

Under the applicable appellate review standard, the Board must afford a substantial amount of deference to the credibility determinations of the Investigating Officer. It depends, of course, on the evidence in the record. The Board is well aware of its appellate role. However, a review of the record in the instant matter does not contain substantial evidence that the Claimant was dishonest. He reported his injury in a comprehensive manner. Nobody saw what occurred and the only facts about the injury came from the Claimant's report. The other conclusions are drawn from the re-enactment and the evidence from the Foreman who saw the Claimant when he was lying on the ground behind the truck. The re-enactment and the Foreman's testimony do not establish substantial evidence that the Claimant was dishonest.

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AWARD

Claim sustained.

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 21st day of December 2009.

CARRIER MEMBERS' DISSENT

to

THIRD DIVISION AWARD 40219 – DOCKET MW-40573

(Referee Brian Clauss)

The Majority accurately sets forth the standard of appellate review in discipline cases such as this. It correctly observes that it should afford substantial deference to the credibility determinations made by the Hearing Officer, which of course is due to the Hearing Officer's unique position of observing the witnesses testify and noting their demeanor and other indications of believability. But despite its professed realization of its appellate function and the foregoing standards, the Majority improperly based its holding on its own evaluation of the credibility of the witnesses, second-guessing the Hearing Officer's determination in a manner which appellate arbitration panels should be loath to employ. Even if the record were susceptible to an interpretation which contrasted with the Carrier's, there was indeed substantial evidence to support the Hearing Officer's finding of guilt. Therefore, the Majority erred in substituting its interpretation for that of the Hearing Officer.

Although the Majority succumbed to the Organization's plea to evaluate the credibility of the witnesses, it is well established that such was not the Board's function. As stated in Third Division Award 35870:

"As we have said many times, the Board does not sit to weigh evidence and second-guess the Carrier's disciplinary determinations. Instead, our role is limited to reviewing the record developed by the parties during their handling of the matter on the property to ascertain only whether substantial evidence exists in that record to support the Carrier's actions. While this record is susceptible to a contrasting interpretation, our review also discloses substantial evidence supporting the Carrier's determination. That evidence permitted the Carrier to conclude that the Claimant was culpable on both charges of misconduct. Given the nature of the falsification charge, dismissal is an appropriate disciplinary penalty notwithstanding long years of service."

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The record here revealed substantial evidence to support the Carrier's conclusion that the Claimant's story was simply not believable, regardless of the Organization's "contrasting interpretation." His report of how the fall allegedly occurred was directly contradicted by eyewitness testimony. Moreover, the Claimant's actions after the alleged fall are not consistent with his having actually sustained any injury. In reaching its conclusion, the Carrier considered, among other things, that the Foreman saw the Claimant standing on the ground only ten seconds before he heard the Claimant call out, that it was conclusively established (and it is common sense) that the truck would have moved if someone climbed in the back, but no movement occurred in that ten second span, and that there were no footprints or other evidence that anyone had been in the bed of the truck. The Hearing Officer also took into consideration that the Claimant's contention that he had climbed into the back of the truck to throw away a pallet was contradicted by the eyewitness testimony of the Foreman who saw him move the pallet from the truck to the dumpster while standing on the ground at the back of the truck and that, incredibly, the Claimant was making a call with his cell phone in the few seconds between his calling out and the Foreman finding him. He further considered that the Claimant specifically stated that he was not injured when the Foreman discovered him. And most significantly, he considered that the Foreman had no reason to fabricate his testimony, while the Claimant had motive to claim an injury, which is further borne out by his subsequent FELA claim.

In overturning the Hearing Officer's determination, the Majority states that the Claimant "reported his injury in a comprehensive manner." The issue, however, was not whether the Claimant reported his injury, but whether he was honest in claiming to have fallen out of the back of the truck. In light of all evidence presented, including the Claimant's highly dubious contention regarding his making a call on his cell phone as soon as he allegedly hit the ground, there was more than sufficient evidence for the Hearing Officer to conclude that the Claimant was not honest in making his report, no matter how "comprehensive" it might have been. Any of the factors described above were reason to find the Claimant's statement to be unbelievable. Taken altogether, they constitute more than substantial evidence to support that conclusion. The Claimant's version of the events simply was not found to be credible, and such credibility determinations should not have been second guessed in this appellate proceeding. Several recent Awards have upheld the

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conclusion that such altered accounts of alleged personal injuries constitute dishonesty. See, e.g., Public Law Board Award No. 7001, Awards 19 and 27, as well as Public Law Board No. 5666, Awards 140 and 142. There was no reason to reach a different conclusion here. The Majority clearly erred in substituting its credibility determination for that of the Hearing Officer and, therefore, the Carrier Members respectfully dissent.

Michael D. Phillips
Michael D. Phillips

Michael C. Lesnik
Michael C. Lesnik

December 21, 2009

LABOR MEMBER'S RESPONSE
TO
CARRIER MEMBERS' DISSENT
TO
AWARD 40219, DOCKET MW-40573
(Referee Clauss)

It has been my observation that the Carrier has taken to dissenting to nearly every award that does not come down in their favor. Whether this is merely coincidence, frustration or madness is a mystery to me. Also evident is the propensity of the Carrier to not only dissent to the award, but along the way attempts to vilify the neutral member of the Board in the process. The Carrier Members' Dissent in this award is a case in point.

The National Railroad Adjustment Board does not take testimony or evidence de novo. Consequently, all the neutral member has to deal with is a cold dead record of the investigation that was held months, if not years, prior to review by the Board. Moreover, the Carrier has the three-pronged duty of being the prosecutor, judge and jury in discipline matters. Hence, in order for an employee to get a fair and impartial investigation, the Carrier must assure that the employee receives proper notice of the investigation, ample opportunity to attain representation, be able to face his accusers and be given a **fair and independent** review of the discipline assessed, if any.

The Carrier Members' Dissent begins with an assault on the majority's decision to overturn the discipline imposed by the Carrier. The dissent alleges that because the majority did not confine its assessment of the case to findings of the hearing officer, it overstepped its authority. The Carrier then goes on to assert that the Claimant's testimony of the events at issue contradicted eyewitness accounts of the event.

There are a number of problems with the Carrier's assertions listed above. **First**, a review of the record reveals that there were no eyewitnesses to the injury involved here. The foreman was nearby, but never actually witnessed the Claimant's fall to the ground. Somehow, the foreman's assertion that merely ten (10) seconds elapsed from the time the Claimant cried out that he fell to when the foreman found him is somehow important. Whether that time frame was accurate or not is subject to debate, but what is not debatable is the fact that a fall from the back of a truck to the ground would happen in only one (1) second, not ten (10) seconds. Whatever happened on the date in question is debatable, but what is not debatable is the clear and unambiguous fact there were no eyewitnesses to the incident. Remember, the Carrier has the burden of proof in discipline cases and this Board has repeatedly held that suspicion, speculation and assertion are not proof.

Second, what the Carrier Members' Dissent has woven throughout, is the issue of the findings of the hearing officer and how the Board has apparently upset the space and time continuum when it sustained the claim. It insists that "second-guessing the hearing officer's determination in a manner which appellate arbitration panels should be loath to employ" was

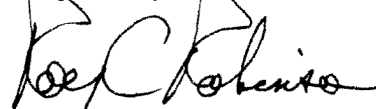
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simply wrong. The Organization has long been troubled by the assertion of many Section 3 tribunal findings in discipline cases that the standard of proof has been held to be "substantial evidence", which is the least stringent of the evidence tests. That does not mean that when, as here, there were no eyewitnesses to the event and the fact that the staged re-enactment of the incident took place the following day without any input from the Claimant, the Board should blindly follow the findings of the hearing officer, reality be damned. The problem here is that the hearing in this case was conducted by Carrier Superintendent T. Orr. The decision of the Carrier was issued by Mechanical Superintendent R. Wulff. Clearly, the hearing officer made no credibility determination in this case. In fact, Hearing Officer Orr stated within his opening statement that made it clear that he had no intention to review the transcript of the investigation and stated: "**** If I cannot make a ruling on the objection during the proceedings of this investigation, the objection will be noted in the transcript of the investigation and **given appropriate consideration by the reviewing manager.**" Hence, the Carrier Members' Dissent is nothing more than sour grapes and is designed to denigrate the neutral member's decision in this case.

A review of the above-cited quotation from the letter of hearing officer's instructions reveals that the decision to dismiss the Claimant from service was not made by Superintendent Orr, but was rendered by Mechanical Superintendent Wulff. Hence, the Carrier Members' allegation that the neutral member overstepped his authority by substituting his judgment for that of the Carrier hearing officer who had a "**** unique position of observing the witnesses testify and noting their demeanor and other indications of believability. ****" is not true and must be considered for what it is, i.e., claptrap.

The award is correct and stands as precedent.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Roy C. Robinson". The signature is stylized with a large, looped "R" and "C".

Roy C. Robinson
Labor Member