

PUBLIC LAW BOARD NO. 2774

PARTIES Brotherhood of Maintenance of Way Employees
TO
DISPUTE: and

The Atchison, Topeka and Santa Fe Railway Company

STATEMENT OF CLAIM:

1. That the Carrier's decision to remove former California Division Machine Operator J.K. Hearn from service, effective January 30, 1989, was unjust.
2. Accordingly Carrier should be required to reinstate Claimant Hearn to service with his seniority rights unimpaired and compensate him for all wages lost from January 30, 1989.

FINDINGS:

Upon the whole record, after hearing, the Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted under Public Law 89-456 and has jurisdiction of the parties and the subject matter.

Claimant hereon was employed by Carrier on January 18, 1972. On December 14, 1988, while employed by Carrier as a Machine Operator on Carrier's California Division, Claimant strained a muscle in the right groin area while alighting from his speed swing. According to the record, his version of the facts was that his foot slipped because of the steps being slick causing him to land with most of his weight on one foot causing the groin pull. He worked the following day and reported the injury on that day, December 15th, to his Foreman, Mr. Geary. On the following day, December 16th, he reported to the Road Masters Office and discussed the accident and injury and requested medical assistance. He was at that

point tendered the reporting form and filled it out, and it was reviewed by the Roadmaster who suggested he change certain answers. At the investigation, which followed, Mr. Geary's version of the incident was that when he was told by Claimant of the accident that he had "jumped off his speed swing machine" to avoid a puddle of water and felt a pull in the groin area of his leg. The Foreman recorded this matter in his Foreman's diary at 7:00 A.M. on the morning of December 15th.

By letter dated January 10, 1989, Claimant was cited to attend an investigation to investigate his alleged falsification of facts with respect to the accident indicated above. Following the investigative hearing, by letter dated January 30th, Claimant was notified that he had been found guilty of the charges and was removed from service for violation of the rules relating to his falsification of information.

Petitioner takes the position that Carrier's basic arguments are in two parts. First, according to Petitioner, Carrier notes that Claimant falsified his accident report when he said that his foot slipped while Carrier contends that he willfully jumped from the equipment to avoid landing in a water hole. Thus Carrier maintains that he falsified the report. Secondly, according to Petitioner, the Carrier contends that even if he failed to prove the first allegation, the accident report was filed late, which is grounds in itself for dismissal. The Organization indicates first that Claimant reported the accident the first thing following the day of its occurrence to his Foreman. Furthermore, the Foreman made no effort to furnish Claimant with the required reporting forms. In addition, the Organization notes that the Foreman's testimony was vague and far from decisive with respect to the incident involved. The Organization would characterize the Foreman's testimony as flimsy and is quite insufficient, as the Organization views it, to substantiate Carrier's position with respect to the occurrences involved in the accident.

First, Carrier maintains that the accident, which took place at approximately 2:45 P.M. on December 14, 1988, was not reported to the Foreman until the following morning. Furthermore, the injury report was not filled out until December 16th, some two days following the incident in question. As a principal position, Carrier argues that the testimony of Claimant, in which he denied that he jumped off the machine to avoid a puddle of water is suspect. The Foreman was steadfast, as the Carrier views it, in maintaining that Claimant told him that he had jumped off the machine to avoid a puddle rather than slipping. Furthermore, it is not the province of the Board, as the Carrier views it, to make a determination with respect to credibility. The hearing officer found that the Foreman's version of what Claimant had told him was credible and not that of the Claimant in his allegation of slippage. Carrier concludes that Claimant clearly falsified the injury report and was in fact in the process of committing a dishonest act with intent to defraud the Carrier because of the incident. Claimant was attempting to show that the equipment was faulty causing the accident when in fact it was caused by his own negligence. Thus, this dishonest act was appropriately dealt with by the termination decision, as Carrier views it.

From the Board's point of view, there is no question but that the hearing officer must determine whose testimony is to be credited. The Board cannot do this. In this instance the hearing officer credited the Foreman with regard to the incident, as reported to him by Claimant, rather than the version by Claimant. Thus, Carrier has established that the fact of the matter, as reported by Claimant in his injury report, was false in terms of what he had told his Foreman the day before. Given Claimant's guilt of a falsification was the penalty of dismissal warranted? This is the sole question which remains before this Board. While the Board understands the implication of negligence on the part of Claimant, with respect to

the injury, versus poor equipment causing the injury as testified to by Claimant, this in itself is not sufficient grounds for the ultimate penalty of dismissal. Clearly, Claimant was injured while on the job on the day in question and the reasons for the injury, whether Claimant's version was a deliberate lie or not, does not make the difference with respect to the penalty significant. It is the Board's view that the penalty of dismissal was excessive under the circumstances of this particular case. He should be disciplined for his misconduct based on the credibility finding, but dismissal was unwarranted. That discharge will be reduced to a 90-day suspension, which seems to be adequate to deal with the particular infraction. All wage loss, in excess of that 90-day period, shall be recompensed and Claimant made whole.

AWARD

Claim sustained in part; Claimant shall be returned to service with all rights unimpaired and his dismissal reduced to a 90-day suspension. He shall be made whole for all wage loss suffered following the 90-day suspension.

ORDER


Carrier shall comply with the Award herein within 30 days from the day hereof.



I. M. Lieberman, Neutral-Chairman



L. L. Pope
Carrier Member



C. F. Foote
Employee Member

Chicago, Illinois
June 26, 1991