

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 1049

JOHN C. FLETCHER, CHAIRMAN & NEUTRAL MEMBER
E. N. JACOBS, JR., CARRIER MEMBER
RICHARD A. LAU, ORGANIZATION MEMBER

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES and NORFOLK SOUTHERN RAILWAY COMPANY
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Award No. 78
Case No. 78

*Date of Hearing - August 1, 1997
Date of Award -December 27, 1997*

Statement of Claim:

1. The dismissal of Laborer J. M. Lanham for his allegedly making false and conflicting statements concerning an on duty injury he sustained on January 19, 19967 was without just and sufficient cause and based on an unproved charge (System File JML 049 / MW-FTW-96-10)
2. Labor J. M. Lanham shall now be reinstated to service with seniority, vacation and all other rights unimpaired and compensated for all wage loss suffered.

FINDINGS:

Special Board of Adjustment No. 1049, upon the whole record and all of the evidence, finds and holds that the Employee(s) and the Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute(s) herein; and, that the parties to the dispute(s) were given due notice of the hearing thereon and did participate therein.

Carrier's discipline of Claimant, in the circumstances of this case, borders on the bizarre. In January Claimant was diagnosed for carpal tunnel syndrome. On January 19, 1996, shortly before he was to visit a specialist for release surgery, Claimant complained to his supervisor that the pain (from his carpal tunnel and a combination of work tasks) radiating to other parts of his upper body was too excruciating to continue working. The supervisor transported Claimant to see a company doctor that date. While traveling to the doctor's office and while waiting for an examination, Claimant is alleged to have made statements that conflicted with other statements he subsequently made on March 6, 1996.

Claimant underwent release surgery on February 28, 1996. On April 3, 1996 he was cited to attend a formal investigation on a charge that he had made false and misleading statements concerning an on-duty injury. Following the investigation that was held on April 12th, Claimant was notified, on April 26th, that he was dismissed. Claimant's dismissal will not be allowed to stand, as the facts pertaining to the incident do not warrant discipline.

This is a classic case involving four sets of facts pertaining to one particular incident, and the appropriate weighing of these facts by the party responsible for sorting out these four sets of facts. In each incident that ends up before a Section 3 Railway Labor Act Board there exist four sets of facts, *the real facts*, *the perceived facts*, *the retained facts*, and *the communicated facts*. The *real facts* are the incident itself. The incident has some structure and some sequence, an event, an action, or communication that actually occurred. With respect to an action if the event was video taped the *real facts* are readily ascertainable. With respect to a communication, if it is written or audio taped, those *real facts* are also readily ascertainable. When a video or audio tape or a written document is presented to the Board then the Board has a better chance to understand the *real facts*.

But, more often than not, the *real facts* are not presented to fact finders in this manner. They are presented in oral testimony. This because the *real facts* are often times observed or heard by witnesses. Therein lies the problem. We all know that two eye witnesses observing the same incident or listening to the same comment will frequently give conflicting accounts of what they observed or heard. Many times this is the result of their personal interest in the matter. As applied to this case, Claimant's supervisor may have had one interest in what he thought he was hearing, and Claimant a different interest in what he thought he was saying. Thus, a single comment could have two meanings, depending on the interest of the party. That they differed does not mean that one was sufficiently at odds with the other so as to warrant discipline.

This brings us to *perceived facts*. *Perceived facts* result from the fact that individuals, when exposed to an incident, mentally organize events into large general categories, based on their previous experiences, without serious attention to details. And while *perceived facts* may be identical to the *real facts*, they also may be less inclusive than the *real facts*. And almost always they are shaded to reflect the perceptions of the individual. This causes incomplete and/or inaccurate retention. Which moves us to the third fact situation, *retained facts*.

Retained facts are those facts that a witness is able to communicate to the trier of fact after some time as elapsed between the incident and the testimony. If a witness has not retained all of the facts (s)he is only able to communicate those that have been retained. Further, in some instances motive may be present not to communicate even all of the facts retained. What is communicated, though, are *communicated facts*. It is *communicated facts* that the trier of fact deals with. In this record, the *communicated facts* were insufficient for the trier of fact (the Hearing Officer) to make a fair determination that Claimant was guilty of the charge.

The *communicated facts* were, among other defects, presented in part through hearsay testimony. The *communicated facts* also contained perceptions of the communicator that were obviously biased. The *communicated facts* offered by Carrier witnesses ignored Claimant's painful condition at the time. In total, Carrier simply had no basis to issue discipline on the basis of these *communicated facts*. The charge was "false and conflicting statements." The *communicated facts* the Hearing Officer had before him support neither result.

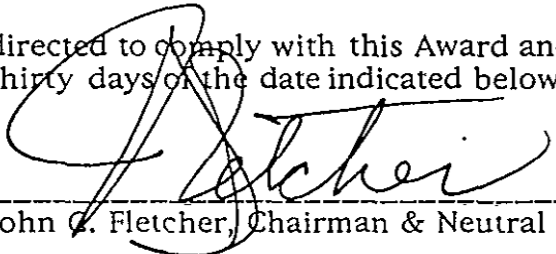
Accordingly, the Board will order that the discipline be removed from Claimant's service record, that he promptly be restored to service with full seniority and compensated for all wage and fringe benefit losses, as requested in the statement of Claim.

A W A R D

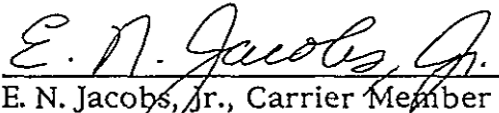
Claim sustained.

O R D E R

Carrier is directed to comply with this Award and make all payments due Claimant within thirty days of the date indicated below.


John G. Fletcher, Chairman & Neutral Member

I Dissent.


E. N. Jacobs, Jr., Carrier Member


Richard A. Lau, Employee Member

Dated at Mt. Prospect, Illinois., December 27, 1997