

Award 19378

Docket 36419

NATIONAL RAILROAD ADJUSTMENT BOARD

FIRST DIVISION

39 South La Salle Street, Chicago 3, Illinois

With Referee Carroll R. Daugherty

PARTIES TO DISPUTE:

**BROTHERHOOD OF LOCOMOTIVE FIREMEN AND
ENGINEMEN**

UNION PACIFIC RAILROAD COMPANY (Northwestern District)

STATEMENT OF CLAIM: "Claim of Fireman J. J. Trujillo that discipline was improper and that he be compensated for all time lost from September 1st, 1958 until restored to service as fireman."

FINDINGS: The First Division of the National Railroad Adjustment Board, upon the whole record and all the evidence, finds that the parties herein are carrier and employe within the meaning of the Railway Labor Act, as amended, and that this Division has jurisdiction.

Hearing was waived.

As in all discipline cases, the broad and general issue here is whether carrier's decision to discharge claimant was arbitrary, capricious, unreasonable, or discriminatory.

This general question breaks down into two main parts: (1) There are the substantive questions of whether carrier's Operating Rules were reasonable; whether carrier had made them known to claimant and claimant was aware of the consequences of disobeying them; whether substantial and convincing evidence adduced at carrier's hearing supported carrier's finding of guilt; if so, whether the discipline imposed was reasonably related to the seriousness of the offense and to claimant's past record; and whether the rules and the carrier's disciplinary decisions in respect thereto had been applied and made in an even-handed rather than discriminatory fashion. (2) Did carrier violate the procedural and fair-hearing requirements contained in the rules of the Agreement?

As to the substantive questions, the Board finds from the record as follows: First, carrier's Operating Rule 700 is reasonably related to the safe, orderly, and efficient operation of its business. Honesty among employes is a wholly proper requirement. Carrier's Operating Rule 714 (E) is also reasonable, unless administered to ridiculous extremes. Second, claimant

knew of said rules and of the possible consequences of disobedience thereto. Third, carrier made three charges that were investigated at the hearing. The first was that claimant failed to report his alleged personal injuries promptly. Two injuries were involved — an abrasion on claimant's elbow and a slipped disc in his lower back, both said to have been sustained on September 12, 1957, when claimant was working with Engineer Paulsen in Pocatello Yard. The evidence shows that claimant was aware of the skinned elbow injury on said date but did not feel his back injury until later, reporting off duty because of illness on or about October 23, 1957. Claimant was furloughed by carrier on November 26, 1957. During the period after reporting off sick, claimant was treated by various physicians until recovery in 1958. On carrier's initiative he signed a Personal Injury Report (Form 2611) on December 16, 1957. From all of this it follows that carrier's first charge was substantiated by the record of the investigation.

The second charge was that claimant falsified his Form 2611. Study of this Form shows that claimant alleged a slipped disc which, he said, "may" have resulted from his falling off the fireman's seat box to the engine deck when a cut of cars dropped in on the engine. The record shows that claimant did suffer a slipped disc; that there was a jolt to the engine and a movement of the seat box; and that claimant's before-impact position was considerably changed. The only possible element of falsification would be in claimant's statement that he was knocked to the engine deck, a movement categorically denied in Paulsen's statement and testimony. On balance and from the standpoint of the asserted injury, it does not appear that claimant's Form 2611 was falsified. Its language was moderate and tentative. Being "knocked to the deck" does not necessarily mean that claimant fell on his back on the deck. In the last analysis, the evidence amounted to one man's word against the other's. It must be concluded that carrier failed to support the second charge with substantial and convincing evidence.

The third charge was that claimant tried to obtain a false witness for a false claim. The evidence of record does not establish that the filling out of a Form 2611 constitutes the making of a claim on carrier for damages for personal injury. Nor does claimant's request to the Railroad Retirement Board for disability benefits support an inference that such a claim would be brought. But suppose that claimant had or intended to file such a claim. He had a right to make such claim. The acute question is, would it have been a false claim? It would have been false only if claimant's admitted back injury had resulted from some cause other than the one he tentatively alleged. The record contains no evidence on other possible causes. Paulsen in his statement flatly denied that claimant was hurt, but in his testimony at the hearing he told of joking with claimant about an "AX" form, and the record shows that claimant's seat box and claimant were moved by some sort of jolt. It appears also that Paulsen had once been minor-disciplined for rough handling of equipment and that he was disinclined to have anything to do with claim agents. On balance, it cannot be concluded that carrier had substantial and convincing evidence that claimant was going to file an injury claim or that, if he did, said claim would be false. From this it must follow that claimant's efforts (even including the offer of money) to get Paulsen to agree with claimant's version of the incident of September 12, 1957, may not be placed in the category of trying to obtain a "false" witness.

The Board finds, then, that substantial and convincing evidence supported only the first of carrier's three charges. Before proceeding to the other two substantive questions (on the propriety of the discipline imposed and

on possible discriminatory application of carrier's rules), it is necessary to consider the procedural questions. This is because a serious procedural defect, if found, will compel the Board to nullify the discipline in its entirety.

As to said procedural questions, petitioner and/or his representative here argues that (1) the hearing was not timely held; (2) the questions asked by and the behavior of carrier's investigating officer were biased, prejudicial, and improper; and (3) carrier's taking of Paulsen's statement in claimant's absence was improper.

The Board reminds the parties that, in respect to such alleged procedural defects, the Board's rules include the following: (1) If specific rules of the Agreement, e.g., time limits for holding hearings or for rendering decisions, have been breached, carrier's action violates the Agreement, and carrier's disciplinary decision must be set aside. (2) At the hearing carrier's investigating officer is permitted to act as both judge and prosecutor, but not as witness. If, in filling both of the two permitted roles, carrier's officer appears to have overstepped the bounds of impartiality, the crucial question is this: Has same actually prejudiced the rights of claimant? Has claimant been denied what he is properly entitled to in an industrial democracy, in the sense that a just verdict on the charges would have been different if carrier's officer had not so overstepped?

As to the alleged breach of the time-limit Rule (177 c), the Board finds that there was no breach. Claimant had been on furlough; carrier was not obligated to make charges immediately after claimant filed his Form 2611. Upon his recall carrier acted within the Rule's requirements.

As to the behavior of carrier's investigating officer, the Board finds that some of his questions were improper, i.e., were leading and were grasping for opinions and conclusions rather than facts. But, although same might set aside a verdict in a court of law, same cannot in this jurisdiction be said to have prejudiced the rights of claimant or changed a proper decision.

As to the alleged prejudice of the Paulsen statement, the Board finds that none was produced thereby. The statement was introduced at the investigation and claimant had the same opportunity to attack it there as if he had been present when the statement was taken. The maker of the statement was present at the hearing, and claimant and his representative had the opportunity to and did attack the statement and question him.

It must be concluded that there were no procedural defects of moment. Carrier's discipline cannot on this account be set aside.

The Board comes, then, to the two final substantive questions: (1) Was carrier's application of its Operating Rules discriminatory? On this question the evidence of record demands a negative answer. (a) If Paulsen said no injury to claimant occurred on September 12, 1957, carrier could not have been expected to require him to report same. (b) There is no evidence as to whether Ellis filed a Form 2611. (2) Was carrier's discharge of claimant reasonably related to (a) the seriousness of claimant's proven guilt on charge number one; and (b) his past record?

On this last double-barreled question the Board rules that, under the conditions of this particular case as above summarized, the carrier's decision to discharge was not reasonably related to the seriousness of the proved offense. True, claimant's record was mediocre. But the only proved offense

here was a delay in filing a Form 2611 under the circumstances of a slowly developing back injury and prolonged treatment thereof. The Board finds that carrier's decision to discharge claimant was on this account arbitrary and unreasonable.

Given all the above findings, the Board rules that claimant shall be reinstated with seniority rights unimpaired but without pay for time lost.

AWARD: Claim sustained to extent above set forth.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of FIRST DIVISION

ATTEST: J. M. MacLeod
Executive Secretary

Dated at Chicago, Illinois, this 18th day of December 1959.

DISSENT OF LABOR MEMBERS

We dissent from the within findings and award in the following respect:

As to Procedural Questions

We are in accord with the holding of the majority (reiterating the fundamental principle established with complete finality by this Division and predecessor tribunals) that "if specific rules of the Agreement . . . have been breached . . . carrier's disciplinary decision must be set aside."

(1) Rule 177(c) specifically provides that "hearings will be held as promptly as possible." That hearings are set by, and are the responsibility of, the carrier is too well recognized and established to require citation of authority. The record here shows that claimant was available, was interviewed by carrier's claim and special agents and was hospitalized under carrier's doctors while on "furlough". That the hearing was not "held as promptly as possible" is patent. We further submit that failure to enforce the "prompt" requirement of the collectively-bargained agreement on the basis of "furlough" status on this record cannot be logically reconciled with holding the claimant responsible for the "prompt" requirement of Operating Rule 714(E) while in that same status. It must be borne in mind that this record does not show on what (if any) date prior to December 16, 1957, claimant acquired knowledge based upon competent medical advice that his slowly developing back injury was diagnosed as a herniated disc which might have been occasioned by the incident of September 12, 1957; however, certain it is that if December 16, 1957, was not "prompt" to any possible date involved, then September 1, 1958, assuredly cannot be "prompt" with respect to December 16, 1957 (about which date there can be no question). The carrier's actions throughout reek with oppression, persecution, prejudice and prejudgment; but, in any event, Rule 177(c) (designed to prevent such abuses) was not complied with here, the carrier was contractually prohibited from "securing claimant's person" to apply discipline, and the claim should have been sustained as presented under Rule 177(c) without further inquiry. See Awards 7064 and 16299.

(2) At the hearing carrier's investigating officer did act in the capacities of judge, prosecutor and witness. He introduced testimony of a witness

into the record (and clearly foreclosed offering himself for cross-examination). See **Award 10616**. The “improper” questions propounded by the carrier’s investigating officer “were leading and were grasping for opinions and conclusions” as to who should be believed involving a situation of one man’s word against another’s. We submit that such cannot be other than prejudicial. We further submit that if the “same might set aside a verdict in a court of law”, how much more weighty should it be “in this jurisdiction” when coupled with the cumulative effect of surrounding circumstances so hopelessly tainted with prejudices and prejudgment. See **Awards 5555, 8376, 13354, 13633, 15406 and 16707**.

Inextricably interwoven with “the behavior of the carrier’s investigating officer” is a matter of the use “of the Paulson statement.” The inherent right of confrontation and cross-examination as an absolute requisite of “a fair and impartial hearing” is assuredly so well known and established as to require no citation of authority; however, see **Award 5197**. The procedure followed at the investigation here was designed to circumvent that basic right and constituted mere lip service thereto. **Directly in point is Award 15656**.

As to the Merits

We are in accord that carrier failed to sustain the burden of proving by sufficiently conclusive evidence the second and third (principal) charges against claimant.

We are in accord that the carrier did so sustain the first (minor) charge. On page 23 of the record the carrier states, “On October 24, 1957 the Claimant was furloughed in forced reduction . . .” At page 33 of the record the carrier states, “The Carrier does not disagree with the Organization’s statement that there is no requirement to report an injury until it is known that one is injured.” There is simply no satisfactory showing whatsoever in the trial record as to what date the claimant acquired knowledge from competent medical authority that that which he had thought to be a mere pulled back muscle was in fact a slipped disc which “may” have been caused by the incident that it was later developed took place on September 12, 1957. We submit that on this record Operating Rule 714 (E) has been “administered to ridiculous extremes” — to say the least.

As to the Measure of Discipline

It is, of course, impossible to unscramble the discipline applied for each of the three charges. As to discrimination in connection with Engineer Paulson, it is clear that he had the same knowledge of the “scraped” elbow as claimant; therefore, if the matter was not reportable for Paulson on that basis certainly neither could it be so for claimant. As to discrimination with respect to Ellis, the record contains his statement in which the flat assertion is made, “I made no report of this because I didn’t think anything of what had happened.”

In short, the carrier failed “to make its case.” The discharge was wrongful. To penalize the claimant with the loss of sixteen months’ pay is indefensible and smacks of “slapping the carrier’s wrist” in the process of relieving from its contractual obligation to pay.

On the whole record, the claim should have been sustained as presented including pay for time lost.

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For the reasons stated, we dissent.

Don A. Miller

C. W. Kealey

J. K. Hinks

B. W. Fern

W. R. Meyers