

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD

FIRST DIVISION

Award No. 24301

Docket No. 43927

94-1-93-1-C-4600

The First Division consisted of the regular members and in addition Referee John C. Fletcher when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Locomotive Engineers  
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(Chicago and North Western Transportation  
(Company

STATEMENT OF CLAIM:

"Engineer J. A. Bahr, Central Division (Des Moines District) requests that he be compensated for all time lost, including the time spent at the investigation, and that discipline entry be completely and totally expunged from his record including his removal from the C&NW Discipline System. Claimant was investigated in Des Moines, Iowa on April 30, 1992 on the following charge:

'Your responsibility in connection with your failure to furnish and the withholding of factual information with regard to injury sustained by R. E. Gilliam as testified to on March 4, 1992, in prior deposition given on July 2, 1991.'"

FINDINGS:

The First 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 waived right of appearance at hearing thereon.

Claimant was employed as engineer on Yard Job No. YYA04 at Carrier's Des Moines, Iowa Short Line Yard on December 13, 1989. At approximately 8:00 P.M. on that date, Claimant's switchman, R. E. Gilliam, injured his back throwing a switch. Gilliam subsequently filed suit against Carrier under the Federal Employers' Liability Act. In connection with that litigation, Claimant was required to give a deposition on July 2, 1991. At the deposition, Claimant gave the following testimony:

"Q. There is a switch in that particular yard that Mr. Gilliam alleges he was injured trying to throw. I understand the name of it to be the new lead switch in the Short Line Yard. Is that correct? Is there a switch of that --

A. It's -- yes. It's on the new lead. It also goes to what they call the Rocket Track, is where it -- it would line off to, the Rocket Track and to the -- another track, the Caboose Track.

\* \* \*

Q. Is there any question in your mind which switch Mr. Gilliam alleges he was injured on?

A. No, I know which one it is. It's by what they call the pocket switch by the yard office.

Q. They call this switch the pocket switch?

A. No, I say it's next to the pocket switch. There's two switches right close together there. There's a switch that goes into what they call the pocket and then this one here where Bob got hurt."

Gilliam's suit subsequently went to trial and, on March 4, 1992, Claimant was called to give testimony. In response to one question, Claimant answered:

"Q. Do you, as you sit here today, have a clear recollection of which switch it was that he attempted to throw?

A. No, I don't. I know it was a facing point switch. So it would have been either two or four."

Claimant was subsequently directed to attend a Formal Investigation at which he was charged with failing to furnish and withholding information regarding Gilliam's injury as testified to at trial in his prior deposition. Following this Investigation, Claimant was assessed a five-day suspension.

The Board has reviewed the transcript of the Investigation, which includes transcripts of both Claimant's July 2, 1991, deposition and his testimony before the court on March 4, 1992.

We do not reach the same conclusion as Carrier, that Claimant changed his testimony between these two events. At the deposition, Claimant was being asked the location of the switch where Gilliam said he was injured. Claimant also, at that time, testified that he could not see the switch because he was on the other side of the engine. At the trial, he was asked if he remembered which switch Gilliam had tried to throw. Claimant's response did not contradict his answer in the deposition because the questions were different. In the deposition, he was asked what Gilliam had claimed, and at trial he was asked what he knew to have occurred. Furthermore, the trial was more than three years after the injury. Claimant's response that he could not recollect may very well have been true. But, what is more important, Carrier has not proved that it was false.

Finding that the evidence does not support the charge, we conclude that the discipline assessed against Claimant was arbitrary and unreasonable. The Agreement, therefore, was violated. The Claim will be sustained as presented.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of First Division

Attest: \_\_\_\_\_

*Linda Woods*

Linda Woods - Arbitration Assistant

Dated at Chicago, Illinois, this 25th day of April 1994.