

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 25236

Docket No. 44834

01-1-99-1-U-2085

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

(Brotherhood of Locomotive Engineers
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company (former Chicago and
(North Western Transportation Company)

STATEMENT OF CLAIM:

"The Brotherhood of Locomotive Engineers, Union Pacific Railroad (CNW) General Committee requests the Division consider and authorize the reinstatement to service of Engineer M. E. Collier, SS No. 497-58-4170, with full compensation for all time lost, his expenditures for COBRA insurance premiums, and with all seniority and vacation rights unimpaired from the date he was removed from service until the date he resumes service.

Subsequent to an investigation held in Gering, Nebraska on April 2, 1998, claimant was dismissed from service, regarding the following charge:

' . . . while you were employed as Engineer on the North Platte Subdivision, you claimed lost time ostensibly for being required to appear as a company witness in engineer D. M. Martin's formal investigation held on February 12, 1998.'

Claim premised upon the 1996 BLE UP System Discipline Agreement effective June 1, 1996."

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 were given due notice of hearing thereon.

Sections 15 and 16 of the applicable system wide disciplinary Rule provide:

- "15. Engineers attending an investigation as witnesses at the direction of the carrier will be compensated for all time lost and, in addition, will be reimbursed for actual, reasonable and necessary expenses incurred. When no time is lost, witnesses will be paid for actual time attending the investigation with a minimum of two hours, to be paid at the rate of the last service performed.
16. The engineer being investigated or the BLE representative may request the Carrier to direct a witness to attend an investigation, provided sufficient advance notice is given as well as a description of the testimony the witness would be expected to provide. If the Carrier declines to call the witness and the witness attends at the request of the engineer or BLE and provides relevant testimony which would not otherwise have been in the record, the carrier will compensate the witness as if it had directed the witness to attend."

Pursuant to proper written notice, the Carrier convened an Investigation on April 2, 1998, to determine if the Claimant, an Engineer with 19 years of service, attempted to embezzle monies from the Carrier by filing a fraudulent time claim. While there was not much of a dispute about the basic facts adduced at the Investigation, the parties differ greatly on how the facts should be interpreted.

The Manager of Train Operations testified that on or about March 2, 1998, the Manager of Administration and Purchasing had a question concerning a time claim which Claimant had submitted on February 16, 1998. The claim had been processed for payment to the Claimant in the amount of \$400.51. On his time claim, the Claimant

sought 292 miles of pay because he was "... directed to appear as an investigation witness for Engr Dave Martin's formal investigation." The 292 miles represented the Claimant's round trip pool turn which he missed on February 10, 1998.

The Claimant testified that the United Transportation Union Vice Local Chairman requested his presence and testimony at Engineer Martin's Investigation scheduled for February 10, 1998. The Claimant marked off duty early in the day and thus, was unable to work his 7:00 A.M. pool turn because he went to the Investigation. The Claimant further declared that when he arrived at the Investigation, he learned that the Carrier had postponed it for two days. The Claimant suspected that either the Carrier would not accept him as a witness or the Carrier would continue to postpone the Investigation until a day that the Claimant could not attend. Based on these suspicions, the Claimant reduced his anticipated testimony to writing, had his statement notarized and forwarded the statement to the Vice Local Chairman. The Claimant did not attend Engineer Martin's February 12 Investigation. The Hearing Officer refused to admit the Claimant's written statement into the record of Engineer Martin's Investigation.

After being informed by the Manager of Administration and Purchasing that the Claimant had submitted the time claim, the Manager of Train Operations reviewed the Claimant's work history. Inasmuch as he was the presiding hearing officer at Engineer Martin's Investigation, the Manager knew that the Claimant had not attended the February 12, 1998 Investigation. Furthermore, after reading the claim, the Manager of Train Operations formed the opinion that the Claimant's time claim falsely suggested that the Company had called the Claimant as a witness to Engineer Martin's Investigation. As a result, the Carrier charged the Claimant with submitting a fraudulent time claim.

At the April 2, 1998 Investigation, both the Manager of Train Operations and the Hearing Officer sloughed off the fact that the Carrier's Investigation Notice alleged that the Claimant claimed time for attending the February 12 Investigation even though the Claimant sought compensation for his missed turn on February 10. They properly acknowledged that the wording on the Investigation Notice was a mistake but the Hearing Officer repeatedly questioned the Claimant about attending the February 12 Investigation. Each time, the Claimant frankly and truthfully answered that he did not attend the February 12 Investigation. Also, during the Claimant's April 2, 1998 Investigation, the Hearing Officer refused to admit the Claimant's notarized statement that he had submitted to the Vice Local Chairman on February 10.

The Manager of Train Operations emphasized that the time claim was fraudulent because the Carrier had not directed the Claimant to attend Engineer Martin's Investigation as a witness. The Manager of Train Operations opined that the Claimant was entitled to compensation per Section 15 of the disciplinary Rule only if the Carrier called him to testify at Engineer Martin's Investigation. According to the Carrier, Section 16 only applied if the Claimant had offered relevant testimony and he did not because his statement was not admitted into the record of Engineer Martin's Investigation.

Following the April 2, 1998 Investigation, the Carrier dismissed the Claimant from service.

A close perusal of this case reveals that the Carrier did not satisfy its burden of proving, with substantial evidence, that the Claimant's time claim was fraudulent for two reasons. First, the Carrier failed to articulate exactly what facts the Claimant misrepresented in his claim. Second, the Carrier did not come forward with sufficient evidence showing that the Claimant held a deceitful intent at the time that he submitted the claim.

For the Carrier to discipline an employee for submitting a fraudulent time claim, the facts set forth in the claim must be false or misleading and the grieving employee knew or should have known that the matters in the claim were false and misleading. Public Law Board No. 1405, Award 11. A mere error in the statement of the facts or an allegation by the claiming employee that the Rules support the claim are insufficient to prove the time claim was fraudulent.

In this case, the Carrier relied heavily on the Manager's opinion that the Claimant misrepresented that he had been directed by the Carrier to attend Engineer Martin's Investigation. In his claim, the Claimant wrote that he had been "directed" to attend Engineer Martin's Investigation but he did not state who was directing him. The Claimant did not allege that a Carrier Officer instructed him to attend the Investigation. Moreover, the word "directed" is not patently misleading because the UTU Vice Local Chairman urged the Claimant to attend. Even if the Claimant's use of the verb "directed" was a poor word choice, he then wrote that he was an "investigation witness" rather than a Carrier witness.

In addition, the Carrier created confusion between February 10 and February 12. The record is unclear whether the Carrier was disciplining the Claimant for filing a time claim for February 12, when he admittedly did not attend the Investigation or for February 10 when he did attend the Investigation only to learn that it was postponed. The Carrier never cleared up this confusion. Also, the Hearing Officer's refusal to enter the Claimant's notarized statement (containing what would have been his testimony at Engineer Martin's Investigation) means that the record herein did not permit the Hearing Officer or the Board to determine whether the Claimant's testimony would have been relevant within the meaning of Section 16 of the system-wide disciplinary Rule. Stated differently, the Carrier is estopped from concluding that the Claimant would not have given relevant testimony at Engineer Martin's Investigation if the record herein does not contain that testimony. If the Carrier wants to show that the Claimant's time claim was so baseless that it constituted fraud, the Carrier must demonstrate that the testimony that the UTU tried to enter into the record of Engineer Martin's Investigation was not even remotely relevant to the matters being investigated.

Next, the Carrier failed to prove that the Claimant held a deceitful intent. First Division Award 24732. Public Law Board No. 1845, Award 16. The Claimant sincerely believed that he was filing a valid time claim pursuant to Section 16 of the system-wide disciplinary Rule. The Claimant marked off duty and attended Engineer Martin's Investigation which was postponed. He lost a turn in his pool. Believing his testimony was relevant, the Claimant properly alleged that the Carrier was responsible to compensate him for losing a pool turn. Regardless of whether the claim was meritless or meritorious, the Claimant lacked the intent to fraudulently obtain money from the Carrier. The Carrier overreacted to the claim. Public Law Board No. 3641, Award 9. The Carrier should have simply investigated the claim and if it concluded that it lacked merit, denied the claim. Without a showing that the Claimant intended to embezzle money from the Carrier, he could not be guilty of fraudulently submitting a time claim.

AWARD

Claim sustained.

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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 First Division

Dated at Chicago, Illinois, this 5th day of June, 2001.