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**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13420

Docket No. 13294

99-2-97-2-66

The Second Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

(Brotherhood Railway Carmen, Division of Transportation
(Communications International Union

PARTIES TO DISPUTE: (

(Springfield Terminal Railway Company

STATEMENT OF CLAIM:

1. "That the Springfield Terminal Railway Company violated the terms of our current agreement, in particular Rule 13.1 when they arbitrarily suspended Carman Ernest E. Moulton from service as a result of an investigation held on July 16, 1996.
2. That, accordingly, the Springfield Terminal Railway Company be ordered to compensate Carman Ernest E. Moulton in the amount of eight (8) hours pay for each workday he was withheld from service, commencing August 19, 1996 through and including August 21, 1996, a total of three (3) working days. Additionally, time lost to attend this hearing, any overtime hours he may have lost and all correspondence regarding this investigation be removed from his record and file."

FINDINGS:

The Second 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.

On July 9, 1996, Claimant was notified to appear for an investigation on July 16, 1996. The notice charged Claimant with being absent dishonest when, "in an attempt to exonerate yourself and discredit the Carrier and its officials . . . in a hearing conducted on June 27 and 28, 1996, you provided testimony regarding the Paint Shop Breathing Air Compressor, the information you provided, on record, in your behalf was false." The hearing was held as scheduled. On August 14, 1996, Claimant was advised that he had been found guilty of the charges and that he was assessed a three day suspension.

The Organization raises several procedural arguments. Because of the result that we reach on the merits of the claim, we see no need to address the procedural issues.

Carrier had the burden to prove the charge of dishonesty by substantial evidence. Our review of the record leads us to conclude that Carrier failed to carry its burden of proof.

On June 27 and 28, 1996, Claimant participated in an investigation in which he was charged with being an unsafe employee. Carrier introduced pages from the transcript of the investigation that it maintained displayed Claimant's dishonest testimony. We consider each alleged instance of dishonesty in turn.

Carrier relied on the following from the transcript of June 27:

"E. Moulton: . . . Was you aware that on that machine that it says there shouldn't be more than fifty feet of hose run from that?

J. Patterson: No.

E. Moulton: It says on the machine I believe and I know it says in the paper work. Well we are running it a long ways more than that."

Initially, we observe that contrary to the allegations in the charge, Claimant was not testifying at this point in the investigation. Claimant was cross-examining the Heavy Repair Shop Manager. After asking a question and receiving a negative answer, Claimant improperly made a statement, arguing with the witness. The record reflects that Claimant's representative cautioned Claimant not to make such statements at this stage of the proceeding but to confine himself to asking questions of the witnesses.

Even if we could construe the statement as testimony, the record reflects only that the statement that the machine and paper work contained warnings against using more than fifty feet of hose was inaccurate. Claimant testified that he honestly believed that the manuals restricted the hose to fifty feet. The manuals did contain specifications concerning length of hose for various machines. They did not restrict the hose on the machine in question to fifty feet. However, there is not even a scintilla of evidence that Claimant's statement was anything other than an honest mistake. There is no evidence of deliberate falsification. Carrier simply failed to prove dishonesty with respect to the statement Claimant made on June 27.

On June 28, Claimant did testify. He stated that about a year previously, when the machine was first installed, he discussed the need to restrict the hose to fifty feet maximum with the Heavy Repair Shop Manager and the Assistant Manager Paint Shop Wheel Shop. He further stated that he had raised the issue with the Assistant Manager Paint Shop Wheel Shop several times.

During the instant investigation, Claimant testified that he did complain to the two managers about the breathing machine and specifically about the hose being too long. Each manager testified that Claimant had raised safety concerns regarding the breathing machine but that Claimant had not raised the issue of the hose being too long. Here again, there is absolutely no evidence of dishonesty on Claimant's part. The most that can be said is that the evidence established that Claimant had in fact raised safety concerns but that the managers and Claimant had a good faith difference in their recollections about the specifics of those concerns. The managers' testimony that Claimant never raised the hose length does not prove that Claimant deliberately lied when he testified that he did raise the hose length. Similarly, Claimant's testimony that he did raise the hose length could not prove that the managers deliberately lied in their testimony.

Accordingly, we find absolutely no evidence in this record that Claimant testified dishonestly on June 27 or June 28. Therefore, the claim must be sustained.

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 Second Division

Dated at Chicago, Illinois, this 16th day of June 1999.