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**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 33944
Docket No. CL-34020
00-3-97-3-553

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

(Transportation Communications International Union
PARTIES TO DISPUTE: (
(Sand Springs Railway Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Organization (GL-11807) that:

Carrier acted in an arbitrary, capricious and unjust manner and violated the Agreement between the parties when, by letter dated March 15, 1996, Mr. Jesse I. Cranford, Superintendent, dismissed Claimant Richard H. Vawter, yard clerk at Sands Springs, Oklahoma, from the service of the Sand Springs Railway Company.

In view of the Carrier's arbitrary, capricious and unjust action Carrier shall now be required to exonerate Claimant pursuant to Rule 19(g) and thereby:

1. Restore Claimant to service with all seniority, vacation, back pay, wage increases, health and welfare benefits, and all other rights unimpaired; and,
2. Pay Claimant for all lost time commencing with March 1, 1996, and continuing until Claimant is restored to service.”

FINDINGS:

The Third 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 February 8, 1996, Claimant filed an on-duty injury report, claiming that he had been injured on or about October 30, 1995, and that he had sought medical treatment for the injury on November 10, 1995. On February 28, 1996, Carrier sent a letter to Claimant directing him to report for an investigation on March 8, 1996, concerning his responsibility in connection with an alleged charge of submitting a fraudulent personal injury report and falsely asserting an on-duty injury. The investigation was held as scheduled. On March 15, 1996, Carrier notified Claimant that he had been found guilty of the charge and had been dismissed from service.

The Organization raises a number of arguments attacking the discipline. The only argument that we need address arises from the multiple roles played by Carrier officials who reviewed the claim on appeal. After very careful consideration, we find this issue dispositive of the claim.

The Carrier is a small railroad. In its Submission, the Carrier asserts that it has only three supervisors: the Superintendent, the Controller, and the Vice President - General Manager. Carrier employed an outside consultant to serve as Hearing Officer. Evidence at the Hearing revealed that Claimant could not specify the exact date of the alleged injury, that he did not report the alleged injury at the time it occurred or at the time that he allegedly first sought medical attention for it.

In his testimony, Claimant explained his actions by advising that when he sought medical attention for his on-duty injury, his doctor gave him muscle relaxers which relieved the pain for a considerable period of time. Further, Claimant maintained, at the same time his doctor discovered a more serious, perhaps life threatening, condition which he began to treat immediately. Claimant testified that the combination of the treatment with muscle relaxers and the distraction caused by the more serious condition led him to forego reporting the injury until the pain resurfaced at the end of January.

Claimant's story certainly was out of the ordinary, to the point of arousing suspicion. However, Claimant was not charged with eccentricity; he was charged with fraudulent conduct and suspicion alone does not prove fraud. The critical evidence concerning the alleged fraudulent nature of Claimant's conduct was testimony from the Controller and the Vice President - General Manager.

The Controller and the Vice President - General Manager each testified that together they interviewed Claimant's doctor, at which time the doctor advised them that he had no record of treating Claimant for an on-duty injury on November 10, 1995. Claimant, in contrast, testified that he advised his doctor on November 10, 1995, that he had sustained a work-related injury.

The Hearing Officer issued a report summarizing the evidence and indicating his determinations concerning the relative credibility of the witnesses. The Superintendent issued the letter imposing the discipline. The Organization filed a claim on Claimant's behalf. The Controller denied the claim and the Organization appealed. The Vice President - General Manager denied the appeal.

The obvious problem raised by this case arises from the fact that the claim was ruled on by a Carrier Official who was a key witness in the Investigation and the appeal was ruled on by another Carrier Official who also was a key witness. As the Board stated in Third Division Award 23427:

"The right of appeal is neither technical nor mechanical. It is an important and meaningful right that is not to be regarded lightly or ignored. The obvious purpose of the appeals machinery is to provide Claimant with independent consideration of his appeal at each appellate level. See Fourth Division Award No. 2642. . . ." (emphasis in original).

We recognize that the Carrier is a small railroad and we are sympathetic to the position in which the Carrier found itself. Carrier asserts that it had no other Supervisors who could rule on the claim and the appeal. Indeed, there is a legal maxim that if all are disqualified, none are disqualified.

Nevertheless, we are forced to conclude that under the facts and circumstances presented in this case, Carrier violated Claimant's due process rights. First, we find that Claimant was materially prejudiced by the multiple roles filled by the Controller

and the Vice President - General Manager. They were the key witnesses against Claimant and their testimony furnished the key evidence that Claimant acted fraudulently.

Second, it is not clear that Carrier had no alternative way of handling the situation which could have avoided denying Claimant his right to an independent review. There was no explanation as to why both Carrier Officers had to interview Claimant's doctor. Moreover, there was no explanation as to why they did not obtain a written statement from the doctor. Had they obtained such a statement, these two Carrier Officers would have served as the conduit for the statement, but the statement itself would have been the direct evidence and the credibility of the statement, including its hearsay nature, is what would have been in issue. Instead, at issue was not only the doctor's oral statement to the Controller and the Vice President - General Manager, but also the two Carrier Officers' credibility, including the accuracy of their recollection of the statement and any interest they might have which could influence their testimony reporting the statement.

This Board has recognized that multiple roles do not per se invalidate discipline. There must be some prejudice to the Claimant. Furthermore, this Board has recognized the peculiar position in which small carriers sometimes find themselves. In this case, however, the conflict between the roles of critical witness against Claimant and Officer on appeal is manifest. To excuse the breach of Claimant's right to an independent appellate review because of Carrier's size would relegate Claimant and other employees of small railroads to being second class citizens in the industry. Because of the seriousness of the conflict between the roles of witness and Appellate Officer in the instant case, the complete absence of any independent review of the claim, and the availability of alternatives to the Carrier, we find that the handling of the claim was procedurally flawed and that 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 Third Division

Dated at Chicago, Illinois, this 22nd day of February, 2000.