

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 36213
Docket No. MW-36387
02-3-00-3-628

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The discipline (Level 5 and dismissal) imposed on Mr. R. Potokar on August 13, 1999 for alleged violation of Union Pacific Rule 1.6(4) on charges of allegedly giving false information at his investigation of July 2, 1999 was without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement (System File W-9948-164/1213023).
- (2) As a consequence of the violation referred to in Part (1) above, Mr. R. Potokar shall now have the aforesaid discipline removed from his personal record and he shall be returned to service and compensated for all time that he was withheld from 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.

This is the second dismissal case involving Claimant R. Potokar. On July 2, 1999, an Investigation was conducted following an Incident on March 24, 1999 in which the Claimant sustained an injury to his back. He was subsequently discharged for violating a plethora of the Carrier Rules. The Organization's claim was progressed to the Board and resulted in Third Division Award 36212.

In the instant case, the Carrier charges that the Claimant made false statements during the July 2, 1999 Investigation. A second Investigation was held on the matter on July 30, 1999, after which the Claimant was found guilty of violating Carrier Rule 1.6.4, which prohibits dishonesty. The Claimant was assessed a Level 5 (dismissal) discipline under the UPGRADE policy and a second claim filed in this connection is now before the Board.

The following colloquy between Carrier Officer D. G. Paul and the Claimant at the July 2, 1999 Investigation are relied upon by the Carrier as the basis for the charge of dishonesty.

"Q: And on your accident report, your second accident report, did anyone coach or assist you in filling that accident report out?

A: No. No. 1 - - Mr. Kelley is correct with regard to where I obtained that report. It was the original report that he gave me. That report - - my wife has some serious illness, and I have people taking care of her. They did some cleaning in my house and that report was misplaced. I later found out that report after I filled out the second one, the one on the 24th, or excuse me - the first of March. And so that was the report that I used to fill out to turn in here. So, he gave me - actually he gave me both reports. So he was correct there."

At the July 30, 1999 Investigation, Welder Foreman Whitehead testified he had a conversation with the Claimant after the first Investigation on July 2, 1999. Specifically, Whitehead testified in response to a question from the Claimant as to whether he could have misunderstood the earlier conversation:

"Q: Is it possible that you misunderstood me?"

A: - - that's how I took it when - - that's how I took it, that you were when you said that you weren't pointing the finger at me and didn't mean for it to sound like you were pointing the finger at me, that the Union and the lawyer had told you had to fill that out. And I just, you know, I mean I didn't even think anything was going to come about that, you know, I just made a statement on it and I didn't, you know, I didn't think anything was going to come about on it. But, you know, I was kind of glad it was said, because I couldn't understand why the finger was being pointed at me. And when you told me that I thought, well, that's why the finger was pointed at me, you know, that you weren't blaming me for what had happened, but I really didn't think anything was going to come about it on that. I thought it was all over with."

Manager Track Maintenance P. O'Kelley testified that, in his view, the Claimant's conversation with Whitehead contained statements contrary to the Claimant's testimony at the July 2, 1999 Investigation. O'Kelley testified that he believed the Claimant admitted to Whitehead that he was instructed or assisted in completing the incident report, yet the Claimant in earlier testimony denied receiving such assistance. O'Kelley further testified that he believed "influence was used on [Claimant to] fill out an accident report for his own benefit, in the intent of processing a claim for his injury against the company."

The Claimant insisted that his earlier testimony was not falsified and that no one instructed him on how to fill out the incident report. He stated that he filled out the report himself and denied the assertion that his later conversation with Whitehead was inconsistent with his testimony at the July 2, 1999 Investigation.

The Board carefully reviewed the record and the arguments of the parties as presented on the property. At issue here is whether the Claimant lied when he testified at the July 2, 1999 Investigation. In order to resolve that question, there must be a determination as to whether the Claimant's July 2, 1999 testimony was impeached by a later inconsistent statement. On this narrow question, the Board is not convinced that the record contains substantial evidence to establish that the charge directed against the Claimant has been proven.

The Carrier's proofs are insufficient in at least two significant respects. First, the Claimant's testimony at the July 2, 1999 Investigation is less than a clear declaration that no one assisted him in filling out the accident report. Close examination of his answer to the Carrier Officer's question, when read in full context, suggests that he was addressing a different issue entirely. Second, Whitehead's testimony does not go so far as to say that the Claimant was instructed in or assisted with filling out the report. According to Whitehead's testimony, the Claimant told him only that the Union and the lawyer told him (the Claimant) to fill out a report. Such testimony, standing alone, does not establish that the Claimant was coached on what to say in the report.

The charge of dishonesty is a serious one and requires proof of intent. As noted in Public Law Board No. 6402, Award 7, a case very similar to this one: "To carry its burden of proof, Carrier must show by substantial evidence not only that the answers were inaccurate but that Claimant did not believe them when he gave them, i.e. that Claimant deliberately lied." That level of proof is lacking on this record, because the Carrier failed to show that the Claimant's statements were inconsistent, much less fraudulent or dishonest.

Apparently recognizing the weakness of the specific charge directed against the Claimant, the Carrier attempted at the Investigation to interject issues that were raised in the earlier Investigation. We believe those issues have been fully addressed by the Board in Third Division Award 36212 and they will not be revisited at this juncture.

The Carrier failed to establish its charge by substantial evidence and therefore the claim must be sustained. As a remedy, we adopt and incorporate fully herein the same conditions regarding the Claimant's reinstatement and compensation for time lost as previously set forth in Third Division Award 36212.

AWARD

Claim sustained in accordance with the Findings.

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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 24th day of September 2002.