

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION**

**Award No. 26298
Docket No. 46184
06-1-05-1-52**

The First Division consisted of the regular members and in addition Referee Barry E. Simon when award was rendered.

PARTIES TO DISPUTE: (**Brotherhood of Locomotive Engineers and Trainmen**
(**Union Pacific Railroad Company**

STATEMENT OF CLAIM:

“Claim in behalf of Engineer J. Z. Riley, hereinafter referred to as claimant, ID Employee No. 0000993, Union Pacific Railroad Northern Region, Twin Cities Service Unit, that claimant be reinstated to service with full seniority and vacation benefits restored, compensated for any and all lost time, without deduction for outside earnings, including time spent at the investigation, reimbursed for any and all medical, eye care and dental expenses incurred as well as any COBRA payments made by claimant while claimant was dismissed from service, that claimant be removed from the Union Pacific Upgrade Discipline Policy and the Behavior Modification Matrix and that this incident be expunged from claimant’s personal record when claimant was investigated on August 31 and September 13, 2004 on the following charge:

‘for investigation and hearing for your responsibility, if any, in connection with your alleged dishonesty in reporting your personal injury of July 10, 2004, which is inconsistent with statements made in the formal investigation conducted by Mr. J. E. Dutton on August 2, 2004.’

“Claim is supported by the 1996 BLE/UPRR System Discipline Agreement.”

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.

On July 10, 2004, Claimant was assigned as Engineer on Train CNABK-10, on duty at 9:00 am at Mason City, Iowa and operating to St. Paul, Minnesota. Claimant tied up at 8:30 pm. On July 12, 2004, Claimant filed an injury report, alleging he sustained a back injury while on duty on July 10, 2004. According to Claimant's report, this injury was caused by rough track at the south end of a crossing between mile posts 274 and 275 in the vicinity of Hope, Minnesota.

Because Claimant neither reported the injury nor the rough track before going off duty, he was directed to attend a formal Investigation at which he was charged with failing to properly report a personal injury and failing to report defective track. The Investigation was conducted on August 2, 2004, and Claimant received no discipline as a result. When the Carrier reviewed the transcript of the Investigation, though, it was felt that Claimant's testimony was inconsistent with his injury report. Consequently, he was directed to attend a second Investigation at which he was charged with dishonesty in the reporting of his personal injury. Following that Investigation, Claimant was dismissed from service.

The Carrier has concluded that Claimant did not sustain an injury, and if he did it occurred at some place other than Carrier property and at some time other than his tour of duty on July 10, 2004. From this, the Carrier asserts that Claimant was dishonest in his reporting of the injury.

The burden of proof is upon the Carrier in this case. Not only must the Carrier prove that Claimant's statements, either in the August 2, 2004, Investigation

or in his injury report were erroneous, but it must also prove that they were the result of Claimant's dishonesty. Dishonesty implies that Claimant knowingly made false statements to attain some benefit from the Carrier. In this regard, the Board concludes the Carrier has fallen short in its proof. We note that Claimant was not charged in this case the late reporting of an injury; he had already been vindicated of that charge.

Although Claimant completed the portion of the accident report that asks "What specifically caused the accident/injury," by replying "pinched syatic nerve lower back do to rough track [*sic*]," he answered "S. End crossing at Hope MN MP 274-275," when the form asked him to "List any job(s), exposure(s), or location(s) that you believe may have caused or contributed to you symptoms."

While it is true that there may be some inconsistencies between Claimant's testimony at the first Investigation and his statements on the injury report, these inconsistencies are insufficient to prove that either he did not sustain an injury or the injury did not occur while on duty. We particularly note that Claimant's decision to wait until July 12 to seek medical attention does not establish he was not injured at work. Furthermore, the inconsistencies do not establish that Claimant was guilty of dishonest conduct either when he filled out the report or when he testified at the Investigation. It is not beyond the realm of reason to conclude that Claimant had some idea on July 12 as to what caused his sciatic pain two days earlier, but upon further reflection attributed it to other causes, namely movement of the locomotive cab. The Carrier may have been suspicious as a result of these inconsistencies, but this Board requires more than mere suspicion before it will uphold an employee's dismissal.

Because we do not find substantial evidence in the record to support the Carrier's charge, we have no choice but to set aside the discipline imposed. Accordingly, we will direct that the discipline entry be removed from Claimant's record and that he be returned to service. Furthermore, the Carrier is directed to make Claimant whole for wages lost as a result of this action, subject to deduction for outside earnings during the period of his dismissal.

AWARD

Claim sustained in accordance with the Findings.

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 2nd day of June 2006.