

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Form 1

Award No. 24249
Docket No. 43847
93-1-92-1-C-4570

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

PARTIES TO DISPUTE: (Brotherhood of Locomotive Engineers
(
(CSX Transportation, Inc. (formerly Chesapeake
(& Ohio Railway Company)

STATEMENT OF CLAIM:

"Vantichelt, J. L., Engineer, Peninsula Seniority District, Huntington Division, who was dismissed from the service of the Carrier on March 26, 1991, pursuant to a formal investigation that was conducted on March 20, 1991, wherein the Claimant was charged with responsibility, if any, in connection with his conduct unbecoming of an employee and statements made by him in connection with the damage to CSXT Unit 7583 at or about 1645 hours (4:45 p.m.) on February 18, 1991. Request is made that the Claimant be exonerated of the charges that the same be removed from his service record, that he be restored to service with seniority unimpaired, and that he be paid for all time lost and expenses incurred. Rule 71, Engineers' Schedule of Wages and General Regulations."

FINDINGS:

The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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 March 26, 1991, the Carrier dismissed Claimant, an engineer with approximately twenty years of service, for allegedly engaging

in conduct unbecoming an employee and for making false statements concerning the cause of the damage to CSXT Engine Unit No. 7583 on February 18, 1991. To fully understand this case, this Board must relate the facts adduced at the March 20, 1991 Investigation in some detail.

On February 18, 1991, Claimant was working his regular yard assignment at the Carrier's Fulton Terminal in Richmond, Virginia. At about 4:45 p.m., Claimant backed his switcher pulling a long cut of cars onto a viaduct.

Claimant gave the following rendition of the ensuing incident. Claimant heard something hard hit the side of the engine. He immediately shut the engine windows and laid down on the cab floor. Next, he heard more projectiles hit the side of the engine. Claimant radioed the Yardmaster to call the police because someone was shooting at him. Claimant observed a man squatting behind the open left door of a brown car holding a rifle about 150 yards from the viaduct. After firing the rifle several times, the shooter quickly drove away.

Neither of Claimant's fellow crew members heard any shots. However, they were some distance away from the engine setting the next switching move.

The first police officer to respond was Patrolman McMahon, who did not testify at the investigation. The Assistant Trainmaster related that Patrolman McMahon found some indentations on the engine cab which, the Patrolman surmised, were caused by projectiles from a small caliber firearm.

Before a thorough inspection of the engine could be completed, the engine was used in through freight service to Rocky Mount, North Carolina, and return.

The Captain of the Carrier's police force at Richmond inspected unit No. 7583 and was not convinced that the indentations were made by a small bullet. The Captain found a small ball-peen hammer laying next to the engineer's seat. There was blue paint on the head of the hammer which, according to a visual examination made by the Captain, matched the paint on the side of the engine where the indentations were located. The Captain conducted an experiment. He reached out the window with the hammer (about arm's length), swung upward and made indentations in the side of the engine that matched the indentations supposedly made by rifle bullets.

The Richmond Police Department assigned Detective Sergeant Robert Walker, an expert on random shootings, to investigate the

incident. When the Captain and the Detective entered the engine cab, they smelled the odor of gun powder and found several exploded and unexploded firecrackers in the cab. They could neither find anybody who witnessed the shooting nor any spent shell casings. Like the Captain, the Detective examined the ball-peen hammer and began to draw the inference that the hammer, rather than bullets, made the indentations. The Detective also engaged in the same experiment as the Captain and found that the ball-peen hammer made the same marks that Claimant contended were made by bullets. After determining the angle of the indentations, the Detective also found that due to the angle of the indentations, the shots must have originated from almost directly below the engine yet Claimant had said that the shots were fired from an automobile more than 150 yards away at a horizontal angle to the engine. Also, the Detective was concerned about the truthfulness of Claimant's observations of the alleged shooter since Claimant said he hit the cab floor after the first shot. The Detective wondered how Claimant could see who was firing while he was lying on the floor below the cab window.

On March 6, 1991, the Detective interviewed Claimant. The Detective gave an account of the interview that differed significantly from the rendition given by Claimant and his girlfriend.

According to the Detective, he confronted Claimant with his inconsistent statements and offered a proposition. The City would not charge him with filing a false police report if he conceded that he concocted the shooting incident. According to the Detective, Claimant voluntarily admitted that he "made it up."

On the other hand, Claimant testified that he simply told Detective Walker to forget about the incident because Claimant did not want to tell the police the real reason why someone might want to shoot him. Claimant's girlfriend corroborated Claimant's version of the March 6 interview. At the investigation, Claimant presented a note, purportedly signed by an agent of the Virginia Alcohol Beverage Control Board, attesting that Claimant and his girlfriend had received threats against their lives. According to Claimant, he was working undercover for the Board on a narcotics matter. Claimant did not elaborate.

At the onset, the Organization contends that the Carrier deprived Claimant of a fair and impartial Rule 71 investigation because Patrolman McMahon did not testify at the hearing. We find that the Carrier's failure to call Patrolman McMahon as a witness at the investigation did not prejudice Claimant's defense. His observations were not as critical as Detective Walker's observations because Patrolman McMahon was not the investigating officer. He merely responded to the initial police call. Moreover, despite

his absence from the investigation, Patrolman McMahon's observations that the indentations were made by a bullet from a small caliber firearm were incorporated in the investigation record. His presence would have added nothing. Also, while Patrolman McMahon believed Claimant's version of the incident, even the Patrolman's observations did not directly corroborate all the facts asserted by Claimant. Claimant stated that a man shot a rifle while Patrolman McMahon said the indentations were made by bullets from a small caliber firearm. Thus, the Patrolman's testimony hurt rather than helped Claimant.

All the evidence against Claimant is circumstantial. However, circumstantial evidence can be just as probative as direct evidence if the circumstances tightly weave a web of guilt around Claimant. In this case, the circumstances clearly allowed the Hearing Officer to draw the reasonable, and indeed the only plausible conclusion, that is, Claimant fabricated the incident.

From the start, Claimant's story was riddled with inconsistencies. He vividly related that he saw a male stooped behind the left front door of a brown automobile holding a rifle and shooting at him but, he supposedly shut the window and flung to the cab floor upon hearing of the first shot. Perhaps, Claimant viewed the alleged shooter while closing the window but Claimant never explained why he first shut the window before leaping to safety on the floor. Even if Grievant saw a shooter, why did he waste his time closing the window? Being at the window made Grievant an easy target. Rather, it is plausible that Claimant closed the window to prevent any investigator from thinking that he had leaned out the window with the ball-peen hammer to make the indentations.

Next, Claimant testified that the shooter held a rifle yet the indentations allegedly made by the bullets were small. If Patrolman McMahon's observations are credited, the shooter had a small caliber handgun as opposed to a rifle.

Other circumstances support the Carrier's finding of Claimant's guilt. The ball-peen hammer contained a small smudge of blue paint indicating that it had recently come into contact with the color of paint that coincidentally matched the paint color on the side of the engine. Also, even though it was a busy time of day, the Detective could not find any witness who heard shots fired. If the shooter had a rifle, somebody surely would have heard something. Next, although the engine unit was used in service for a round trip, the investigator found firecrackers in the cab that could have been used to make noises like shots. However, even if the firecracker evidence is discounted because the engines were in service, the absence of the shell casings was conclusive. If Claimant's account is to be believed, the shooter immediately got

in the car and drove away. The perpetrator did not retrieve shell casings before the getaway. Again, if Claimant was telling the truth, the casings would be on the ground near where he purportedly saw the brown car. The absence of the casings militates in favor of a finding that Claimant was fabricating the incident.

The Hearing Officer could credit the detectives' rendition of the March 6 interview over Claimant's self-serving testimony. This Board, as an appellate body, may not resolve conflicts in testimony or pass on the credibility of witnesses. The Detective testified that Claimant admitted to concocting the incident, albeit, the Detective had threatened Claimant with criminal charges. If Claimant was working undercover for the State of Virginia, surely State authorities would have contacted Richmond authorities to alert them to Claimant's undercover service.

Similarly, the Hearing Officer could discount the testimony of Claimant's girlfriend since she is obviously biased in favor of Claimant. Finally, even if Claimant's version of the interview is correct, he never explained why he wanted the authorities to forget the matter. A reasonable person, who had received threats on his life and been the victim of a shooting while working on the railroad, would be concerned with his safety. A reasonable person in Claimant's position would zealously pursue the matter to catch the wrongdoer. If Claimant is correct, he will never be safe until the alleged shooter is apprehended. Instead, the Hearing Officer plausibly concluded that when Claimant was confronted with his inconsistent statements and with the possibility of having to defend himself against a criminal charge, he truthfully stated that he had made up the incident. Next, after Claimant confessed, he had to retract the confession once the Carrier preferred charges against him. Claimant cannot have it both ways. He cannot confess to avoid criminal charges and then conveniently disown the confession to evade discipline from the Carrier. The only plausible, cumulative conclusion that can be drawn from all of the circumstantial evidence is that Claimant was guilty.

The only circumstance the Carrier did not prove was Claimant's motive for fabricating the incident. Although Claimant's motive will forever remain a mystery, the circumstantial evidence constituted sufficient evidence proving Claimant's guilt.

Claimant committed two serious infractions. By vandalizing the engine, he engaged in conduct unbecoming an employee and more importantly, he was guilty of dishonesty by giving false statements concerning the cause of the damage. Despite his many long years of service, dishonesty is a serious offense which warrants a severe punishment. Claimant's many years of service cannot overcome his reprehensible conduct.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division

Attest: _____

Catherine Loughrin

Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 1st day of November 1993.