PUBLIC LAW BOARD NO. 5396

Parties to the Dispute	BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES vs. UNION PACIFIC TRANSPORTATION COMPANY (former Southern Pacific Transportation Company, Western Lines)	PLB Case No. 50 NMB Case No. 50

STATEMENT OF CLAIM

1. The dismissal of Truck Operator R.L. Lowery was in violation of the Agreement, based on unproven charges and an abuse of discretion.

2. Claimant Lowery must be reinstated to his previous assignment with his seniority and all other contractual rights restored unimpaired; he must be compensated for all wage losses incurred since his wrongful dismissal; and all charges and reference to this incident must be expunged from his personal record.

FINDINGS

Claimant R.L. Lowery was dismissed from service on March 17, 1997, following an investigation into the charge that he had

falsified his employment application on August 21, 1996, when he allegedly failed to disclose a previous shoulder injury. Carrier's decision was based in part on the testimony of three witnesses at the hearing (A.S. Gonzales, J. Stevenson, and D. Brooks) that Claimant had told them that his injury occurred prior to his employment with Carrier. Immediately thereafter, he said that he did not know if the injury occurred just before or just after his being hired. Carrier notes that had it known of Claimant's rotator cuff tear, it would not have hired him for the physically strenuous work of a Maintenance of Way employe.

The Organization maintains that Claimant did not suffer a problem until after he began working for the Company and argues that Carrier failed to produce any medical records to suggest otherwise.

The Organization is correct when it points out that the record is devoid of any medical documentation to support the contention that Claimant originally injured himself prior to his employment with the Company. His doctor wrote that Claimant first reported a problem with his shoulder in 1996 when "he was working for the railroad." Clearly, Carrier acted because of Claimant's initial statement--which he quickly modified--that the injury occurred before he was hired.

While this Board agrees that the evidence produced is less than dispositive of the matter, we cannot help but conclude that Claimant's inconsistent statements strongly point to his culpability. Both Track Foreman Stevenson and Brooks testified that Claimant had told them prior to February 3 that he had injured his shoulder before coming to work for the railroad. It was only when meeting with Messrs. Stevenson and Brooks and Roadmaster Gonzales on February 3 that Claimant now said he could not recall if it happened before or after joining the railroad and that it had occurred at home while throwing a baseball. Mr. Gonzales reported that Claimant also said he had a torn rotator cuff and was taking medication for it.

At the hearing, Claimant now indicated that he had never been treated for a rotator cuff tear. Mr. Stevenson testified that he thought that Claimant had told him before that he had injured his shoulder while water skiing.

Although the Board determined in a bench decision on March 25, 1999, that Claimant should be returned to service with seniority and other rights intact, we cannot endorse his payment for all time lost. We therefore direct as follows:

AWARD

Claim sustained in part and denied in part. Claimant is to be returned

to service with seniority and all other rights intact. He is to be compensated for a one-year period (the year prior to his return to work), less outside earnings.

C.H. Gold,
Neutral Chairman

See Dissent
R.B. Wehrli,
Employe Member

D.A. Ring,
Carrier Member

Date of Approval

ORGANIZATION MEMBER'S DISSENT

TO

AWARD NO. 50 OF PUBLIC LAW BOARD NO. 5396

It has been said more than once that one school of thought among railroad industry arbitration practitioners is that dissents are not worth the paper they are printed on because they rarely consist of anything but a regurgitation of the arguments which were considered by the Board and rejected. Without endorsing this school of thought in general, it is equally recognized that a dissent is required when the award is not based on the on-property handling. Such is the case here.

Specifically, the charge brought against the Claimant, as taken from the Carrier's Notice of Discipline, indicated the Claimant was allegedly guilty of being *"DISHONEST"* for an *"...alleged falsification of your employment application dated August 21, 1996, whereon you failed to disclose a previous shoulder injury."*

There was no question between the parties that the application for employment filled out by Claimant on August 21, 1996, did not make any reference to a shoulder injury. Obviously, the only question to be answered, therefore, was if the Claimant suffered a shoulder injury before or after August 21, 1996. If, in fact, the Carrier provided sufficient evidence that Claimant suffered a shoulder injury before August 21, 1996, and such was the type of injury that should have been reported on his application for employment, it would be clear there was a valid basis for sustaining the charge because, again, the record shows that it was not reported on the application for employment. On the other hand, if the Carrier failed to produce sufficient evidence that such an injury occurred before August 21, 1996, the lack of such information on an application for employment would be a moot issue and/or appropriate; and the sustaining of any charge in that connection could not be upheld.

All divisions of the National Railroad Adjustment Board have stated many times over that it is the Carrier's responsibility to produce and submit direct, positive, substantial material and relevant evidence to sustain its charge and action taken. The Organization clearly established that the Carrier failed to produce any witness of the Claimant's injury that would substantiate it occurred prior to August 21, 1996. The Organization also established that the Carrier failed to produce any visual evidence from watching Claimant perform work that he injured his shoulder prior to August 21, 1996. To the contrary, witnesses testified they seen no effects of a shoulder injury while Claimant performed his work. Finally, it was established that the Carrier failed to produce any medical records to prove Claimant hurt his shoulder before August 21, 1996. In fact, and again to the contrary, the medical records presented and a written statement from the treating physician, <u>all</u> indicate the injury developed <u>after claimant entered service</u>, i.e., <u>after August 21, 1996</u>, as a result of an off-the-job incident, throwing a softball. Here, the Board is in complete agreement by stating in the Award:

> " The Organization is correct when it points out that the record is devoid of any medical documentation to support the contention that Claimant originally injured himself prior to his employment with the Company. His doctor wrote that Claimant first reported a problem with his shoulder in 1996 when "he was working for the railroad." (underscoring added)

Absent any evidence to support the charge of an alleged falsification of an employment application, exactly why did the majority of this Board deny the Organization's claim in part? Irresponsibility, the majority of the Board agreed to find the Claimant guilty of a charge that was not included in any valid notice of charges associated with this case. Specifically, on page 3 of the Award, the majority indicated:

> "...we cannot help but conclude that Claimant's inconsistent statements strongly point to his culpability."

Nowhere in the official notice of charges can you find a charge preferred against Claimant for allegedly making *"inconsistent statements."* Instead, and again, he was charged with falsifying his employment application. Further, whether or not Claimant made *"inconsistent statements"* is completely inconsequential. The fact still remains that there is no proof Claimant injured his shoulder before August 21, 1996, and there is proof that the information on Claimant's employment application is false or inaccurate in anyway. Additionally, the direct evidence developed, i.e., the medical records and the attending physician's written statement, indicate the injury occurred AFTER August 21, 1996. Without any evidence to prove he injured his shoulder before August 21, 1996, there is no valid or logical basis for concluding the Claimant's employment application was falsified.

For this Board to sustain a charge that was never introduced in any notice of discipline; or to sustain a charge for which no direct supporting evidence was ever presented, is without valid foundation or merit. Clearly, this Carrier went on a witch-hunt and a majority of this Board overstepped its bounds by progressing it to this inappropriate conclusion.

For these reasons, I dissent. Further, like the evidence developed in support of the charges in this case, my signature on this Award will be the same - nonexistent - to illustrate my complete disdain for this decision that, in my opinion, can be best described as a *"sham."*

Yours truly,

R. B. Wehrli
Organization Member