

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 5905
AWARD NO. 46, (Case No. 46)**

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES DIVISION - IBT RAIL CONFERENCE**

vs

GARY RAILWAY COMPANY

William R. Miller, Chairman and Neutral Member
Ryan Hidalgo, Employee Member
Sean M. Dalton, Carrier Member

Hearing Date: January 8, 2014

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

- 1. The dismissal of Mr. V. Ramirez for his alleged violation of Maintenance of Way Rules 0.4, 0.7, 1.15 and 1.27 when on July 30, 2012, he allegedly provided false written and verbal statements to carrier official(s) and/or U.S. Steel medical personnel regarding an alleged injury he reported is arbitrary, capricious, excessive, unwarranted and in violation of the Agreement (System File GW-8-12/142-293).**
- 2. As a consequence of the violation above, Claimant Ramirez shall now be allowed the remedy prescribed in Rule 57(c)."**

FINDINGS:

Public Law Board No. 5905, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

The undisputed facts indicate on July 30, 2012, the Claimant was working as part of a Maintenance of Way track crew. At approximately 10:15 a.m. the crew parked their trucks at their "camp" building, GM-12 for their lunch break. Shortly, thereafter, Claimant reported to M of W Supervisor Ortegon, whose office was in the same building, that he had sustained an injury to his left leg/knee while placing an orange cone behind his parked vehicle, truck #478 which is required by the Carrier Safety Rule when parking in the mill.

After the Claimant reported his injury to Supervisor Ortegon, he transported Claimant to the U.S. Steel medical dispensary for evaluation and/or necessary treatment. Subsequently, Ortegon secured a written statement from the Claimant and his fellow crew members. Because

there was a contradiction between the Claimant's statement and two of his co-workers the Carrier subsequently brought charges against the Claimant.

On August 9, 2012, Carrier notified Claimant to appear for a formal Investigation on August 14, 2012, concerning in pertinent part the following charge:

"...to develop all facts and to determine your responsibility, if any, in connection with the charge that you allegedly violated Maintenance of Way Rules 0.4, 0.7, 1.15 and 1.27 when on July 30, 2012 you provided false written and verbal statements to carrier official(s) and/or U.S. Steel medical personnel regarding an alleged injury you reported."

On August 16, 2012, Claimant was notified that he had been found guilty as charged and was dismissed from service.

It is the position of the Organization that the Carrier did not meet its burden of proof and the Claimant was improperly disciplined. The Organization asserted that prior to July 30th the Claimant developed a rash in between his legs which caused him some discomfort and also affected the manner in which he walked, but was not related to his subsequent on-duty injury. It argued the accident happened when the Claimant removed a orange cone from his truck to be placed behind the parked vehicle. Claimant explained the incident by stating that he climbed onto the back of the truck to get an orange cone so he could place it behind the parked truck in accordance with Safety Rules. Claimant stated that he threw the cone out from the rear of the truck bed and then stepped down, left leg first. According to the Claimant, as he touched the ground his left knee buckled and he felt a slight pop on top of his knee cap. He reported that he could walk, but could not bend his knee and that he reported the injury immediately. The Organization reasoned that the accident was unavoidable and the Claimant did nothing wrong. It concluded by requesting that the termination of the Claimant be rescinded and the claim sustained as presented.

It is the position of the Carrier that it properly terminated the Claimant from its service and the discipline exercised was appropriate for a serious offense. The Carrier asserted that two of the Claimant's co-workers offered written statements and testimony that contradicted the Claimant's version of the July 30, 2012, incident. The Carrier first argued Mr. Sahagun who was a passenger in the same vehicle that the Claimant drove, testified that he placed the orange cone behind the truck # 478 rather than the Claimant and Mr. Morganelli testified that he observed Mr. Sahagun putting the cone behind the truck as the Claimant exited the driver side of the truck and walked directly into the building, all of which he witnessed while he was seated in his vehicle. Morganelli also testified that he noticed the Claimant was limping early on in the shift and the Claimant told him he had aggravated his leg over the weekend. The Carrier further argued that it contacted U.S. Steel Security and requested to view the entrance gate video for

July 30th in order to view how the Claimant was walking when he entered the plant that morning. According to the Carrier that video showed Claimant limping down the ramp to the swipe-in-gate and swiping in at exactly 5:53 a.m., far before the alleged injury occurred at 10:15 a.m. The Carrier suggested that the Claimant fabricated a story for possible financial gain for his alleged suffering under the Federal Employer's Liability Act (FELA) and his story should not be believed because it was not credible. It closed by asking that the discipline not be disturbed and the claim remain denied.

The Board has thoroughly reviewed the record and we find no procedural errors occurred during the Hearing and the handling of the case and the Claimant was afforded his "due process" Agreement rights, therefore, the case will be resolved on its merits.

On page nine of the transcript the Hearing Officer questioned Mr. M. Sahagun, Trackman, who was riding in the same truck as the Claimant on July 30th as follows:

"Hearing Officer: ...When you pulled up and got out of the vehicle to go to lunch, I'm assuming it was lunch.

M. Sahagun: Yes.

Hearing Officer: Did you go to the back of the vehicle and remove the orange cone and place it behind the truck?

M. Sahagun: Yes.

Hearing Officer: You are positive it was you that did that move?

M. Sahagun: Yes.

Hearing Officer: At that time, at any time did you see or observe Mr. Ramirez remove that orange cone and place it behind the truck?

M. Sahagun: No." *(Underlining Board's emphasis)*

On pages 11 and 12 of the transcript Mr. M. A. Morganelli, Trackman, who was part of the crew the Claimant was working with was questioned as follows:

"Hearing Officer: According to your statement to the carrier, on July 30, 2012, at 6:20 a.m., you say 'I noticed Victor Ramirez limping' and you asked him what was wrong. Did he tell you that he injured his leg over the weekend or aggravated

his leg over the weekend?

M. A. Morganelli: Yes.

Hearing Officer: That morning, when you were coming back to the building for lunch, I guess according to your statement you were in truck 462?

M. A. Morganelli: Yes.

Hearing Officer: Where was that truck positioned with respect to truck 478?

M. A. Morganelli: Facing each other.

Hearing Officer: Did you visually observe Mr. Sahagun get out of truck 478, go to the back and get the cone out and place it behind the truck?

M. A. Morganelli: Yes.

Hearing Officer: And from that point Mr. Sahagun walked into the building?

M. A. Morganelli: Correct.

Hearing Officer: At any time did you observe Mr. Ramirez get a cone out of the back of truck 478?

M. A. Morganelli: No

Hearing Officer: Then following that, you then went into the building?

M. A. Morganelli: No I stayed in the truck.

Hearing Officer: You stayed in the truck the whole time, so at no time period did you observe Mr. Ramirez get a cone out of the back of truck 478?

M. A. Morganelli: No.

Hearing Officer: And just as clarification, in the morning you visible observed Mr. Ramirez limping and favoring his left leg?

M. A. Morganelli: Yes.

Hearing Officer: And that is what brought about your question asking him what happened?

M. A. Morganelli: Correct.

Hearing Officer: And he did confirm or confide in you that he had aggravated it over the weekend?

M. A. Morganelli: Yes." (*Underlining Board's emphasis*)

Examination of Mr. Sahagun and Mr. Morganelli's testimony reveals that it was consistent with their handwritten statements. On page 13 of the transcript Mr. Morganelli re-emphasized that he never left his truck 462 during the lunch break.

On page 14 of the transcript the Claimant testified that when he parked his company vehicle he went directly into the lunchroom, but that he came out a couple of minutes later to put the cone out and that was when he injured his knee. Claimant testimony on page 14 contradicted Mr. Sahagun's testimony as the Claimant testified that when he went back out to the truck there was no cone behind the truck. Claimant also testified on page 15 of the transcript that he told Mr. Morganelli that he was limping due to a rash between his legs and he denied telling Mr. Morganelli that he aggravated his leg over the weekend. He further testified that Mr. Morganelli went into the lunch room for a couple of minutes suggesting that was when he went out and placed the cone behind the truck. When Mr. Morganelli was called back for questioning he reiterated that he never left his truck during the lunch period and that only Mr. Sahagun put the cone behind the truck.

On page 22 of the transcript Claimant was questioned as to why the accident happened as follows:

"R. Delmuro: At the time you exited the vehicle and you stated you climbed on the back of the truck then you climbed off did you have to make any abnormal moves there?

V. M. Ramirez: Yes.

R. Delmuro: Can you clarify?

V. M. Ramirez: As I got up, from the discomfort of the rash from my legs rubbing together I got up and went got the cone, threw it out. I came forward and stepped backwards and as I got down I did have to open the leg up, the legs open a little bit to keep them from rubbing together. But that is where I had it, so I did have to

extend my leg a little bit out as I was going back to keep it from being together, and as I stepped back that is when I buckled my knee."

Review of the Claimant's statement of July 30th and his Injury Report of the same date reveals that the Claimant never reported that he had a rash that contributed to him making an awkward movement as he stepped off the back of the pickup while allegedly removing the parking cone. Claimant also testified that he never advised Maintenance Supervisor, Mr. B. R. Ortegon about his rash.

On page 22 of the transcript Mr. B. R. Ortegon confirmed the Claimant's testimony when he was questioned about his field interview of the Claimant regarding the alleged injury. Mr. Ortegon testified that the Claimant never told him he had a rash that made him open his legs wider to step down.

The testimony elicited above from the Claimant confirms that the Claimant withheld information relative to an alleged rash as he never reported it in the Injury Report, his written statement and interview with his superior, thereby, leaving the impression that had no physical problems prior to his alleged on-property injury.

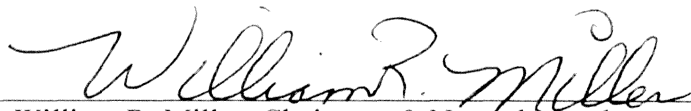
The testimony of Mr. Sahagun was supported by the testimony of Mr. Morganelli, and the testimony of Mr. Morganelli regarding the Claimant's noticeable limp was supported by the video of the Claimant clocking in for work on July 30th approximately five plus hours to the alleged accident. When the testimony of Messrs. Sahagun and Morganelli is reviewed we find there was no compelling reason or motivation for Claimant's co-workers to fabricate stories regarding the alleged incident whereas examination of the Claimant's testimony finds it to be self-serving as the Claimant colorized the incident to his best interest.

The totality of the record shows that substantial evidence was adduced at the Hearing that Claimant was injured off the Carrier's property and he subsequently staged an un-witnessed accident on July 30, 2012, with the possible intent to gain some type of financial benefit for his alleged injury and suffering from the Carrier.

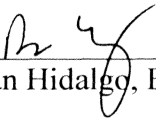
The only issue remaining is whether the discipline assessed was appropriate. At the time of the incident the Claimant had approximately one and half years of service and his offenses in this instance were of a serious nature. The Carrier's assessment of dismissal was in accordance with its Disciplinary Policy and because it was not arbitrary, excessive or capricious it will not be set aside. The claim will remain denied.

AWARD

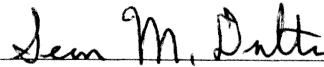
Claim denied.



William R. Miller, Chairman & Neutral Member



Ryan Hidalgo, Employee Member



Sean M. Dalton, Carrier Member

Award Date: 3-5-14