

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 5905
AWARD NO. 51, (Case No. 51)**

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

vs

GARY RAILWAY COMPANY

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

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

- 1. The Carrier's dismissal of Mr. O. Whitt for his alleged violation of Maintenance of Way Rules 1.10, 1.15, 1.27, 1.46, 1.53, 4.2, 9.1, 9.2, 10.4 and 10.20 (22.5, Parts 1&7-Track Foreman only) when he allegedly provided false written and/or verbal statements to Carrier official(s) regarding an incident that occurred on July 17, 2012 is arbitrary, capricious, excessive, unwarranted and in violation of the Agreement (System File GW-13-12/142-243).**
- 2. As a consequence of the violation referred to in Part 1 above, Claimant Whitt 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 that on July 17, 2012, Claimant was working as a Machine Operator on a Maintenance of Way track crew that was replacing worn rail and ties on Track 2-L in U.S. Steel, Gary Work Plant. At approximately 9:30 a.m., M of W Supervisor Groebner arrived at the work site to deliver some supplies when he observed crew member Mr. McEwen walking towards him with another member of the crew, Mr. Sowonik, who was bleeding and had been injured. Supervisor Groebner immediately transported Mr. Sowonik to the U.S. Steel medical dispensary where he received initial treatment for an injury to his chest, after which he was transported by ambulance to a nearby hospital.

On the same date of the incident the Carrier instigated a field investigation to determine the cause of the incident. Based upon discussions with and written statements given by the various crew members, it was determined that Mr. Sowonik was swinging a sledge hammer in an effort to remove bolts and a pair of joint bars from the rail of the track, when a small piece of metal struck him and became embedded in the upper left side of his chest. The crew members reported that none of them had seen exactly how Mr. Sowonik was injured.

The initial inspection of the sledge hammer found it to be in good working condition with no defects found on the striking surface. An inspection of the surface of the splice bar that Mr. Sowonik allegedly struck with the sledge hammer when working was found to have no defects as well, where fragments could have broken off and struck Mr. Sowonik.

The parties are in agreement that if the task done by Mr. Sowonik on July 17th was attempted by one person, the proper tool to be used would have been a sledgehammer whereas if two employees did the task a track punch would be used in conjunction with a sledgehammer, one person holding the track punch and the other using a sledgehammer to strike the track punch that was placed against the bolts and/or joint bars. The track punch is a tool that has a handle the approximate length of a sledgehammer with a large head for being struck by a sledgehammer that narrows down to a smaller point for breaking loose rusted objects, etc.

Subsequently, another inspection of the job site was done and a track punch was found to have a metal chip missing. The Carrier reasoned that Mr. Sowonik might have used a track punch which was an improper tool for the work he was doing when he was injured. The Carrier sent the track punch to an independent metallurgical engineering firm, ITC Experts on July 27, 2012, and was tasked with determining whether the dimensions of the void on the track punch were consistent with the hospital's written reported dimensions of the metal fragment removed from Mr. Sowonik's chest.

On July 20th the Carrier conducted second interviews with the crew members and asked each how the incident occurred, where each individual crew member was physically located and whether or not a track punch was used in the removal of the bolts and joint bar. All of the crew members identified the locations of the various crew members at the time of the incident and all stated they had not used the track punch and had no knowledge of the track punch being used by Mr. Sowonik.

Because the Carrier believed there were some alleged discrepancies between the physical evidence and the crew members statements the Carrier brought charges against all of the crew members including the Claimant.

On August 31, 2012, Carrier notified Claimant and fellow crew members to appear for a formal Investigation on September 6, 2012, concerning in pertinent part the following charge:

"This investigation is being convened to develop all facts and determine your responsibility, if any, in connection with the charge that you allegedly violated Maintenance of Way Rules 1.10, 1.15, 1.27, 1.46, 1.63, 4.2, 9.1, 9.2, 10.4, 10.20, (22.6, Parts 1 & 7 - Track Foreman only) when you provided false written and/or verbal statements to carrier official(s) regarding an incident on July 17, 2012."

On September 14, 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 Claimant's Investigation was not "fair and impartial" because the Hearing was not called within 30 days of the incident under charge which was not in accordance with Rule 57(a). Based upon that alleged procedural error the Organization asked that the discipline be set aside without reviewing the merits of the case. However, if the Board chose to review the case it asserted that the Board would discover that the Carrier did not meet its burden of proof. It argued that the Claimant was assigned to perform his regularly scheduled Machine Operator duties and, in connection therewith, he traveled his machine near Track L-2 to assist a track maintenance gang in the performance of track repair work. It further argued that when the Claimant arrived at Track L-2, he met employee A. Maurizi and began to have a conversation with Mr. Maurizi and a short while later, the Claimant heard some commotion and he noticed that Foreman Sowonik appeared to have injured himself. At that point he offered Mr. Sowonik a clean rag to hold against the wound and he saw co-worker McEwen approach Mr. Sowonik to assess his physical condition and watched him escort Mr. Sowonik to meet with Track Supervisor Groebner to inform their superior of what had just occurred. According to the Organization, the Claimant performed all of his duties in a safe manner and he told the Carrier everything he knew about the incident and there is nothing in the record to indicate that he was not truthful about the incident. Lastly, and without prejudice to the Organization's position that even if the Carrier provided sufficient evidence in support of the charges against the Claimant (which it did not do) the discipline is excessive as the Claimant had 18 years of service. 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 was appropriate for a serious offense. It first argued the Hearing was held in a "fair and impartial" manner and the Investigation was held in a timely manner. It asserted that it did not have first knowledge that an offense may have been committed until it obtained a final report from ITC on August 29th confirming that the metal fragment removed from Mr. Sowonik's chest was the same fragment from the void in the track punch, thus, according to it, the calling for the Investigation on August 31, 2012, was in conformity with Rule 57(a). The Carrier requested that the case be resolved on its merits because there were no procedural errors.

Turning to the merits the Carrier asserted that the record shows that a track punch was used on the day of the incident and it was not inspected or used properly, because it did not have the protective rubber collar on it. It argued that the metal fragment that was lodged in Foreman Sowonik's chest came from that tool which was verified by a scientific examination. It further argued that Claimant and the other charged employees chose to withhold information from Carrier Officers and gave false written and/or verbal statements regarding how the incident of July 17, 2012, actually happened. Additionally, the Carrier stated that subsequent to the formal Investigation one of the charged employees, Mr. McEwen contacted Supervisor Ortegon on September 7th and claimed that during a recess in the course of the formal Investigation, Mr. J. Guzman admitted to the other charged employees that he held the track punch on July 17th, indicating that Mr. Sowonik was the one who struck the track punch. The Carrier argued that despite that conversation having allegedly taken place prior to all the charged employee's testimony, each of the employees including Claimant testified to having no knowledge of the use of the track punch. Furthermore, the Carrier stated that Mr. Sowonik also contacted Supervisor Ortegon on September 7, 2012, wherein he told Ortegon that Mr. Guzman confessed to him in the parking lot immediately following the Investigation as to having held the track punch while maintaining that he had no prior knowledge or recollection that the punch had been used. It reasoned that the Claimant and the other charged employees engaged in a concerted effort to cover up the true cause of the incident and lied to multiple Managers about the accident. It closed by asking that the discipline not be disturbed and the claim remain denied.

The Board notes that this is a companion case to Award No. 47, 48, 49 and 50 of this tribunal, all of which dealt with an alleged incident that occurred on July 17, 2012.

The Board will first address the Organization's procedural argument that the Investigation was not "fair and impartial" because the Hearing was not called within 30 days of the incident under charge and that was an alleged violation of Rule 57(a). Rule 57(a) states in pertinent part:

"...No charge shall be made more than thirty (30) days after the date a carrier officer has knowledge of the offense...."
(Underlining Board's emphasis)

The aforementioned Rule is clear that the determining factor for an Investigation being called in a timely manner is dependent upon the Carrier's first knowledge of an alleged offense and not when the offense may have occurred. The question at issue then becomes when did the Carrier have first knowledge that an offense may have been committed on July 17, 2012. The Carrier argued that it did not have knowledge that an offense may have been committed until it obtained a final report from ITC on August 29th wherein it was shown that the metal fragment removed from Mr. Sowonik's chest matched the void in the track punch. The Board is not persuaded by the Carrier's argument that it did not have first knowledge of the incident under charge until August 29, 2012, when it received a final report from ITC, but instead it is

determined that the Carrier had reasonable first knowledge when it received ITC's initial report on August 2nd to issue its charge letter. Using the August 2 date as Carrier's first knowledge of the alleged incident the issuance of the Notice of Investigation on August 31st was on the 29th day and was in accordance with Rule 57(a). The dispute will be resolved on its merits.

Examination of the entire record substantiated that on July 17, 2012, the Claimant was assigned as a Machine Operator to assist the track crew that was replacing worn rail and ties on Track 2-L in U.S. Steel, Gary Work Plant. Claimant asserted that at the time of Mr. Sowonik's accident he had his back turned and was conversing with co-worker Maurizi and saw nothing happen. Mr. Sowonik alleged that he attempted the task alone and properly used a sledgehammer without the assistance of any other employee.

Contrary to Mr. Sowonik's and the rest of the crew's rendition of the event the evidence shows that Mr. Sowonik used a sledgehammer while co-worker Mr. Guzman held a track punch that was used without a protective rubber collar on it or an ill fitting collar which allowed the metal fragment to break off of the track punch and strike Mr. Sowonik in the chest. The Carrier's Safety Rules require the use of a rubber collar on a punch and other striking tools in a effort to minimize potential injuries. When the track punch was examined after Mr. Sowonik's accident the tool was found to have a rubber collar on it, but the collar was from a smaller tool and it did not properly fit the track punch. Additionally, the track punch was not near the immediate vicinity of the incident in what appeared to have been an effort to "stage" a scene that suggested the track punch was not used by Mr. Sowonik and Mr. Guzman and that Mr. Sowonik had been working alone.

The record stands un-refuted that the Carrier paid for an independent metallurgical engineering firm, ITC Experts to examine the track punch that was on site of the accident as to whether the dimensions of the void on the track punch were consistent with the metal fragment removed from Mr. Sowonik's chest. ITC's initial report confirmed that the size of the fragment removed from Mr. Sowonik as reported by the hospital was the same size of the void in the track punch. After that report the Carrier asked Mr. Sowonik for written authorization to obtain the fragment from the hospital, which he agreed to. After obtaining the fragment ITC examined it and issued a second report confirming that the metal fragment had preening marks similar to those on the hammer face, and that the shape and size of the fragment matched that of the void in the track punch. The evidence was conclusive that the metal fragment that struck the Foreman's chest came from the track punch that was on the job site.

In the Claimant's multiple statements he attested that he did not see anything and only knew the accident happened after Mr. Sowonik yelled out in pain at which time he offered Mr. Sowonik a clean rag for his bleeding chest area. On pages 52 - 54 of the transcript the Claimant was questioned about the incident as follows:

"Hearing Officer: Okay. So using the photograph as an exhibit, we're looking at exhibit 9-d the photograph. You're pointing to right around the I beam with the cone laying next to it. You were back further behind that between that and the piece of machinery?

Whitt: Correct.

* * * * *

Hearing Officer: At that time you were having a conversation with Mr. Maurizi?

Whitt: Correct.

* * * * *

Hearing Officer: And at this time, did you hear work going on while your back was to where the work was happening?

Whitt: I don't recall.

Hearing Officer: Do you recall who was in the area of that joint bar where the work was being performed?

Whitt: No.

* * * * *

Hearing Officer: Do you recall where Mr. Guzman was at that time?

Whitt: No.

* * * * *

Hearing Officer: While you were down there, did you observe a track punch in the area on the ground?

Whitt: No.

Hearing Officer: You never observed a track punch?

Whitt: Nope.

Hearing Officer: Did You observe anyone using a track punch?

Whitt: No.

(Underlining Board's emphasis)

As previously stated the Claimant continued to testify that he had his back to the injury scene and did not turn around until he hear Mr. Sowonik say "ouch", and then handed him a clean rag for the injury.

Assuming for the sake of argument that the Claimant never saw the accident involving Mr. Sowonik and did not notice another employee holding the track punch and/or did not see that tool near the injured employee that did not absolve the Claimant of his responsibility to tell everything he knew about the incident. In the Carrier's final declination of May 6, 2013, it wrote in pertinent part:

"On September 7, 2012, the day following the Investigation, M of W Supervisor, B. Ortegon received a phone call from Claimant McEwen in which he stated that during one of the recesses taken at the Investigation, that Claimant Guzman admitted that he was the one holding the track punch.... Despite this, however, during the remainder of the Investigation that day, all of the charged employees continued to deny any knowledge of the use of the track punch. Later that same day, September 7, 2012, Supervisor Ortegon also received a phone call from Claimant Sowonik in which he claimed that after the Investigation concluded, Claimant Guzman admitted to him in the parking lot that he had been holding the track punch on July 17. Based on the information gathered prior to the Investigation on September 6, the Carrier does not believe, as the claims of Claimants McEwen and Sowonik seem to suggest, that the charged employees did not know that the track punch had been used, or by whom it had been used, prior to September 6, 2012."

(Underlining Board's emphasis)

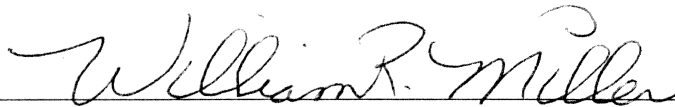
The Carrier's aforementioned statement was not refuted. Arbitral precedent has continually determined that un-refuted statements are to be considered factually correct and those industrial precedential decisions will be followed in this instance as well.

Giving the Claimant the benefit of doubt it is possible that on July 17th he did not see the incident and he reported everything he knew in his written statements correctly. However, it is clear that when he testified at the Hearing he had chose to collectively join with his fellow crew members in a fabrication of the incident via omission, with the hope that Mr. Guzman would testify that at the time of the accident he was holding the track punch when Mr. Sowonik struck it with a sledgehammer. As sometimes happens when individuals conspire to withhold

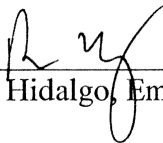
information or not to tell the truth it is not unusual when someone within that group becomes remorseful or decides that it is not in their best interest to not tell all they know, which is what happened regarding Mr. Sowonik's accident. Therefore, it is determined that Claimant knew before he testified that Mr. Sowonik was not working alone and that Foreman Sowonik struck the track punch that Mr. Guzman was holding when Foreman Sowonik was injured and despite that knowledge he independently chose not to be forthright in his explanation of everything he knew about the incident. Substantial evidence was adduced at the formal Investigation that the Claimant was guilty as charged.

The only issue remaining is whether the discipline was appropriate. At the time of the incident the Claimant had approximately 18 years of service. The Board is always reluctant to uphold the dismissal of employees with substantial service, but in this instance the Claimant's offense was of a serious nature as he chose not to be candid about the events of July 17, 2012, and in the process he breached the mutual trust between the Carrier and himself. Additionally, the record substantiated that the Claimant had two prior letters of reprimand, a 20-demerit assessment related to an injury occurrence, and a 15-day suspension for his involvement in an altercation with a co-worker that occurred approximately seven months prior to the instant offense. 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.

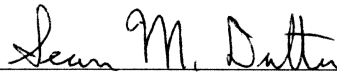
AWARD



William R. Miller, Chairman & Neutral Member



Ryan Hidalgo, Employee Member



Sean M. Dalton, Carrier Member

Award Date: 3-5-14