

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6302

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES)
and) Case No. 110
UNION PACIFIC RAILROAD COMPANY) Award No. 106
_____)

Martin H. Malin, Chairman & Neutral Member
D. D. Bartholomay, Employee Member
D. A. Ring, Carrier Member

Hearing Date: June 4, 2007

STATEMENT OF CLAIM:

- (1) The Carrier violated Rules 1, 2, 3, 4 – Group 26(e), 48(a), 48(c), 48(d) and 48(f) of the Agreement when it improperly dismissed Claimant Thomas Mendoza from service, by Letter of Dismissal dated December 7, 2005, over the signature of Director-Construction David Orrell, for alleged violation of Rule 1.6 - Conduct, as contained in the General Code of Operating Rules, effective April 3, 2005.
- (2) As a result of this violation, the Organization requests that Claimant now be compensated at his respective straight time and overtime rates of pay for all wage loss suffered, commencing from the date Claimant was removed from service, September 28, 2005, continuing until such time as Claimant is properly returned to service; that he be returned to service with all seniority held whole and intact.
- (3) If not able to active service due to any bona fide medical conditions, not specifically limited to his left knee, that he be restored to a status of authorized Medical Leave of Absence, and that this Level-5 Discipline and Dismissal be expunged from Claimant's personal record history.

FINDINGS:

Public Law Board No. 6302 upon the whole record and all of 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.

On September 28, 2005, Claimant was notified to report for a formal investigation on

October 12, 2005, concerning his allegedly having falsified a written personal injury report in violation of Rule 1.6(4). Following two postponements, the hearing was held on November 17, 2005. On December 7, 2005, Claimant was advised that he had been found guilty of the charges and had been dismissed from service.

The Organization contends that Carrier violated Claimant's due process rights because the hearing officer also determined guilt and imposed the discipline. The Organization's argument borders on the frivolous. Having the hearing officer determine guilt is a standard procedure on this property and in the industry generally. In the instant case, as developed below, there were disputed issues of fact that required an assessment of the relative credibility of the witnesses. In such a situation, the hearing officer is the most appropriate Carrier official to determine guilt as it is the hearing officer who observed the witnesses testify and who has the benefit of observing witness demeanor in assessing credibility.

The Organization next contends that Carrier failed to prove the charge by substantial evidence. In the Organization's view, Carrier proved at most that Claimant was "nearing retirement age," and "obviously mentally challenged," and did not speak English and consequently did not understand the personal injury reporting procedures and forms. In other words, the Organization maintains that Claimant lacked dishonest intent. We have reviewed the record thoroughly and are compelled to reject the Organization's argument.

At the time in question, Claimant was working compressed halves. Due to the Labor Day holiday, Claimant's first day of work in the half was September 7, 2005. Track Supervisor K. A. Borron testified that on that date, Welding Foreman J. C. Garcia told him that Claimant's knee was bothering him and that Claimant should not be performing his regular job. Supervisor Borron testified that he assigned Claimant to light duty, cleaning the office trailer and that Claimant and Foreman Garcia attributed Claimant's knee problem to "old age." Truck Driver Laborer M. Alvarez testified that on September 7, after the morning safety meeting, he noticed Claimant having difficulty boarding the bus and asked Claimant what was wrong. According to Laborer Alvarez, Claimant replied that his knee was sore and the knee was visibly swollen. Consequently, Laborer Alvarez alerted Foreman Garcia. Foreman Garcia testified that when alerted to the situation, he reported it to Supervisor Borron who assigned Claimant to light duty.

Claimant denied working light duty on September 7. He testified that he worked his regular duties on September 7 and 8, installing rollers. He denied that his knee bothered him prior to September 8. He denied discussing his knee on September 7 with either Messrs. Alvarez, Garcia or Borron. He testified that he injured the knee around 10:00 a.m. on September 8 and, because of the injury, he was assigned light duty on September 9.

Track Foreman F. Joe testified that he returned from vacation on September 11. On that date, he observed Claimant limping. He asked Claimant what the problem was and Claimant responded that it was due to old age. Foreman Joe further testified that he asked Claimant if the problem was a job-related injury and Claimant replied that it was not and asked Claimant if he wanted to see a doctor and Claimant declined the offer. Foreman Joe testified that because of the

knee problem, he assigned Claimant to fix tools and clean the tool trailer and instructed Claimant to stay away from the track.

Assistant Foreman M. Lozano testified that on September 14, Claimant asked him for assistance in making an appointment to see a doctor about his knee. Assistant Foreman Lozano testified that he called the doctor's office and asked Claimant the relevant information and relayed that information to the doctor's office. According to Assistant Foreman Lorenzo, Claimant stated that the problem was not a job-related injury and that Claimant would be using his regular medical insurance. Claimant was allowed to leave early on September 14 to go to the doctor.

On September 15, 2005, Claimant reported on his day off and indicated that he wished to report an on-duty personal injury to his knee. Claimant was directed to complete a Report of Personal Injury or Occupational Illness form. Because Claimant did not speak, read or write English, Foreman E. Cenicerros and Assistant Foreman Lozano read the questions on the form to Claimant in Spanish and Claimant completed the form in Spanish. Track Supervisor J. L. Davis was overseeing the completion of the form. Supervisor Davis had trouble with the answers being written in Spanish so he asked Foreman Cenicerros and Assistant Foreman Lozano to assist in completing a new form in English. Local Chairman J. Marquez arrived and Messrs. Marquez, Lozano and Cenicerros assisted Claimant in completing the form in English. The Spanish and English versions report that Claimant was injured on September 8 while lifting panels and a jack to install rollers. Both report that Claimant was unable to provide any additional details.

Depending on whose testimony is credited, the record supports two different versions of events. Either Claimant injured his knee while working on September 8 or Claimant reported to work with a swollen knee on September 7 and falsely attributed the condition to an on-duty injury on September 8. The hearing officer credited the testimony of multiple witnesses that Claimant was limping and had a swollen knee on September 7 and because of that was assigned to light duty over Claimant's testimony that he worked his regular duties on September 7 and experienced no problem with his knee until he injured it on September 8. As an appellate body, we are in a comparatively poor position to assess witness credibility compared to the hearing officer who observed the demeanor of the witnesses as they testified. We defer to the hearing officer's decision to credit the testimony of witnesses Alvarez, Borron and Garcia over that of Claimant. We further note that the hearing officer's finding that Claimant falsified the report of a September 8 on-duty injury is corroborated by testimony from Assistant Foreman Lorenzo that on September 14, when Claimant was seeking medical attention, Claimant advised him that the knee had not been injured on duty and that it should be covered by regular medical insurance.

The false report cannot be explained by a claim of confusion with the forms or with the procedures. Simply put, either Claimant injured himself on duty on September 8 or he fabricated a claim of an on-duty injury for a medical problem that he already had when he reported on September 7. As detailed above, we defer to the findings made on the property that the latter version of the events is the more credible. Accordingly, we conclude that Carrier proved the charge of dishonesty by substantial evidence.

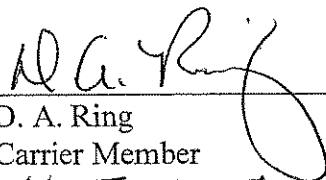
We recognize that Claimant had more than 30 years of service. However, falsifying a claim of an on-duty injury is a very serious offense that generally warrants dismissal. The record contains no evidence that might mitigate against dismissal. On the record presented, we cannot say that the penalty imposed was arbitrary, capricious or excessive.

AWARD

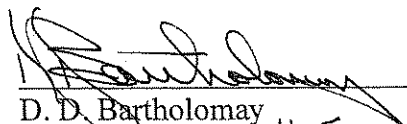
Claim denied.



Martin H. Malin, Chairman



D. A. Ring
Carrier Member
11-5-2007



D. D. Bartholomay
Employee Member 11-5-07

Dated at Chicago, Illinois, October 25, 2007