

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6402**

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

UNION PACIFIC RAILROAD COMPANY

)
) Case No. 16
)
) Award No. 7
)

Martin H. Malin, Chairman & Neutral Member
D. D. Bartholomay, Employee Member
C. M. Will, Carrier Member

Hearing Date: January 21, 2002

STATEMENT OF CLAIM:

1. The dismissal of Mr. R. A. Harralston for alleged dishonest and fraudulent statements and violation of Union Pacific Rule 1.6 effective April 10, 1994, in connection with an incident on February 2, 1999 while working as a trackman near Mile Post 66.3 on the Jonesboro Subdivision was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File MW-99-311/1208105 MPR).
2. As a consequence of the violation referred to in Part (1) above, Mr. R. A. Harralston shall now have all reference to the charges leveled against him removed from his personal record and he shall be reinstated to his former position with pay for all time lost beginning May 27, 1999 and continuing and have all seniority and benefits restored intact and unimpaired.

FINDINGS:

Public Law Board No. 6402, 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.

On May 27, 1999, Carrier notified Claimant to report for an investigation on June 11, 1999, and charged that he "allegedly have been dishonest and made fraudulent statements in connection with the incident involving you that allegedly happened at approximately 11:15 AM

on February 2, 1999 while working as trackman near MP 66.3 on the Jonesboro Subdivision. . . in possible violation of Union Pacific Rule 1.6 effective April 10, 1994." The hearing was postponed to and held on July 22, 1999. On August 13, 1999, Carrier informed Claimant that he had been found guilty of the charge and was dismissed from service.

The principal issue in this case is whether Carrier proved the charge by substantial evidence. First, we must observe that Claimant was charged with acting fraudulently and dishonestly. In other words, the charge required proof of fraudulent and/or dishonest intent.

We observe further that it is impossible to determine from the notice what specific statements Carrier charged were fraudulent and dishonest. Furthermore, the letter of dismissal merely stated, "I have found more than a substantial degree of evidence was presented to warrant sustaining all charges brought against you." Nowhere did it enumerate what specific statements were found to have been fraudulent and dishonest. During on property handling of the claim, it became clear for the first time that Carrier was not contending that Claimant acted fraudulently and dishonestly in reporting an on-duty injury. Carrier, in rejecting the Organization's claim, wrote, "While there is considerable evidence in the transcript that would make one question if this injury actually occurred on the job, this was not alleged by the railroad. Your questions in the investigation and comments in this appeal regarding the validity of the injury really have nothing to do with the charge."

Rather, it appears that Carrier dismissed Claimant for allegedly making fraudulent and dishonest statements during an interview with Carrier's claims agent on March 2, 1999. During the investigation, Carrier introduced pages 1, 9, 13, 17, and 24 from the transcript of the interview. The Organization objected, arguing that Carrier must produce the entire transcript. Carrier overruled the objection and found Claimant guilty based on these excerpts from the transcript.

At the investigation, Claimant was asked whether the five transcript pages accurately depicted those portions of the interview. He replied:

Well, it's hard to say, because there was other questions on, you know, on there before he even got to asking that about things that I answered that not - - that I can't answer about.

The Board is sympathetic to Claimant's inability to verify the accuracy of five disconnected pages of the interview transcript without seeing the entire transcript. Indeed, we consider it extremely difficult, and perhaps impossible, to determine Claimant's honesty with the claims agent without the ability to read the allegedly fraudulent and dishonest answers in the context of the entire interview. Nevertheless, we will examine the specific answers that Carrier maintains were fraudulent and dishonest. In so doing, it is important to note that our concern is not the accuracy of the answers but Claimant's honesty in giving them. To carry its burden of proof, Carrier must show by substantial evidence not only that the answers were inaccurate but that Claimant did not believe them when he gave them, i.e. that Claimant deliberately lied.

On page 9 of the interview transcript, the following exchange between Claimant and the claims agent is recorded:

- Q: Have you ever had any injuries while you were on the railroad?
 A: No, sir.
 B: Okay. This is the first one?
 A: Right.
 Q: Okay. I showed you this Accident Report. Okay? Well, let me ask you this, have you had any other claims outside the railroad from, like, motor vehicle accidents or any other type of personal injuries where you filed a claim?
 A: No, sir.
 Q: Any Worker's Comp from any of your other employers?
 A: No, sir.
 Q: Okay, This is the first injury you have sustained either on the job or through the fault of someone else?
 A: Right.

Carrier found these responses to be fraudulent and dishonest based on records it obtained from Malden Medical Center. One record dated 11/20/98 shows Claimant seen and treated for lower back pain which had been present for three days. A section labeled "Pertinent Past History" was left blank. A record of a follow-up visit dated 11/24/98 records by Pertinent Past History, "work related injury." A follow-up report on 12/1/98 records by Pertinent Past History, "No longer limping." A follow up report on 12/5/98 is blank by Pertinent Past History. A questionnaire completed by Claimant on 4/25/99 answers, "What do you believe is causing the problem?" with, "Don't know (the on job injury)."

At most, we have one reference to a work related injury in one of a series of four medical reports concerning an episode of back pain that Claimant experienced in late 1998. The reference to an on job injury in the 4/25/99 questionnaire, of course, appears to refer to the February 2, 1999, incident that resulted in the interview with the claims agent. At the hearing, Claimant explained that he answered the claims agent as he did because he never previously brought a claim against Carrier or anyone else for a back injury. All evidence introduced at the hearing confirms that Claimant had not previously brought a claim against Carrier for a back injury. As far as we can tell from the excerpts of the interview with the claims agent, Claimant made a reasonable interpretation of the claim agent's questions and gave accurate answers to them in light of that interpretation. Of course, the entire transcript of the interview might shed further light on the context in which the questions were asked but we do not have the benefit of that crucial evidence. Suffice it to say that Carrier has failed to prove by substantial evidence that Claimant's answers were dishonest and we doubt that Carrier even proved that they were inaccurate.

At the top of page 24 of the interview transcript, the claims agent asked Claimant, "Okay. Yeah. I understand that. Have you ever had any other back problems prior to this?" Claimant replied, "No, sir." Carrier relies on the same medical records to prove that Claimant's answer

was fraudulent and dishonest.

First, we observe that it is absolutely impossible to assess this exchange between Claimant and the claims agent in the absence of the prior page of the transcript. Without the prior page of the transcript, we have no way of knowing what the claims agent was referring to when he said, "I understand that."

Second, at the hearing, Claimant testified that he had not previously seen the medical records that Carrier introduced. Claimant further testified that the doctor had told him that he had a pulled muscle and prescribed muscle relaxants. Claimant did not regard a pulled muscle as a prior back problem. There is absolutely no evidence to contradict Claimant's explanation. At most, Carrier proved that Claimant's answer to the claims agent was inaccurate. It certainly did not prove that the answer was fraudulent and dishonest.

Page 13 of the interview transcript reflects that Claimant told the claims agent that he had told one of the welders about twenty minutes after the incident that he had hurt his back and that he wanted to see if it would work itself out. The welder testified that Claimant told him at lunch time and that Claimant told him that Claimant did not want him to say anything about it. Claimant's statement in the interview and the welder's testimony are completely consistent with each other except for a discrepancy in the time of their conversation (twenty minutes after the incident versus lunch time). We cannot say that this minor discrepancy concerning the time of their conversation proves that Claimant's answer to the claims agent was fraudulent and dishonest.

Finally, page 17 of the interview reflects that Claimant told the claims agent that when he went off duty at 3:30, he waited twenty minutes for the Manager Track Maintenance and then went to his doctor because the pain was too intense. After seeing his doctor, he returned to the depot and reported the incident to the MTM. Claimant testified similarly at the investigation. The welder to whom Claimant reported the incident earlier in the day testified that he did not see what Claimant did when they went off duty at 3:30. Rather, he got in his vehicle and went home.

The other welder with whom Claimant was working that day testified that at 3:30 he observed Claimant walking slower than usual and asked Claimant what was wrong. According to the welder, Claimant replied that he had hurt himself earlier in the day when they were carrying a drill together. At the time of the conversation, the welder had gotten out of the truck to walk to his car and Claimant was getting out of the truck. According to the welder, they walked to the end of the truck and each went their separate ways. When asked if he observed Claimant leave the premises, the welder testified, "I didn't see him drive off. But, all terms in effect, I thought we was - - you know, it looked like we was all taking off like we do every day."

Thus, one welder did not see what Claimant did at all when they got off work and the other welder did not see what Claimant did after they had a brief conversation and went their separate ways. At most, the second welder assumed that Claimant went home because that was in keeping with their usual actions after going off duty. There simply is no evidence

contradicting Claimant's statement to the claims agent and his testimony at the hearing that Claimant waited about twenty minutes for the MTM, then went to his doctor because the pain was too intense and returned after seeing his doctor to report the incident to the MTM. Carrier failed to prove that Claimant's answer to the claims agent was inaccurate, much less fraudulent or dishonest.

The only other evidence of dishonesty that Carrier cites consists of the medical records which reflect that in late November 1998, Claimant's doctor restricted him to light duty and the MTM's testimony that Claimant never advised him of the light duty restriction. However, Carrier did not charge Claimant with failing to advise it of his light duty restriction in November 1998. Carrier charged Claimant with fraudulent and dishonest statements in connection with the incident of February 2, 1999. We fail to see the relevance of evidence concerning a light duty restriction several months prior to the incident that was the subject of the charges.

After a thorough review of the record, we are forced to conclude that Carrier failed to prove the charge by substantial evidence. Claimant's dismissal cannot stand. However, at the hearing, Claimant testified that he still was not able to return to work. When asked about his doctor's prognosis, Claimant responded, "[F]rom his opinion of the surgery, yeah. He thinks here - - I don't know when. But, yeah. He thinks that I may be able to return to work. Yes."


Consequently, although we will award that Claimant be reinstated with seniority and benefits unimpaired, reinstatement will be conditioned on Claimant's providing Carrier with a written medical release to return to work and on Claimant's passing a return to work physical exam. Furthermore, Claimant's entitlement to compensation for time held out of service is conditioned on Claimant's furnishing medical documentation of the date, if any, on which he could have returned to work but for his dismissal. Back pay, if any, will run from the date certified by Claimant's doctor that he could have returned to service until he is returned to service. Of course, if Claimant is unable to return to service because his doctor does not release him or because he fails a reasonable return to work physical, Claimant will not be entitled to any back pay.


AWARD


Claim sustained in accordance with the Findings.

ORDER

The Board, having determined that an award favorable to Claimant be made, hereby orders the Carrier to make the award effective within thirty (30) days following the date two members of the Board affix their signatures hereto


Martin H. Malin, Chairman


C. M. Will,
Carrier Member


D. D. Bartholomay,
Employee Member

Dated at Chicago, Illinois, May 13, 2002.