NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6402

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES)
) Case No. 127
and)
) Award No. 109
UNION PACIFIC RAILROAD COMPANY)
)

Martin H. Malin, Chairman & Neutral Member
T. W. Kreke, Employee Member
B. W. Hanquist, Carrier Member

Hearing Date: April 22, 2008

STATEMENT OF CLAIM:

1. The dismissal of Machine Operator L. D. Brooks for alleged violation of Rule 1.6(4) (Conduct - Dishonest) in connection with the allegation that he allegedly falsified an injury on September 7, 2007 is unjust, unwarranted based on unproven charges and in violation of the Agreement (System File MW-07-143/1488510 MPR).

2. As a consequence of the violation outlined in Part (1) above, on behalf of Mr. Brooks, the Organization requests the dismissal be removed and disregarded from Mr. L. D. Brooks personal files, with all (straight time and over time) pay for time lost beginning on September 13, 2007 and on a continuing basis, with round trip mileage from his home and back for both investigations he appeared, reinstated back to work as of now, all benefits due him and all seniority intact and unimpaired.

FINDINGS:

Public Law Board No. 6402 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 13, 2007, Claimant was notified to report for a formal investigation on October 2, 2007, concerning his alleged dishonesty when, on September 7, 2007, he claimed to have suffered a personal injury. Following two postponements, the hearing was held on October

23, 2007. On November 2, 2007, Claimant was advised that he had been found guilty of the charge and had been dismissed from service.

The Organization contends that Carrier violated Rule 21 of the Agreement by postponing the hearing over the Vice Chairman's objection and by holding the hearing outside the Rule 21 time limits. Rule 21(a)(1) provides that "Carrier will make every effort to schedule and hold a formal investigation under this rule within thirty (30) calendar days from date of the occurrence to be investigated except as herein provided or from the date the Carrier has knowledge of the occurrence to be investigated." Rule 21(i) provides that if an employee is suspended pending investigation, "the Carrier will make every effort to schedule and hold a formal investigation within twenty (20) calendar days of the date the employee is suspended, and render a transcript and decision within twenty (20) calendar days following the date the hearing is concluded."

As we observed in Case No. 39, Award No. 26, with respect to identical language in Rule 21(a)(2), the Agreement does not mandate that the hearing be held within the specified time frame. It requires that Carrier "make every effort" to schedule the hearing within the specified time frame. As in Award No. 26, there is no evidence that Carrier failed to make the required effort. Indeed, Carrier initially scheduled the hearing for October 2, 2007, within thirty days of the September 7, 2007, date of the incident under investigation and within twenty days of the September 13, 2007, date of Claimant's suspension. The hearing was postponed only because of the unavailability of witnesses. At the hearing, none of the witnesses who Carrier claimed were unavailable testified to being available within the Agreement's time frame. There is simply no evidence that had Carrier made a further effort, it could have held the hearing within the Agreement's time frame. Furthermore, as in Award No. 26, there is no evidence that the postponement prejudiced Claimant's ability to present a defense.

Rule 21(b) provides, "Formal investigation may be postponed or time limits referred to herein extended by mutual agreement between the Carrier and the employee or his representative." In the instant case, Claimant's Representative objected to the postponements. Accordingly, Carrier may not rely on Rule 21(b) to satisfy the Agreement's requirements for a timely hearing. However, as indicated above, Carrier has satisfied the Agreement's requirements that it "make every effort" to schedule the hearing within thirty days of the date of the incident and within twenty days of the date Claimant was withheld from service. We conclude that there is no procedural basis for disturbing the discipline.

The record reflects that on the morning of September 7, 2007, Claimant was a passenger in the far rear seat of a Carrier van driven by the Switch Gang Foreman. The van was waiting to make a left turn into a store parking lot when another vehicle came out of the parking lot and tried to go around the van but struck it in what witnesses described as a minor accident. The other vehicle scraped the rear of the van.

Claimant claimed to have been injured in the accident and completed a personal injury report. At issue is whether Carrier proved by substantial evidence that Claimant falsified the report. When Claimant stated he was injured, he was taken to the hospital. The evidence in the

record is conflicting. On the one hand, the hospital report shows a diagnosis of "sprain thoracic region, spasm of muscle." On the other hand, the Foreman testified that immediately after the accident he asked if anyone in the van was hurt and Claimant indicated that he was not hurt. About ten minutes later, the Manager of Operating Practices arrived on the scene and Claimant again indicated that he was not hurt. About an hour later, after the drivers completed exchanging insurance information, Claimant told the MOP that he wanted to complete an injury report. When asked again if he was hurt, Claimant replied that his union representative had told him to complete an injury report and to get checked out. A Trackman testified that he observed Claimant call his union representative and that Claimant was periodically laughing about the situation and did not appear to be hurt or taking the accident seriously except while on the phone.

An expert in accident reconstruction retained by Carrier testified that the impact generated insufficient force to transfer any energy to the occupants of the van. In the expert's opinion, it was not possible for any of the van's occupants to have been injured as a result of the collision.

As an appellate body, we do not find facts de novo. Our review is limited to a determination of whether the factual findings made on the property are supported by substantial evidence, that is whether a reasonable person could have come to the same factual conclusions. In the instant case, the diagnosis at the hospital supports a finding that Claimant was not dishonest when he claimed to have been injured in the accident. However, Claimant's statements to the Foreman and the MOP, the testimony of the Trackman and the expert testimony concerning reconstruction of the accident all support the finding made on the property that Claimant was not injured and that he falsified his personal injury report. We cannot say that Carrier was unreasonable in concluding that the evidence supporting a finding of guilt outweighed the contrary evidence. We conclude that Carrier proved the charge by substantial evidence.

Dishonesty is a dismissible offense. We cannot say that the penalty imposed was arbitrary, capricious or excessive.

AWARD

Claim denied.

Martin H. Malin, Chairman

B. W. Hanquist
Carrier Member Sept 17, 2008

T. W. Kreke
Employee Member Sept. 17, 2008

Dated at Chicago, Illinois, September 8, 2008