NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6402

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	)
	) Case No. 134
and	)
	) Award No. 111
UNION PACIFIC RAILROAD COMPANY	)
	)

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

Hearing Date: December 17, 2008

STATEMENT OF CLAIM:

1. The dismissal of Trackman J. C. Hinojosa for violation of GCOR Rule 1.6(4) (Conduct - Dishonest) in connection with alleged falsification of an injury report is unjust, unwarranted and in violation of the Agreement (System File MW-07-172/1493592 MPR).

2. As a consequence of the violation outlined in Part (1) above, we are now requesting that the charges be dropped and that Mr. Hinojosa have his personal record cleared of all charges as addressed in the first paragraph of this letter. Also that he be reinstated with all back pay, seniority unimpaired and all other rights due to him by the collective bargaining agreement. This is in addition to any and all compensation that the Claimant may have already received.

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 November 14, 2007, Claimant was notified to report for a formal investigation on November 20, 2007, concerning charges that "while employed as a Trackman on Gang No. 9103, at or near Osawatomie, Kansas, at approximately 12:30 p.m. , on November 4, 2007, you were allegedly dishonest when you falsified an injury report you submitted to Supervisor J. D. Lanies, on November 4, 2007, claiming you were injured on October 17, 2007, in Villa Grove, Illinois.

The hearing was held as scheduled. On December 6, 2007, Claimant was advised that he had been found guilty of the charge and had been dismissed from service.

The Organization has raised two procedural arguments. First, it contends that the Notice was defective because it alleged that Claimant falsified an injury report on November 4, 2007, whereas the undisputed evidence is that Claimant completed the report on November 3. The discrepancy was explained at the hearing. The morning of November 3, 2007, Claimant required medical attention for his back. Because his supervisor, W. D. Martin, was unavailable, Claimant notified his foreman. The foreman contacted Supervisor Martin who advised Claimant and the foreman to contact Supervisor Lanies who was about 90 miles away from Claimant, closer than Supervisor Martin. Laines took Claimant for medical attention and subsequently completed the injury report with Claimant. However, Laines did not enter the report into Carrier's computer system until November 4, resulting in the use of the November 4 date in the Notice. We do not find the one day discrepancy in the Notice fatal to Carrier's case. There is no question that Claimant was aware of the basis for the charges and came prepared to defend against them. The discrepancy in the dates was not intentional and did not prejudice Claimant's defense in any way. It provides no basis for disturbing the discipline.

Second, the Organization contends that Carrier did not properly deny the claim at the first level appeal. The Organization quotes the Manager Labor Relations' decision as stating, "Based on the evidence, I have found that the Carrier has met its burden and has produced substantial evidence to demonstrate that Claimant did fail to report a personal injury in a timely manner." The Organization urges that Claimant was never charged with failing to report a personal injury in a timely manner. Therefore, in the Organization's view, the denial of the claim failed to provide appropriate reasons or relied on matters outside the scope of the original charge. In either case, the denial was defective and requires that the claim be sustained.

We are unable to agree with the Organization's position. The Organization has quoted a single sentence from the first level appeal denial completely out of context. In the paragraph preceding that sentence, the Manager Labor Relations wrote, "The bottom line is that we have an individual who reports that he incurred an injury on approximately October 17, 2007 yet never indicated to the appropriate Carrier management that he allegedly incurred the personal injury. . . . It is readily apparent throughout the investigation testimony that Claimant Hinojosa did not incur an on-duty injury and is attempting to falsify an alleged incident. If Claimant had incurred a personal injury, he would have reported it to Carrier management immediately, not seventeen (17) days after the alleged injury occurrence." Thus, it is clear that the Manager Labor Relations cited the proof of late reporting not as a violation in and of itself, but as the basis for inferring Claimant's falsification of his injury claim, which was the exact charge on which Claimant's dismissal was based.

The critical issue is whether Carrier proved the charge by substantial evidence. Carrier's case that Claimant falsified his claim of on-duty injury is based on inferences drawn from Claimant's failure to report the injury for more than two weeks after it allegedly occurred and on Claimant's report of an injury occurring at a location where Claimant was not working on the

date that he alleged it occurred. Both bases for the inferences were hotly contested at the hearing.

With respect to the late reporting, Claimant testified that he reported the injury the day it happened to the Assistant Foreman. Claimant explained that Supervisor Martin was not available and the Foreman was on vacation, so he reported to the highest ranking individual who was present. Supervisor Martin testified he asked the Assistant Foreman if Claimant had reported the injury and the Assistant Foreman had no recollection of such a report. The Assistant Foreman was not called as a witness. Thus, an inference from alleged late reporting depends on the comparative credibility of Claimant's direct testimony that he reported the injury to the Assistant Foreman against Supervisor Martin's hearsay testimony as to what the Assistant Foreman told him.

Claimant's injury report claimed that he was injured flipping plates on October 17, 2007, at Villa Grove, Illinois on the Pana Subdivision. In fact, Claimant's gang worked on the Pana Subdivision in September but as of October 1, they were working on the Lost Springs Subdivision in Kansas. It is this discrepancy, noticed by Supervisor Martin, that led to the charge against Claimant and his removal from service pending investigation.

At the investigation, Claimant testified that the injury occurred on October 16, 2007, at Peabody, Kansas. He explained the discrepancy on the injury report as an honest mistake. He testified that on November 3, when he completed the report with Supervisor Lanies, he was under a good deal of stress from the increased back pain he was experiencing and from ethnic harassment that he had reported the previous day on Carrier's EEO Hotline. Claimant explained that his gang had moved around a good deal and, in trying to recall where he was when the injury occurred, he noticed Lanies' cap which said Villa Grove, Illinois, remembered working at Villa Grove on the Pana Subdivision and concluded that that was the location where he had been in October. He further explained that he remembered the date incorrectly because he mistakenly remembered the date that his gang returned for the second compressed half of the month.[1]

Claimant testified that he first realized his errors on November 14, when a Claims Agent telephoned him. Claimant further testified that he did not at that time contact Supervisor Martin to correct his injury report because the Claims Agent told him the matter would be transferred to a claims agent who handled claims from the Peabody, Kansas area and that the new claims agent would contact Claimant. In light of Claimant's testimony, the Hearing Officer quite appropriately attempted to contact the Claims Agent to take his testimony by telephone. The Hearing Officer reported that the Claims Agent was unable to testify by phone but admitted a written statement from the Claims Agent dated November 15. 2007. The written statement reported that in their November 14 telephone conversation, Claimant told the Claims Agent that his injury report was a big mistake and that the injury had actually occurred on November 3 in Peabody, Kansas. The written statement further averred that the Claims Agent advised Claimant

[1]We note that Lanies testified before Claimant did and that neither party sought to recall him to ask if he owned a hat that said Villa Grove, Illinois on it and, if so, if he was wearing it on November 3.

to contact his Supervisor right away to correct the injury report.

Claimant's representative objected to the admission of the written statement into evidence and insisted that the Claims Agent testify so that he could be cross-examined. The Hearing Officer overruled the objection and admitted the written statement. The Hearing Officer gave no rationale for his ruling and we are unable to discern any justification for the ruling. If the Claims Agent was not available to testify by telephone at that moment, we see no reason why the Hearing Officer could not have recessed the hearing and reconvened it at a time that the Claims Agent was available. Instead, determination of what occurred during Claimant's telephone conversation with the Claims Agent, a matter that was extremely significant in determining whether Claimant was honestly mistaken when he reported that the alleged injury occurred on October 17 at Villa Grove, Illinois, was left to evaluating the credibility of Claimant's live testimony against the hearsay written statement of the Claims Agent.

Thus, both factual bases for the inference of Claimant's dishonest intent – his late reporting and his errors in reporting – required a finding that Claimant's live testimony was less credible than the contrary hearsay evidence – Martin's testimony as to what the Assistant Foreman told him and the written statement from the Claims Agent. It is conceivable that a finder of fact who observed the witnesses testify might conclude that Claimant's testimony was so lacking in credibility that the contrary hearsay evidence was entitled to greater weight. However, that is not what occurred in the instant case. The Hearing Officer who observed the witnesses testify made no such finding. Rather, it was the Director Track Programs, who was not present at the investigation and consequently did not observe the witnesses testify, who found Claimant guilty and imposed discipline. We are unable to see how the DTP, without observing the witnesses testify, could conclude that the hearsay evidence was entitled to greater weight than Claimant's live testimony. Accordingly, we are compelled to conclude that Carrier failed to prove Claimant's dishonest intent by substantial evidence.

Although Carrier failed to prove Claimant's dishonesty, there is no dispute that the injury report Claimant filed was significantly inaccurate. It is also apparent that the inaccuracies resulted from Claimant's negligence in completing the report. Such negligence warrants significant discipline, although it does not warrant dismissal. Accordingly, we award that Carrier shall reinstate Claimant to service with seniority unimpaired but without compensation for time out of service.

AWARD

Claim sustained in accordance with the Findings.

ORDER

The Board having determined that an award favorable to Claimant be issued, Carrier is ordered to implement the award within thirty days from the date two members affix their signatures hereto

Martin H. Malin, Chairman

B. W. Hanquist
Carrier Member 2-18-09

T. W. Kreke
Employee Member 2-15-09

Dated at Chicago, Illinois, January 31, 2009