

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6402
AWARD NO. 192, (Case No. 214)**

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

vs

**UNION PACIFIC RAILROAD COMPANY (Former Missouri Pacific
Railroad Company)**

William R. Miller, Chairman & Neutral Member
K. D. Evanski, Employee Member
P. Jeyaram, Carrier Member

Hearing Date: December 20, 2012

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

- 1. The discipline (dismissal) imposed on Claimant P. Torres by letter dated October 6, 2011 for alleged violation of Rule 1.6 of the General Code of Operating Rules in connection with allegations that he falsified a personal injury on January 14, 2011 and/or was allegedly dishonest in the details of his physical condition and limitations in connection therewith was without just and sufficient cause, unwarranted and in violation of the Agreement (System File UP273WF11/1557974).**
- 2. As a consequence of the Carrier's violation referred to in Part 1 above, the Carrier must remove the discipline from Mr. Torres' record and compensate him for all losses, including straight time and overtime wages, benefits, seniority rights and any other losses suffered as a result of the Carrier's unjust and improper discipline."**

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 September 15, 2011, Claimant was directed to attend a formal Investigation on September 27, 2011, concerning in pertinent part the following charge:

"...to develop the facts and determine your responsibility, if any, in connection with the charge that you allegedly falsified a personal injury on January 14, 2011,

and/or were dishonest in the details of your physical condition and limitations from the same. First knowledge of the dishonesty was obtained on September 12, 2011.

These actions, if proven, are considered a violation of Rule 1.6 - Conduct, as contained in the General Code of Operating Rules, effective April 7, 2010. Proposed discipline for this offense is a Level 5...."

On October 6, 2011, Claimant was notified that he had been found guilty as charged and was assessed a Level 5 discipline and dismissed from service.

It is the Organization's position the Carrier violated Rule 22(e) of the Agreement that requires in pertinent part: "...all statements, reports and information made a matter of record at the hearing will be provided the charged employee, his representative at the investigation and his General Chairman on the same date the decision is sent to the charged employee." and in this instance (Transcript Exhibit 9) a video that was presented during the Hearing was never forwarded to either the Claimant or the Organization. The Organization argued that during the Hearing it raised multiple objections regarding the video and specifically asked that it would be provided for further review and use of any appeals. According to it, failure to provide that video denied the Claimant his right to a fair appellate review and on that basis alone it asserted the claim should be sustained without a review of the merits. Turning to the merits it argued that the record shows that the Claimant was on medical leave of absence (MLOA) from his Track Foreman position due to an on duty injury sustained on January 14, 2011. During his time on MLOA, Claimant was informed by his doctor that he was not able to return to service due to his injuries. Claimant testified his doctor initially told him that the extent of the injuries meant that he was unable to do anything and was not released to return to work and he promptly provided the Carrier's medical office with the relevant documentation of his condition. It argued the Claimant never broke his trust and the Carrier did not prove otherwise and he did not lie about his medical condition, therefore, it concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the position of the Carrier that there were no procedural errors that violated the Claimant's right to a "fair and impartial" Investigation and appeal process. It pointed out that contrary to the Organization's contention that it was not provided the video shown at the Hearing the record documents that it was given the video when the matter was discussed in conference. It further argued that the transcript indicates that the Claimant told Manager Fisher on September 12, 2011, that he could not do any physical labor and/or strenuous activity and he could not hold anything in his left hand for an extended period of time. It also asserted that the Claimant told Mr. Fisher that his legs frequently gave out and that he could not drive in traffic because he was unable to turn his head to the right and on September 15th the Claims Department provided Manager Fisher with a document that listed Claimant's restriction, including lifting and carrying

not more than five pounds and restrictions regarding bending, kneeling, walking and standing. That document further restricted Claimant from operating moving equipment and lifting anything above his head. The Carrier argued that the Claimant's statements and evidence were false because an August 24th video showed the Claimant doing many physical things. For one, the video showed Claimant operating his personal truck. It showed Claimant making stops at a convenience store, a medical appointment, Sam's Club, and a storage facility. At the storage facility, the video showed Claimant performing heavy physical labor such as loading a large dresser and washing machine into the back of his truck. Claimant also moved several chairs and other items, including an ice chest he lifted above his head and when the Claimant was questioned about the video, he admitted to performing all of the actions seen in the video. It determined that the Claimant was dishonest by misrepresenting his physical condition and limitations and it closed by asking that the discipline not be disturbed and the claim remain denied because it was in accordance with the Carrier's disciplinary policy.

The Board will next address the Organization's procedural arguments. It first argued that when the Carrier sent it a copy of the transcript it should have attached the video and because it did not, that hindered the Organization in making a proper appeal as it did not have it available for review. The Carrier responded by stating that it had not historically supplied video materials along with Investigation transcripts, but instead had always made them available for viewing. Rule 22(e) states in pertinent part:

"...A transcript of the investigation, which will include all statements, reports and information made a matter of record at the hearing, will be provided the charged employee, his representative at the investigation, and his General Chairman on the same date the decision is sent to the charged employee...."

The Board does not disagree with the Organization's interpretation of the aforementioned Rule, however, there was no rebuttal to the Carrier's statement that it never supplied videos with transcripts, therefore, the Board has determined that both parties are correct in their respective positions in this case. The Board notes that past practice does not set aside Agreement language, but in this instance because the un-refuted facts indicate that videos have not been supplied with transcripts the language of Rule 22(e) will not be held against the Carrier on a non-precedential basis. The Board further states the Rule does not lack impact, but because of the unique facts of this case it will not be resolved on a technical basis and instead the Carrier is forewarned that its past practice does not set aside Rule 22(e) and in the future it needs to adhere to the Rule, otherwise it might be faced with a decision based solely on its failure to supply a video.

The Organization also raised other procedural arguments wherein it asserted that the Claimant was denied a "fair and impartial" Investigation. The Board has reviewed those arguments and has determined that the Claimant was not denied a "fair and impartial"

Investigation and he was afforded all of his "due process" Agreement rights during the handling of the claim.

Turning to the merits the Claimant was questioned on page 95 of the transcript as follows:

"Q: Okay. Are you aware that the doctor had given you restrictions?"

A: In this document, all he ever told me was you can't do anything. I mean, both doctors.

Q: Okay. The doctor said you can't do anything?"

A: Yeah. In other words, that's no work status." (Underlining Board's emphasis)

During the Investigation the Carrier showed a video of the Claimant doing manual labor on August 24, 2011, wherein it showed the Claimant operating his personal truck going to four different locations including a storage facility. At the storage facility the Claimant was also shown loading a large dresser and washing machine into the back of his truck with another man that was traveling with him. Additionally, he was shown moving several chairs and other items, including an ice chest he lifted above his head. On pages 198 - 199 of the transcript the Claimant acknowledged that he performed all of the aforementioned activities despite the fact that he knew he was not suppose to do physical work.

There are essentially two part to the charges the first being that the Claimant falsified a personal injury on January 14, 2011, and the second that he was dishonest in the details of his physical condition and limitations. The Board is not persuaded that the Claimant falsified a personal injury on January 14th because the Medical Progress Report of February 16th signed by Dr. Dennis Gutzman states "**No Work Status**" and again on the date of the video surveillance, August 24th Dr. Gutzman issued another Medical Progress Report wherein he wrote: "**No Work Status**" and Claimant "**continues w/neck and arm pain w/numbness, back pain**" and under Physician's Comments he wrote: "**surgical intervention is indicated**". On September 14th the Doctor issued another Medical Progress Report and under Section 5 of that document he showed that the Claimant could do some minor lifting, but again under Section 7 he wrote: "**No Work Status**". The Board has no medical expertise and does not question the authority of Dr. Gutzman, a licensed Orthopedic Surgeon, therefore, it is determined the Carrier did not meet its burden of proof that the Claimant falsified a personal injury on January 14, 2011, as the Carrier's charge of alleged falsification is premised on the fact that he did various physical tasks on August 24, 2011, rather than substantial proof that the event did not occur.

Regarding the second part of the charge and whether or not the Claimant was dishonest in his physical limitations the Board finds that the Claimant put a different spin on what the first two Medical Progress Reports meant when he questioned Director Track Maintenance, J. E. Moeller, on pages 156 - 194 of the transcript regarding his "**No Work Status**". On page 194 in a question to Mr. Moeller he stated in pertinent part:

"Q: The documents don't reflect that sir. The documents reflect no work status because of medication...." (Underlining Board's emphasis)

Under the Claimant's theory the Medical Progress Reports of February 16 and August 24 placed him in a "**No Work Status**" because of the various medicines he had been prescribed, thus according to the Claimant when he was filmed doing various physical tasks he was not in violation of being less than candid about his limitations because neither report had any physical restrictions placed upon him.

Examination of the three Medical Progress Reports shows the same medication was being prescribed on the three different dates and none of the Reports state he was not able to work because of medication instead they state he was listed as a "**No Work Status**" for the following reasons:

February 16th Report - "**patient still getting treatment and due to his symptoms**"

August 24th Report -- "**continues w/neck and arm pain w/numbness, back pain**"

September 14th Report -- "**continues w/neck pain, arm pain w/numbness and back and leg pain**"

Claimant's theory is not persuasive and is contrary to what his Doctor stated and leads to the inescapable conclusion that Claimant was less than forthright about his physical limitations as the "**No Work Status**" means exactly **NO WORK**. That determination is further enhanced by the testimony of Manager of Track Projects, A. C. Fisher, who stated that he had been in continuous contact with Claimant concerning his condition from January 14 - September 12, 2011. On page 24 of the transcript, Mr. Fisher testified as to what the Claimant told him on September 12th in pertinent part as follows:

"...Mr. Torres told me again, he said 'I just can't do anything or pick anything up.' He said he wished he could because he was making good money before he got hurt but he just couldn't do anything and has not been able to do anything since he got hurt in January...."

Manager Fisher's testimony was not effectively rebutted. After review of the entire record it is determined that there was substantial evidence adduced at the Investigation that the Claimant did not accurately advise the Carrier of his physical abilities and/or limitations, but the Carrier did not prove the Claimant falsified an on-duty injury on January 14, 2011.

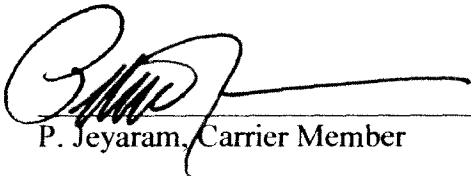
The only issue remaining is whether the discipline was appropriate. At the time of the incident Claimant had almost 40 years of service with no prior history of disciplinary action. Claimant's offense was serious, but based upon his long years of good service, the Board finds and holds that the discipline is reduced to a six month suspension without pay beginning on the day he was dismissed from service. Claimant is to be reinstated to service with seniority intact, all benefits unimpaired and made whole for all time held out of service beyond the six month suspension period (October 6, 2011 thru April 6, 2012) provided he can show that he was physically fit for service. Back-pay owed by the Carrier can be reduced if it is shown that the Claimant was not medically fit for service beyond the six month suspension imposed by the Board. For example if the Claimant was not physically able to perform service until January 1, 2013, the Carrier would only owe back pay from that date until his reinstatement.

AWARD

Claim partially sustained in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed.



William R. Miller, Chairman



P. Jeyaram, Carrier Member



K. D. Evanski, Employee Member

Award Date: 4/18/13