NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6402

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES)
) Case No. 65
and)
) Award No. 47
UNION PACIFIC RAILROAD COMPANY)

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

Hearing Date: May 23, 2005

STATEMENT OF CLAIM:

1. The dismissal of B & B Carpenter C. Hernandez for his allegedly providing false information on an accident/injury report in connection with a personal injury he sustained on July 13, 2004 was without just and sufficient cause, based on unproven charges and in violation of the Agreement (System File MW-05-12/1413927).

2. As a consequence of the violation referred to in Part (1) above, B & B Carpenter C. Hernandez shall now be returned to service with seniority and all other rights unimpaired and compensated for all wage loss suffered.

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 August 5, 2004, Carrier notified Claimant to appear for an investigation on August 24, 2004. The notice alleged that Claimant falsified information on his accident/injury report concerning an alleged personal injury sustained on July 13, 2004. The hearing was postponed to and held on September 28, 2004. On October 15, 2004, Claimant was notified that he had been found guilty of the charge and dismissed from service.

The hearing was lengthy and thorough. It resulted in a transcript running in excess of 425 pages plus almost 200 pages of hearing exhibits. The hearing included testimony by and a detailed report from a consulting engineer in biomechanics who analyzed reports of the incident

and offered analysis and conclusions with respect thereto.

On July 13, 2004, Claimant was seated in the front passenger seat of a truck driven by Assistant Foreman Jesse Maesse. Carpenter J. J. Calderon and Carpenter Helper Gilbert Rodriguez were passengers in the rear seat. The truck was proceeding along a sandy, dusty right-of-way from one job location to another. All four employees were wearing their seat belts. The truck went off the road into an arroyo where it became stuck. Foreman Rene Mendoza arrived on the scene a few minutes later.

The remaining facts and the inferences to draw from those facts were hotly disputed. Claimant testified that the truck was moving at about 30 to 40 miles per hour, that Maesse did not apply the brakes and that the truck dove into the arroyo with the front toolbox striking first. Claimant further testified that he was injured when his head, wearing his hard hat, hit the frame of the windshield and his hand hit the frame of the door. Claimant maintained that he told Maesse that he was hurt and that when Mendoza arrived on the scene, Claimant told Mendoza that he needed medical attention but Mendoza refused the request.

Claimant testified that when Mendoza arrived on the scene, Mendoza yelled at Maesse. According to Claimant, Mendoza yelled, "What were you thinking? Were you trying to win the UP Lotto or get someone killed?"

Maesse testified that he was driving around 20 miles per hour and that when he noticed the drop off he braked and steered to the right to avoid getting stuck. According to Maesse, the truck's rear wheels became bogged down in the sand as the truck slid into the arroyo. Maesse disputed Claimant's version that the truck dove into the arroyo and denied that the front toolbox hit the ground. He likened the impact to going over a speed bump. Maesse testified that when the truck stopped, he asked all of the passengers whether they were hurt and all, including Claimant, replied that they were okay.

Maesse testified that when Mendoza arrived, Mendoza did not make any statements to the effect of, "Were you trying to win the UP Lotto?" Maesse testified that Claimant told Mendoza that he was banged up and that Mendoza asked Claimant if Claimant wanted medical attention, to which Claimant replied that he wanted to wait to see what would happen. Massse testified that Claimant also stated words to the effect of, "I hit the U.P. Lotto." Maesse denied that Claimant requested medical attention and that Mendoza refused any such request. Mendoza testified similarly to Maesse.

Calderon estimated that the truck was traveling at 15 - 20 miles per hour. He testified that the truck slid into the arroyo. He likened the impact to going over a speed bump. He testified that Maesse asked if everyone was okay and that no one reported any injury.

Rodriguez was unable to appear at the hearing. At the request of the Organization, his written statements were entered into the record. He stated that the truck was traveling at 20 miles per hour, that it slid into the arroyo and that he heard Claimant state that his neck was hurting.

The biomechanics expert testified that he assumed the vehicle was traveling at 20 - 25 miles per hour and estimated the stopping distance at 20 feet. He calculated the average acceleration experienced by the vehicle and transferred to the occupants to be slightly more than 1 G. He explained that 1 G is the acceleration due to gravity. He compared the acceleration experienced by the truck to the acceleration experienced during normal braking, which was .8 G. He concluded that it was impossible for anyone to have been injured in the incident. He further concluded, based on the calculations and on the assumption that Claimant was wearing his seat belt, that it was highly unlikely that Claimant would have hit the windshield or the ceiling.

Claimant went to the hospital shortly after arriving home after the end of his shift. During handling on the property, the Organization submitted a report from Oregon Imaging of an MRI of Claimant's cervical spine, The report, dated 8/26/04, found a small central disc herniation protrusion at C3-4 and C4-5, and a left central disc protrusion at C5-6.

The crucial question is whether Carrier proved by substantial evidence that Claimant falsified his claim to have been injured in the July 13, 2004, incident where the truck left the right-of-way and went into the arroyo. The evidence points in conflicting directions. A reasonable finder of fact could credit Claimant's version that the truck was traveling at 35 - 40 miles per hour and dove into the arroyo. Crediting this version would minimize the probative value of the biomechanics expert's report because he based his analysis on the assumption that the truck was traveling at 20 miles per hour and slid into the arroyo. A reasonable factfinder might also credit Claimant's denial of the UP Lotto remark or might dismiss the remark as "gallows humor." Such a factfinder might observe that all witnesses agreed that Claimant told Mendoza that he was hurt, although they disagreed over the severity of injury that Claimant reported and over whether Claimant requested medical attention. A reasonable factfinder would also rely on the fact that Claimant went to the hospital a few hours after the incident and that medical documentation established that Claimant suffered herniated discs. A reasonable factfinder might conclude from this evidence that Claimant did not falsify the injury claim.

A reasonable factfinder might also credit the testimony of Measse and Calderon and the written statement of Rodriguez that the truck was travling at approximately 20 miles per hour, slid into the arroyo and had an impact comparable to going over a speed bump. Crediting such testimony would enhance the probative value of the biomechanical expert's report that it was impossible for someone riding in the truck to have been injured. Such a factfinder would also credit the testimony of Maesse and Mendoza that Claimant stated he had won the UP Lotto and would observe that remark accounted for Claimant's telling Mendoza that he had been roughed up only shortly after telling Maesse that he wasn't hurt at all. A reasonable finder of fact could also discount the probative value of the medical report issued more than a month after the incident because it did not establish that the incident with the truck caused Claimant's herniated disc condition.

This case presents the precise type of situation where, as an appellate body, we should defer to the factual findings made on the property. A crucial factual issue is whether to credit Claimant's testimony or that of Maesse and Calderon with respect to the speed of the truck and

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the nature of the impact with the arroyo. As an appellate body that did not observe the witnesses testify, we are in a poor position to evaluate relative credibility. As a general matter, we defer to credibility determinations made on the property and we see no reason in this case to depart from that general approach.

Accordingly, we defer to the decision made on the property to credit the account that the truck was traveling at approximately 20 miles per hour and slid, rather than dove, into the arroyo. That finding supports the analysis performed by the biomechanical expert that it was impossible for Claimant to have been injured because the force Claimant experienced was only slightly greater than the force experienced during normal braking. The Organization argues that the expert's analysis should not be given any weight because the expert was not a medical doctor. However, the analysis did not concern anything medical. It concerned calculation of the forces likely at work in the incident and their probable impact on the body, matters clearly within the witness's expertise.

The testimony that the truck was moving at only 20 miles per hour, that it slid into the arroyo and that the impact was comparable to going over a speed bump, along with the analysis of the biomechanical expert support a reasonable inference that Claimant falsified his injury claim. The inference is strengthened by the testimony that Claimant declared that he had won the UP Lotto. We conclude that a reasonable trier of fact could find that Claimant falsified his injury claim and hold that Carrier proved the charge by substantial evidnce.

Claimant had 26 years of service. However, falsification of an injury claim is an extremely serious offense that generally warrants dismissal. The Board may only disturb the penalty if it is arbitrary, capricious or excessive. Given the very serious nature of the offense, we are unable to find that the penalty was arbitrary, capricious or excessive. Accordingly, we lack authority to disturb it in any way.

AWARD

Claim denied.

Martin H. Malin, Chairman

D. A. Ring,
Carrier Member
8-8-05

D. D. Bartholomay,
Employee Member 8-8-05

Dated at Chicago, Illinois, July 29, 2005