NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6402

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	)
	) Case No. 87
and	)
	) Award No. 70
UNION PACIFIC RAILROAD COMPANY	)
	)

Martin H. Malin, Chairman & Neutral Member
D. D. Bartholomay, Employee Member
B. W. Hanquist, Carrier Member

Hearing Date: March 20, 2007

STATEMENT OF CLAIM:

1. The Carrier violated the Agreement when it found the Claimant guilty of violating Rules 1.6 and 1.2.5 when it did not afford the Claimant a fair and impartial hearing and did not present substantial evidence proving the Claimant was dishonest about his alleged on-duty injury.

2. As a consequence of the violations referred to in Part (1) above, the Organization requests that the Claimant be reinstated and compensated at his straight time rate of pay for all hours missed beginning with the release from his personal physician and all expenses to be paid for attending the formal investigation on January 4, 2006.

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 December 19, 2005, Claimant was notified to report for a formal investigation on January 4, 2006, concerning his alleged dishonesty and late reporting of an alleged on-duty injury. The hearing was held as scheduled. On January 20, 2006, Claimant was advised that he

had been found guilty of the charge and had been dismissed from service.

The Organization has raised several procedural objections. We have considered them carefully. They do not require individual discussion. It is sufficient to note that they lack merit and do not provide any basis for upsetting the discipline.

The record reflects that on December 6, 2005, Claimant reported that he suffered an on-duty injury on September 10 or 11, 2005. Rule 1.2.5 provides, in relevant part:

> All cases of personal injury, while on duty or on company property, must be reported immediately to the proper manager and the prescribed form completed.
>
> . . . . .
>
> If an employee is injured on-duty, he must report to his manager any follow-up visits to any doctor or other medical care provider resulting from the injury . . . .

The record reflects that, on September 16, 2005, Claimant was seen by his primary care physician, given medication for shoulder and knee pain and referred for an MRI on his right knee and both shoulders which was performed on September 27, 2005. The MRI reports diagnose, among other things, tendon tears in both shoulders. Following the MRI, Claimant's primary care doctor referred him to a specialist who he saw on November 4, 2005, the first available appointment. Throughout this period, Claimant continued to perform his duties, although he was taking medication.

Claimant testified that he notified the Track Supervisor and the Manager of Track Programs about his injury and his ongoing medical treatment. However, the supervisor and manager both testified that Claimant advised them on ongoing medical treatment and advised them that he was sore and wanted to be taken off of the quality work that he was doing and be placed back on his machine but did not notify them that this resulted from an on-duty injury. As an appellate body that does not observe the witnesses testify, we are in a comparatively poor position to weigh relative credibility and resolve conflicts in the testimony. Rather, as a general rule, we defer to credibility determinations made on the property. In the instant case, it is apparent that Carrier found the testimony of the Track Supervisor and the Manager Track Programs to be more credible than Claimant's. We defer to that determination and find that Carrier proved the charge of violating Rule 1.2.5 by substantial evidence.

We now turn to the charge of dishonesty in violation of Rule 1.6. Carrier contends that Claimant fabricated the injury report that he completed on December 6. Carrier infers such dishonesty from the three month delay between the alleged injury and the report. A substantial delay in reporting may support an inference of dishonesty because we generally expect that where an injury is genuine, the victim will report it promptly. In the instant case, however, there is no dispute that Claimant was hurt as reflected in his primary physician's prescription for pain medication on September 16, 2005, the results of the MRI performed on September 27, 2005,

and Claimant's ongoing complaints of discomfort to his supervisor and manager. Considering the circumstances presented in the instant case, we are unable to infer dishonest intent from Claimant's late reporting.

Carrier also infers dishonest intent from Claimant's continuing to work throughout the period between the alleged injury and the December 6 report. Here too, under appropriate circumstances, an employee's continuing to perform his duties for such a substantial period of time would appear to be inconsistent with the claimed injury and would support an inference of dishonesty. However, in the instant case, there is no dispute that while working, Claimant was taking pain medication and that Claimant complained to his supervisor and manager about the discomfort he was experiencing and sought to be returned to his machine as a way of alleviating the pain. Consequently, we are unable to infer dishonest intent from Claimant's continuing to perform his duties.

Carrier finally infers dishonest intent from alleged inconsistencies in Claimant's reporting of the date of his injury. Carrier urges that Claimant told the specialist on November 4 that he was injured between September 5 and 9, 2005. The purported report from the specialist, however, was never introduced into the record of the investigation. Even if it had been introduced, we would find it difficult to infer dishonest intent from a discrepancy of a couple of days. Claimant testified at the hearing that he was not sure of the exact date on which the injury occurred. This is understandable given the nature of the injury which appears to have produced chronic pain. We are unable to infer dishonesty from the minor discrepancies in the dates.

Accordingly, considering the record as a whole, we are compelled to conclude that Carrier failed to prove the charge of dishonesty by substantial evidence. We turn to the penalty imposed. The offense that Carrier did prove, late reporting of an on-duty injury, is a very serious one. It is essential that Carrier learn immediately about an on-duty injury so that Carrier can provide necessary medical attention and assess the situation and take any necessary remedial steps to insure that no one else is injured. However, considering Carrier's failure to prove dishonesty and Claimant's length of service which dated from 1971, we find that the penalty of dismissal is excessive. Carrier shall reinstate Claimant to service with seniority unimpaired but without compensation for time held out of service. Claimant's reinstatement is conditioned on his furnishing medical certification that he is physically able to return to service and on his passing any return-to-work physical exam that Carrier may reasonably require.

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
7/2/07

D. D. Bartholomay
Employee Member
7-2-07

Dated at Chicago, Illinois, June 20, 2007