NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6402

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES)
) Case No. 101
and)
) Award No. 77
UNION PACIFIC RAILROAD COMPANY)
)

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

Hearing Date: January 7, 2008

STATEMENT OF CLAIM:

Claim on behalf of Mr. J. Galavan, ID# 0400154, so that charge letter dated August 11, 2006, to be removed from all company records and for the Union Pacific Railroad Company to compensate him for any loss of time, all vacation rights, including his seniority rights unimpaired and for all personal expenses to be reimbursed back to him while driving from his home to Sosan Yard, San Antonio, Texas, and back home, while attending an investigation on account the Union Pacific Railroad Company has disciplined the employee for allegedly being charged for possible violation of Rule 1.6(4) Dishonest, Rule 1.2.5 Reporting and Rule 1.13 reporting and Complying with Instructions, where it was alleged that on June 15, 2006, he was alleging an injury due to a derailment on June 28, 2004. We are requesting that the charges be dropped because the carrier has failed to meet the burden of proof at the investigation held on July 25, 2006, in San Antonio, Texas.

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 June 20, 2006, Claimant was notified to report for a formal investigation on July 12, 2006, concerning his alleged late reporting of an injury and falsification of an injury report on June 15, 2006. The hearing was postponed to and held on July 25, 2006. On August 11, 2006, Claimant was advised that he had been found guilty of the charges and had been dismissed from service.

The record reflects that a derailment occurred on June 28, 2004, resulting in the breach of a car carrying chlorine and the release of a substantial amount of chlorine. Claimant was one of many employees who worked on repairs following the derailment.

By letter dated March 13, 2006, addressed to an employee with Carrier's Claims Department, an attorney advised Carrier that he was representing Claimant "for personal injuries sustained by him on or about June 28, 2004." On June 14, 2006, the Claims Department advised the Director Track Maintenance of the letter. On the same day, the DTM attempted to question Claimant about his alleged injuries but was unable to do so because Claimant was off with a back injury.

The Organization contends that Carrier violated Rule 21(a)(1) by not holding the investigation within thirty days of Carrier's receipt of the March 13, 2006, letter. We do not agree. Rule 21 required that the hearing be held within thirty days of Carrier's first knowledge of the occurrence. First knowledge is the date that the relevant Carrier officer with authority over the Claimant became aware of the occurrence. Although Carrier's Claims Department had knowledge of the occurrence in March 2006, the DTM, the relevant Carrier officer with authority over the Claimant, did not acquire such knowledge until June 14, 2006. The investigation was scheduled for July 12, 2006, i.e. within thirty days of June 14, 2006. Although the investigation was postponed to July 25, 2006, outside the thirty day period, that postponement came at the request of the Organization. Accordingly, we are unable to find a violation of Rule 21's time limits.

The charges against Claimant essentially were that he failed to report an alleged personal injury in a timely manner and that he falsified his report of and claim of personal injury. We find that Carrier proved these charges by substantial evidence.

Rule 1.2.5 requires that employees report all cases of on-duty personal injuries to management immediately. Claimant testified that while working at the site, he began vomiting and reported such to the Manager Track Maintenance. However, the MTM denied that Claimant reported that he was vomiting. As an appellate body that does not observe witnesses testify, we are in a comparatively poor position to assess relative credibility and resolve disputes in witness testimony. Consequently, we defer to the resolutions made on the property as long as they are reasonable. In the instant case, we see no reason to deny deference to the decision on the property to credit the MTM's testimony over Claimant's. Moreover, Claimant testified that later in 2004, he worked further at the derailment site and each time he felt sick again. According to Claimant, in 2005, he began feeling weakness and experiencing rashes on his feet. Subsequently, he began experiencing headaches and in February 2006 consulted a doctor in Mexico. By March 2006 he had retained an attorney to pursue his claim against the Carrier. Yet, he made no effort to report these matters to management or to complete a personal injury report. He first completed such a report two days before the investigation and submitted it to Carrier at the investigation. We conclude that Carrier proved the charge of late reporting by substantial evidence.

Carrier also proved that Claimant falsified his claims of personal injury. The Senior Toxicologist who led the response to the chlorine release testified that exposure to low levels of chlorine can result in irritation and headaches, and in rare instances vomiting, but that the effects are transient and clear up upon withdrawal from the exposure. According to the Senior Toxicologist, whose testimony was unrefuted, long term effects of chlorine only result from severe reactions which occur at exposure to higher levels of concentration and result in damage to the lungs that typically requires admission to a hospital intensive care unit. Claimant did not experience the type of severe exposure and reaction that would produce long term effects.

Claimant testified that he visited the doctor in Mexico but never received a diagnosis. Nevertheless, in March 2006, Claimant decided to retain an attorney to claim a work-related injury resulting from the 2004 chlorine exposure. Claimant's testimony simply does not make sense and underscores the force of the Senior Toxicologists's testimony that Claimant's claim is inconsistent with the known effects of chlorine exposure.

The Organization argues that Carrier failed to prove Claimant's dishonest intent. The Organization urges that Claimant may have been the victim of poor medical advice or poor legal advice but did not act dishonestly. The record, however, fails to support the Organization's position. We conclude that Carrier proved the charges by substantial evidence.

The Agreement does not require Carrier to maintain employees who display such dishonesty in its employ. The penalty of dismissal was not arbitrary, capricious or excessive.

AWARD

Claim denied.

Martin H. Malin, Chairman

B. W. Hanquist
Carrier Member

T. W. Kreke
Employee Member

Dated at Chicago, Illinois, February 29, 2008

March 12, 2008