NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6402

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	)
	) Case No. 102
and	)
	) Award No. 78
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. R. McHazlett, ID# 0401066, 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 26, 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 13, 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 26, 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 or 15, 2006, the Claims Department advised the Director Track Maintenance of the letter. On June 15, 2006, the DTM questioned Claimant about his alleged lung injuries and Claimant completed a Report of Personal Injury or Occupational Illness reporting chest pains, headaches, loss of breath and runny nose resulting from exposure to chemicals at the derailment site on June 28, 2004.

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 or 15, 2006. The investigation was scheduled for July 13, 2006, i.e. within thirty days of June 14, 2006. Although the investigation was postponed to July 26, 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. The record reflects that Claimant sustained a burn on his arm while working at the derailment site and that he reported this promptly to his Manager Track Maintenance. The charges against Claimant did not stem from the injury he sustained to his arm. However, Claimant testified that beginning about a month after the derailment, he began experiencing chest pains, shortness of breath, headaches and a runny nose. He believed at the time that these symptoms may have been due to his diabetes. According to Claimant, the symptoms persisted through 2005 but he still did not report them to Carrier. Claimant also testified that he retained a lawyer in March 2006, who referred him to a doctor in Mexico. Consequently, at the very latest, Claimant was required to report his personal injury to management in March 2006. He failed to do so. Indeed, he did not report his personal injury until questioned about it by the DTM. Carrier proved the violation of Rule 1.2.5 by substantial evidence.

Carrier also proved that Claimant falsified his personal injury report. Claimant claimed to have experienced chest pains, shortness of breath, headaches and a runny nose as a result of

exposure to chemicals released in the derailment. 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 but that the effects are transient and clear up upon withdrawal from the exposure. In other words, Claimant's claim of chest pains, shortness of breath, headaches and a runny nose beginning a month after the derailment and continuing for almost two years after the derailment is inconsistent with exposure to low levels of chlorine. 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 retained an attorney and, on the attorney's advice, visited the doctor in Mexico but never received a diagnosis. When asked why he retained an attorney when he had not determined that his symptoms were the result of a personal injury, Claimant responded, "[T]hat is a good question. Due to the fact that I had an injury on my arm and I was just further evaluating the rest of my body." Claimant's testimony simply does not make sense and underscores the force of the Senior Toxicologists's testimony that Claimant's claim is completely 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

March 12, 2008

Dated at Chicago, Illinois, February 29, 2008