Award No. 46
Case No. 46

PUBLIC LAW BOARD NO. 7120

PARTIES TO DISPUTE: (BROTHERHOOD OF MAINTENANCE OF WAY
(EMPLOYES DIVISION
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(CSX TRANSPORTATION, INC.

STATEMENT OF CHARGE:

By letter dated March 31, 2009, from D. J. Murphy, Director Operations Support, J. L. Storozuk ("the Claimant") was notified to attend a formal Investigation in the Carrier's Division Office conference room in Jacksonville, Florida, "to determine the facts and place your responsibility, if any, in connection with information that was developed during an investigation that concluded on Wednesday, March 11, 2009, in which you were the Principal, where the testimony and facts appear to indicate that you may have concealed facts under investigation and provided false testimony." The letter stated that the Claimant was "charged with conduct unbecoming an employee of CSX Transportation, concealing facts and providing false information concerning matters under investigation, and possible violations of, but not limited to, CSX Transportation Operating Rules - General Rule A, and General Regulations GR-2 and GR-3." Pending the results of the Investigation, the letter stated, the Claimant was being withheld from service. By mutual agreement of the parties the hearing was postponed to May 27, 2009.

FINDINGS:

Public Law Board No. 7120, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

The Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Claimant began his employment with the Carrier on April 14, 2008. At all times here relevant the Claimant has held the position of Machine Operator assigned to the Jacksonville Division on Force 5J16.

On February 27, 2009, the Claimant was notified to attend an Investigation to determine the facts and place his responsibility if any in connection with information received from him on Friday, February 13, 2009, that he allegedly injured himself on Tuesday February 10, 2009, while working in the vicinity of milepost SP 760. An additional purpose of the Investigation, the Claimant was informed, was to determine if he failed to follow established procedure while mounting or dismounting the rear of a Carrier truck on the same date. In connection with the Investigation, the Claimant was informed, he was charged with failure to perform the responsibilities of his position, failure to timely report an alleged injury, failure to maintain three points of contact while

mounting or dismounting a vehicle, and possible violations of several Operating Rules, General Safety Rules, and Engineering Department Safety Rules.

Following the Investigation that was held on March 10 and 11, 2009, the Carrier notified the Claimant by letter dated March 31, 2009, of the determination that all charges had been substantiated and that a review of the testimony showed that he failed to abide by CSX requirements to immediately notify his supervisor at the time of an incident or when he decided to seek medical attention and that he admitted to not using proper three-point contact while attempting to gain access to the section truck. Because of the seriousness of the proven charges, the Claimant was informed, he was assessed discipline of an actual 60-day suspension effective April 1, through May 30, 2009.

The Claimant appealed the suspension. On June 10, 2009, Public Law Board No. 7288 issued Award No. 7, ordering as follows:

> Discipline shall be stricken from Claimant record and he shall be made whole consistent with CBA Rule 25, Section 4. Claimant shall participate in the "time out" process and the only recorded information will be a note that Claimant was referred to "time out" and 5-day overhead recorded suspension. Carrier shall comply with this Award on or before 30 days from its execution.

Six days after Award No. 7 of Public Law Board No. 7288 issued, J. T. Echler, Assistant Chief Engineer, by letter dated June 16, 2009, addressed to the Claimant, issued his decision in the present case. The Assistant Chief Engineer's letter noted the charges against the Claimant and stated, "During the hearing on these charges, Carrier representatives presented sufficient evidence and testimony to substantiate the above-

referenced charges." The letter further stated, "Also, a review of your testimony during this hearing shows that you admitted contacting Division Engineer Johnson and telling him that the original statement you gave was false." Finally, the Assistant Chief Engineer's letter stated in bold letters as follows:

> **Based on evidence and testimony during the course of this hearing, sufficient proof exists to demonstrate that you are guilty as charged. Through this review, and because all charges assessed were properly proven, it is my decision that the discipline to be assessed is your immediate dismissal in all capacities from CSX Transportation.**

The hearing in this case, which was held on May 27, 2009, consisted of a discussion and analysis of the testimony and exhibits presented into evidence in the March 10-11, 2009, hearing. Only two witnesses were called to testify in this case, one for each side. The Carrier's witness (hereinafter referred to as Hearing Officer) was one of the two hearing officers in the original case. The other witness was the Claimant. The transcript of the March 10-11 hearing was introduced into evidence as an exhibit in this case together with some of the documents that were exhibits in the prior case.

Following is a summary of the testimony given by the Claimant at the March 10-11 Investigation. (All dates contained in this Award No. 46 are for the year 2009). In his testimony in the original (March 10-11) hearing the Claimant stated that he was injured at work on the afternoon of Tuesday, February 10, 2009, when he slipped and fell while climbing up into the section truck for water. According to the Claimant he slashed his right side sliding down on the side of the truck and also hit the side of his head on the

back of the truck. This occurred at milepost 760. He stated that he reported the injury to the Roadmaster and told him that he had to be checked out. The Roadmaster, according to the Claimant, replied "call me in the morning" or "remind me in the morning." According to the Claimant, he also showed the injury to two co-workers, Derian Bonds and Lyndon Bruckerhoff.

On his way home after work on February 10th [to continue with the summary of the Claimant's testimony], he stopped at the office where his fiancée works and showed her his injury. She encouraged him to go to the hospital to have it looked at. He went home and took his younger son with him to the local hospital in Madison, Florida, and was seen by a physician's assistant who stapled the laceration on his side. After-hours there are no doctors on duty at the Madison hospital, which is a very small facility consisting of a few rooms. The physician's assistant recommended he go to a larger hospital in Valdosta, about 35 miles distant, if he had any additional symptoms. The Claimant went home with his son, where his fiancée was waiting for him.

Later that evening [the Claimant's testimony continued] he became nauseous and his head ached. His fiancée drove him to the hospital in Valdosta, where he was given a cat scan and diagnosed as having suffered a mild concussion. He was given some medication for dizziness and nausea and sent home, arriving around 3:00 a.m. The next morning the Claimant went to work late at the Greenville depot. He informed the Roadmaster by telephone that he did not wait to report the accident and went for medical

treatment. The Claimant said that he was sorry that he had spoiled his (the Roadmaster's) long accident-free streak. The Roadmaster said that he (the Roadmaster) was going to be in trouble because he did not report the injury and that he wanted to talk to the Claimant. He instructed the Claimant to remain at the depot until he got there.

In the meantime [the Claimant's testimony proceeded] the Engineer of Track arrived at the depot, having been notified by the Roadmaster of a reported injury. The Engineer of Track talked to the Claimant about how his injury could affect Division bonuses which were related to safe operations. He also told the Claimant that the latter could be charged in connection with the injury. The Engineer of Track asked the Claimant if there was any way that the incident happened at the Greenville depot, stating that it would be much better if it happened after work while the Claimant was not on duty.

About 20 minutes after the Engineer of Track arrived [the Claimant's testimony at the March 10-11 Investigation proceeded], the Roadmaster pulled up in his pickup truck, and employees Derian Bonds and Lyndon Bruckerhoff arrived in the section truck. The Engineer of Track discussed with the Roadmaster about the accident not happening during working hours. At first the Claimant, Mr. Bonds, and Mr. Bruckerhoff wrote statements describing the preceding day's incident at milepost 760. After the Roadmaster and the Engineer of Track had discussed the accident happening after hours at the depot, the original statements were collected, and the Claimant, Mr. Bonds, and Mr. Bruckerhoff were told to write new statements placing the incident at the Greenville depot. At this

time also, a reenactment was done of the accident, but at the Greenville yard instead of going to milepost 760 where it happened.

The Roadmaster [the Claimant's testimony continued] then said that their story would not work because so long as the accident happened in the railroad yard it would be FRA reportable. The Engineer of Track and the Roadmaster then brought the Claimant into the office and had a conversation with him about the accident happening at home or not at work. In this way everybody's safety bonus that they were supposed to get in a couple of weeks would be spared and next year's safety bonus would not be affected. Also discussed was the possibility of Mr. Bruckerhoff and Mr. Bonds losing their jobs because of their short service and that the Claimant would face charges. The Claimant agreed to go along with the coverup and state that he was injured at home. He did so because he was intimidated.

The Roadmaster and the Engineer of Track then went outside [to proceed with the Claimant's testimony], and the Roadmaster told Mr. Bonds and Mr. Bruckerhoff to get back in the section truck, go back to work, and "forget all this ever happened." The Roadmaster then sat in the office with the Claimant at the Greenville depot while the Claimant wrote a statement which said that he was working at home on the night of February 10th and cut his back while fixing a fence. The statement said that he went to the doctor, got checked out, and received staples to close the wound. In the statement the Claimant mentioned that he had reported the injury by phone to the Roadmaster in

explanation of arriving late to work on February 11th but that "the way the phone call between [the Roadmaster] and myself went, made it sound like I said I got hurt at work." The Roadmaster faxed the statement to the Division Engineer's office, together with information that in addition to his injury at home the Claimant reported that he had fallen off of a truck while on duty.

The Roadmaster [the Claimant's March 10-11 testimony continued] took the Engineer of Track and the Claimant out to lunch. All of the four welders who had been at the accident site at milepost 760 were also in the restaurant. The Claimant talked to a couple of the welders, told them what was taking place, and asked what he should do. They told him to put his back against the wall and punt. After lunch the Claimant, the Engineer of Track, and the Roadmaster went back to the depot waiting to hear from the Division Engineer to see if he would buy the Claimant's statement. After about an hour and a half the Claimant was told that everything was fine and to go home.

The Claimant testified that Wednesday night, February 11th, he felt intimidated by what had happened that day at work and that he called different people on the railroad and his union for advice on what to do. In a telephone conversation with the Division Engineer on February 13, 2009, the Claimant informed him that his written statement of February 11was false and that, in fact, he had suffered an injury in a fall at work on February 10, 2009. The two met in person on February 18, 2009, at which time the Claimant filled out CSX Form PI-1A, Employee's Injury and/or Illness Report. On the

form he stated that at about 3:40 p.m. on February 10, 2009, at milepost 761 he suffered a cut to the right side of his back and a bruise to his head when he slipped and slid down the right side of a truck as he attempted to climb into the back of the truck.

At the hearing held on March 10 and 11, 2009, the Engineer of Track and the Roadmaster denied any attempt to cover up any alleged on-duty injury on the part of the Claimant. They also denied participating in any conversation with the Claimant or any other person where threats or attempts at intimidation were directed at the Claimant or any other employee. Additional testimony will be discussed below.

It is the position of the Carrier that the discipline of the Claimant was fully justified because he was provided a fair and impartial Investigation, that it produced substantial evidence of his guilt, and that the discipline assessed was appropriate in light of the seriousness of the offense. The Carrier contends that its witness, who was one of the two hearing officers in the previous Investigation of March 10-11, where the Claimant allegedly concealed facts and gave false testimony, "detailed instance after instance of testimony offered by Claimant Storozuk that either concealed facts or provided false information regarding matters under investigation." In its submission the Carrier gives examples of alleged false testimony by the Claimant and asserts that a complete listing of all the examples provided by the hearing officer in his testimony is included in Carrier Exhibit B.

The Carrier further argues that the Claimant's admission that he provided false

information to the Engineer of Track and the Roadmaster was an admission of guilt "and such an admission fulfills the burden of proof standard." The Carrier contends that it "clearly met its burden of proof and exceeded the substantial evidence threshold with respect to the instant case."

The Carrier maintains that the penalty of dismissal was fully justified because by concealing facts and providing false information the Claimant was dishonest. Dismissal, the Carrier contends, is routinely upheld where an employee engages in dishonesty.

The Claimant's position in this case is that his testimony in the March 10-11, 2009, Investigation was truthful.

The ultimate issue of fact in this case is whether the Claimant was injured at work on February 10, 2009. As detailed in the discussion above, it is the Claimant's position that he was injured on that date, reported the injury, and, because of intimidation, changed his story, only to reveal the attempted coverup after reconsideration. The Carrier's position is that Claimant was not injured at work on February 10th and testified falsely in claiming that he was.

The procedural problem in this case, however, is that in its decision in the March 10-11 Investigation the Carrier determined that the Claimant violated CSX Safeway General Rules GS-5 A, B, and D by failing to immediately notify his supervisor of his February 10, 2009, on-duty injury or prior to seeking medical attention for the injury. See Award No. 7 of Public Law Board No. 7288 at pages 1 and 2.

One of the issues litigated in the March 10-11 Investigation was whether the Claimant incurred an on-the-job injury on February 10, 2009. This is clear from the charge letter dated February 27, 2009, addressed to the Claimant from Division Engineer Johnson which stated that the purpose of the Investigation was to determine the facts and place the Claimant's responsibility, if any, in connection with information that the Division Engineer received from the Claimant that he allegedly injured himself on Tuesday, February 10, 2009, at approximately 1500 hours while the Claimant was working in the vicinity of milepost SP 760.

The Carrier ruled in the March 10-11 Investigation that the Claimant violated CSX Safe Way General Rules GS-5 A, B, and D by failing to notify his supervisor of the February 10 incident either immediately after the injury occurred or at the time he decided to seek medical attention for the injury. The Carrier's ruling in the March 10-11 Investigation was necessarily a finding that Claimant's February 10 injury occurred on the job because Safe Way General Rules GS-5 A, B, and D pertain to on-duty injuries and not to an injury that occurs off duty at an employee's residence. The facts surrounding the Claimant's injury for which he was treated on February 10, 2009, were fully explored at the hearing. If the Carrier believed that the evidence established that the Claimant's injury occurred at his home and not on the job, nothing prevented the Carrier from so stating in its decision letter in the case. It could then also, if it wished, as it did in the present case, file additional charges alleging that the Claimant concealed facts under

investigation and gave false testimony by testifying to the contrary.

The Carrier, however, as a matter of law and fairness, may not fully litigate the issue of whether an alleged injury occurred on the job, make an official determination that it did happen on the job, and then relitigate that identical issue in a subsequent Investigation involving the exact same parties. The legal doctrine that prohibits this is called collateral estoppel. To quote the United States Supreme Court: "'Collateral estoppel' . . . means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." Ashe v. Swenson, 397 U.S. 436 at 443 (1970).

Further in the decision on appeal of the Carrier's determination in the March 10-11 Investigation involving the Claimant, Public Law Board No. 7288 fully endorsed the finding that the injury in question occurred on the job. Thus in Award No. 7, Public Law Board No. 7288 stated as follows:

> Carrier's discipline appears to disregard the consistency of Claimant's testimony corroborated by witnesses called both by Organization and Carrier. It appears to disregard the documented sequence of events beginning with treatment of Claimant's injuries on the date of the incident into the early hours of the following day. Carrier failed to refute significant testimony which pieced together supports Claimant. Numerous contemporaneous conversations and comments support his assertion that Carrier knew that he had been injured shortly after the incident occurred and that he was seeking treatment. Carrier failed to provide evidence to refute Claimant's assertion that his written statement made on February 12 [sic 11], was false.

In sum, because the Carrier's final determination in the March 10-11 Investigation was

that the Claimant violated CSX Safe Way General Rules GS-5 A, B, and D by failing to report his on-duty injuries of February 10, 2009; and the decision on appeal did not reverse the finding that the February 10 injuries occurred on-duty, the Carrier may not relitigate in the present Investigation the issue of ultimate fact of whether the Claimant sustained on-duty injuries on February 10, 2009. The Board so finds.

It is true that, in addition to being charged with failing to report the February 10 on-duty injury, the Claimant was also charged with failure to follow established procedure by failing to maintain three-point contact while mounting or dismounting the rear of the CSX truck. Some of the alleged falsifications of testimony cited by the Carrier's witness in the present Investigation relate to the facts involving the mounting of the truck and the three-point contact.

The fact that the Carrier is collaterally estopped from attempting to prove in this Investigation that the Claimant was not involved in an on-duty injury on February 10th does not mean that it cannot attempt to show that the Claimant gave false testimony regarding the facts pertaining to his climbing onto the truck. As a practical matter, however, it is unlikely that the Carrier would have proceeded with a second Investigation in this case after the March 10-11 Investigation except for its attempt to show that the Claimant falsely testified that he was injured on the job on February 10th – a factual issue that the Carrier is collaterally estopped from pursuing.

Nevertheless because the Carrier technically is not foreclosed from attempting to

prove that the Claimant gave false testimony as to some of the facts in this case, the Board has decided to address the falsification issue on the merits also and not merely on the procedural ground of collateral estoppel. The Board has painstakingly scrutinized the entire record in the March 10-11 hearing and concludes that there is not substantial evidence that the Claimant concealed evidence or gave false testimony in the case.

Perhaps the strongest argument that supported the Carrier's position, if the facts were as the Carrier understood them to be, is item 5 on the Carrier's list of 25 "bullet points of [alleged] conflicting testimony during this investigation." The Carrier summarized the alleged conflict as follows:

> Pg 59 Storozuk claims Roadmaster had message from him in am on cell phone – exhibit G show[s] NO calls from Storozuk, but many calls from Roadmaster trying to contact the employee for work which were unsuccessful until 0954 [sic] at the Greenville Depot. Storozuk admitted being late that morning.

Item 5 refers to the Claimant's testimony that on February 11, 2009, he called the Roadmaster in the morning and left a message regarding the on-duty injury that he sustained the previous afternoon. The Hearing Officer[1] testified that the Roadmaster's "phone records did not indicate any call in that morning timeframe." He stated that there was a record of a completed call to the Claimant from the Roadmaster but none from the

[1]The term "Hearing Officer" is used in this award to refer to the Carrier's hearing officer in the March 10-11 Investigation who was the charging officer and the Carrier's sole witness in the May 27, 2009, Investigation.

Claimant to the Roadmaster. The Hearing Officer further testified that "there was no voice mail on [the Roadmaster's] cell phone from any call and there was no record of any call in the morning on that phone."

Unfortunately for the Carrier's position, it has misinterpreted the record of the Roadmaster's cell phone calls. The Roadmaster's cell phone record shows a call from the Roadmaster completed to the Claimant at the depot at 9:27 a.m. (not 9:54 a.m. as mistakenly stated by the Hearing Officer). The phone record also shows two voice mails received by the Roadmaster immediately before the Roadmaster made cell phone contact with the Claimant at the depot at 9:27 a.m. One voice mail was for two minutes beginning at 9:24 a.m. and the second for one minute, starting at 9:26 a.m.

What the Hearing Officer evidently failed to recognize was that either or both of those voice mails could have been from the Claimant to the Roadmaster and contained the recorded message testified to by the Claimant. Apparently the Hearing Officer assumed that those voice mails were not from the Claimant because the Claimant's phone number is not shown in the column for phone numbers next to those voice mails. That assumption was incorrect.

The fact is that the Roadmaster's cell phone record does not show the phone number of the caller for voice mail calls. Thus the Roadmaster's cell phone record shows eight voice mails received by him at various times on February 11 and 12. The same number is shown in the phone number column for all eight voice mails: 0000000066.

Obviously nobody has a telephone number where the first eight digits are zero. It is clear that the Roadmaster's phone record does not identify the caller on voice mails but uses a 10-digit code, of which the first eight numbers are zero, to mark such calls.

One or both of the voice mails received by the Roadmaster immediately before he called the Claimant at the depot at 9:27 a.m. could have been from the Claimant regarding his injury on the previous workday. Indeed the fact that the Roadmaster called the Claimant so close to the time that he received the voice mails may indicate that the voice mail was from the Claimant and that he then returned the call immediately after listening to the voice mail. In any event, however, it is clear that, contrary to the Hearing Officer's testimony, the Roadmaster's phone record does not provide any evidence that the Claimant did not call the Roadmaster on February 11 and leave a recorded message regarding his on-duty injury of the previous day.

The Hearing Officer also relied on the absence of any record of a phone call to the Claimant in the Roadmaster's cell phone documentation to discredit the Claimant's testimony that his fiancée told him that the Roadmaster called the Claimant's home the night of February 10th. The absence of a record of such a call might bring into question the accuracy of the fiancée's report to the Claimant, but it would not necessarily reflect on his truthfulness. There was, however, no testimony that the call in question was made from the Roadmaster's cell phone. Had the call been made from the Roadmaster's home telephone, there would have been no record of it on his cell phone call record. The

absence of any record of such a call in the Roadmaster's cell phone record therefore does not reflect negatively on the credibility of either the Claimant or his fiancée.

The Hearing Officer attempted to show that the Claimant falsely testified that he showed Mr. Bonds and Mr. Bruckerhoff a wound that he received on his fall at work on February 10th. Clearly, however, Mr. Bonds corroborated the Claimant's testimony that he saw blood on the Claimant's wound on February 10th. Mr. Bonds testified that there was minor bleeding in the wound (Tr. 131). At no time did the Claimant state that there was major bleeding. On the contrary, he stated that the wound did not bleed profusely, that he is "not a big bleeder." (Tr. 68).

The Hearing Officer testified that the absence of any reference in the documentation from the hospital in Madison of a head injury is evidence that the Claimant gave false testimony about injuring his head. The Claimant, however, testified that he did mention hitting his head to the care giver at Madison hospital. In addition, he produced documentation from the hospital in Valdosta that he was given a cat scan of the head on the night of February 10th and diagnosed as having suffered a mild concussion. Based on that documentation and in the absence of any testimony or written statement from the Madison hospital that the Claimant did not mention hitting his head when he was seen there on February 10th, there is no substantial evidence in the record that the Claimant gave false testimony regarding injuring his head.

Moreover, as a defensive measure in this litigious age, it may well be that it is the

policy of Madison hospital not to mention in its records of patient treatment any complaint of a patient for which treatment is not provided. The preponderance of the evidence in the record supports a finding that the Claimant did injure his head when he fell off the section truck on February 10th, and there is not substantial evidence to support a contrary conclusion.

The Hearing Officer contended that because Mr. Bruckerhoff denied that the Claimant ever showed him his injury or saw any blood, this was evidence that the Claimant falsely testified that he showed his injury to Mr. Bruckerhoff. The Board's study of the record persuades it that Mr. Bruckerhoff was not a reliable witness. For example, when asked by the Hearing Officer whether the Claimant lifted his shirt to show a scratch or cut to his right side, Mr. Bruckerhoff testified, "Not that I'd seen." (Tr. 147) On cross-examination, however, when asked, "And Mr. Storozuk did show you a laceration or a scrape or anything?", Mr. Bruckerhoff answered, "He might've pulled his shirt up but I [was] watching what was going on with the track 'cause the welders was going. If he did, I didn't see it." The totality of Mr. Bruckerhoff's testimony hardly amounts to a denial that the Claimant showed him his injury on February 10th.

Mr. Bruckerhoff further admitted on cross-examination that he made a comment that he had closed up a scratch that he received with Superglue. The Claimant testified that Mr. Bruckerhoff made the remark when he showed Mr. Bruckerhoff his (the Claimant's) injury. Mr. Bruckerhoff stated that he made the remark about Superglue

when his coworkers "were talking about scratches and stuff." (Tr. 149). Mr. Bruckerhoff's testimony, the Board finds, does not support the Carrier's charge that the Claimant concealed facts or gave false testimony in the March 10-11 Investigation.

In items 20 and 25 of his list of conflicting testimony the Hearing Officer stated that Mr. Bonds is supposed to have said that the Claimant admitted to him that he had certain missing statements. The Claimant denied making such a statement to Mr. Bonds. In his own testimony, moreover, Mr. Bonds did not say what was attributed to him.

In the March 10-11 Investigation, Mr. Bonds was asked, "Did Mr. Storozuk tell you anything about your statement, about where it was?" He answered, "Yes, he said had those, the statements he had on Wednesday and that he turned em into Ricky Johnson or something like that?" (Tr. 249). That testimony is quite different than the allegation that Mr. Bonds said that the Claimant told him that he had missing statements, implying that the Claimant had stolen the statements and was keeping them from management. Moreover, the addition to his testimony of the words "or something like that" shows that Mr. Bonds was not sure of what exactly the Claimant said to him about missing statements.

Further, it should be noted that the Roadmaster testified, "I had the original copies with me at all times." (Tr. 39). The use of the plural "copies" would indicate that the Roadmaster was talking about more than one statement.

The Hearing Officer also testified that he relied on testimony by Mr. Bonds that in

a telephone conversation the Claimant mentioned to him that he changed his statement because he felt that he was being wronged by the Roadmaster and the Engineer of Track in that they did not pay his copay and would not give him three days off. (Tr. 249). The Claimant testified that Mr. Bonds's testimony on the subject "was 100% false." (Tr. 256). There is no corroboration in the record that there was any issue regarding copayment of any hospital or other medical bill involving the Claimant. There is no evidence that he ever requested and was denied three days off. The Board finds that Mr. Bonds's testimony regarding his telephone conversation with the Claimant does not alone, or in conjunction with other testimony or documentation, provide a sufficient basis for finding that the Claimant concealed facts or gave false testimony in the March 10-11 Investigation.

The Hearing Officer also cited testimony by Mr. Bonds that the Hearing Officer characterized in item 25 of his list of conflicting testimony as a statement by Bonds "that Storozuk offered to pay Bonds for any days off given to him for lying about the incident." It is clear from Mr. Bonds's testimony that what the Hearing Officer referred to as "lying" was that, in his first statement, Mr. Bonds changed the facts regarding the time and the place of the Claimant's fall from the truck. Thus Mr. Bonds testified (Tr. 138):

> The statement I wrote on Wednesday after the event was that it happened at the Greenville Depot after hours while we were moving ice or something to the back of the truck. And the one I wrote on Friday was pretty much exactly what

happened on Tuesday no exaggeration about places or anything like that.

At no time in his testimony in the March 10-11 Investigation did Mr. Bonds waver from his testimony that he heard a sound, looked, and saw the Claimant sitting on the ground with his hand on the hand bar or hand rail of the truck.

Mr. Bonds also testified that in a telephone conversation with the Claimant he (Mr. Bonds) expressed concern that he could end up with time off or even get terminated because he gave two different statements regarding the truck incident. In reply, Mr. Bonds testified, the Claimant told him that he did not have to worry about being terminated and that the Claimant said that even if Mr. Bonds ended up getting time off, he (the Claimant) would pay him back for the time missed. (Tr. 254).

That testimony by Mr. Bonds contradicted testimony that he gave a few minutes earlier at page 249 of the transcript, as shown in the following question and answer:

Hearing Officer: Did you have any conversation about the statement that you had written earlier that day?

Bonds: Probably so. I think I said something that, you know, that was gonna get me in trouble because I got two statements. I don't know, actually, I don't think I said that to him.

Where the same witness first testified that he did not think that he said anything to the Claimant to the effect that he was going to get into trouble because he gave two statements later contradicts himself on that very point, such testimony cannot serve as a

basis for finding that the Claimant gave false testimony. The Claimant unequivocally denied that he ever said that he would pay for any losses that Mr. Bonds incurred in the Investigation (Tr. 256, 257).

The Hearing Officer relies on the fact that the Claimant named certain witnesses but did not ask them to be present at the Investigation as evidence that the Claimant gave false testimony. The Board does not agree that the Claimant's failure to call someone as a witness over whom he has no control is evidence that he gave false testimony. It is not uncommon for people who have knowledge of an incident not to want to get involved. In addition, an employee who has knowledge that is harmful to his supervisor will often not want to testify against the supervisor either out of loyalty to the supervisor or because of fear of repercussions. The Board is not saying that any of the potential witnesses here involved had information harmful to their supervisor. What it is saying is that the failure of a claimant to call other employees as witnesses on issues of fact that may reflect negatively on their supervisor generally may not be taken as evidence that the employee has given false testimony on the issue.

In this connection the Board notes that the Claimant testified that among the employees who knew that a coverup was taking place were four welders. The Claimant testified as follows regarding a conversation he had in a restaurant with the welders:

> I talked to a couple of the welders and I told them what was going taking place. I asked them what I should do. I'm new on the railroad. They told me to put my back against the wall and punt, which later I found basically cover your rear. They

> knew what was taking place. I explained it to them. . . . it was a brief conversation. They knew about the cover up they knew it was taking place. . . . (Tr. 58).

One of the four welders, John Russell Owens, was called as a witness by the Carrier. The hearing officer asked him if the Claimant ever talked to him about a cut to his back on the 10th or the 11th. He answered, "We saw each other in Madison, Florida at a restaurant I think two days later or maybe one day later two days and he said that he cut himself and pulled his shirt up and showed me an injury."

The hearing officer asked, "Did you ask, did you make any comments to Mr. Storozuk as far as what he should do." Mr. Owens answered, "No." The hearing officer then asked, "Have you ever made a comment to Mr. Storozuk that he should put his back to the wall and punt?" Mr. Owens stated:

> No, I didn't say that. He, he said I need some advice I don't know what to do. And we were sitting at a table there was four [of] us to the table and I said you better back up and punt is what I said it is an old term, you know just deal with, just back up and punt turn the ball over to the other team. (Tr. 120).

Neither the hearing officer or the Claimant's Organization representative asked Mr. Owens what it was that the Claimant asked advice about and was in a quandary over what to do. Mr. Owens's testimony does reveal, however, that the Claimant was speaking to other employees about his injury and his situation, as he testified.

The Hearing Officer cites conflicting testimony between the Claimant and Mr. Bonds as to the direction that the Claimant's legs were pointing after he fell from the

truck. The Board does not believe that such a discrepancy is evidence that either employee gave false testimony on the factual issue. Either witness's memory may have been faulty on that point without any intention to falsify the truth. Nor has the Carrier shown how the question of which direction the Claimant's legs were pointing is material to this case. Mr. Bonds's testimony is consistent with the Claimant's having fallen from the truck as the Claimant testified that he did. Thus Mr. Bonds acknowledged that he saw a scratch on the Claimant's side with blood on it (not dried blood) shortly after he heard a sound, looked behind him, and saw the Claimant sitting on the ground with his hand on the hand bar of the truck.

The Carrier argues that the fact that the written statement that the Claimant gave to the Roadmaster and the Engineer of Track on February 11th was admittedly false and differs from the statement he gave a few days later when filling out the PI-1A form in Division Engineer Johnson's presence supports the Carrier's position that he gave false testimony in the March 10-11 Investigation. The Board is not persuaded by that argument. To accept the Carrier's position would mean that an employee who gave a false statement could never make amends for his action and later tell the truth, admitting his falsification.

In the March 10-11 Investigation the Claimant testified that his February 11 statement was false because he was intimidated by management to falsify the facts. The fact that he admitted that his February 11 statement was false can hardly serve as proof

that his March 10-11 testimony was false. Indeed it is the function of this Board to determine if the Carrier has presented substantial evidence that he provided false testimony in the March 10-11 Investigation. The fact that both before the Investigation and in the Investigation the Claimant stated that his February 11 statement was false is not evidence that the Claimant concealed facts or provided false evidence in the March 10-11 Investigation. In this connection this Board notes that in its ruling on the Claimant's appeal of the Carrier's decision in the March 10-11 Investigation, Public Law Board No. 7288 expressly found on page 6 of its Award No. 7 that "Carrier failed to provide evidence to refute Claimant's assertion that his written statement made on February 12 [sic 11], was false."[2]

The foregoing are the most serious alleged conflicts with respect to testimony or other evidence relied on by the Hearing Officer in charging the Claimant with concealing facts and providing false information concerning matters under investigation. For the reasons stated in the preceding discussion the Board finds that none of the items relied on by the Hearing Officer, considered either singly or in combination, establishes that the Claimant concealed facts or provided false information in the March 10-11 Investigation.

There is, moreover, affirmative evidence in the record, independent of the Claimant's own testimony, that supports the Claimant's case. For example, Rich Roberts,

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[2]The February 12 date was clearly an error since on page 4 of the Award the following sentence appears, "Claimant returned Mr. Johnson's call and told him that the statement he had written on February 11, was false."

General Manager of Safety, was assigned by the Carrier to investigate the Claimant's alleged injury of February 10th. From his testimony at pages 198-199 of the transcript, it is clear that in finding that there was no coverup, Mr. Roberts attached great weight to the fact than none of the witnesses he interviewed corroborated that there was any contact between the Claimant and the Roadmaster on February 10th.

Thus Mr. Roberts testified that he interviewed all members of the team "and we could not validate anybody else having seen any kind of contact between the two that afternoon." (Tr. 198). In his testimony, however, the Roadmaster admitted that he spoke to the Claimant at milepost 760 on the afternoon of February 10th (Tr. 170, 171). He stated that he instructed the Claimant to come to Tallahassee the next morning to join the section crew. This contradicted the Roadmaster's testimony on the first day of hearing when he was asked by the Hearing Officer whether he talked to the Claimant about anything at all while he was at the worksite on February 10th. He answered, "At the second location, not that I recall." (Tr. 36). The fact that the Roadmaster admitted talking to the Claimant at milepost 760 on February 10th means that it was possible for the Claimant to have informed the Roadmaster of his injury that date as he testified that he did. It also means that Mr. Roberts's conclusion that there was no coverup was based at least in part on an erroneous premise, namely, that the Roadmaster and the Claimant had no contact with each other on February 10th.

Other evidence that strongly supports the Claimant's case is the fact that the

Roadmaster informed the Engineer of Track on the morning of February 11th that the Claimant had reported an on-duty injury to him. The Engineer actually traveled for more than an hour that morning to interview the Claimant. The Roadmaster's subsequent explanation that the message he received from the Claimant was garbled by static requires a very trusting nature to accept. Why would one give information about an incident to his superior based on a garbled transmission where the report will cause the superior to have to travel for more than an hour to investigate the incident? Would one not first make sure that the information was accurate?

It is not this Board's role to determine whether there was or was not a coverup. The Board makes no finding on that issue. The Board, however, finds that the Carrier was foreclosed on procedural grounds, namely, collateral estoppel, from relitigating the ultimate factual issue of whether the Claimant suffered an on-duty injury on February 10, 2009. On the merits, the Board finds that the Carrier has not established by substantial evidence that the Claimant concealed facts or provided false information concerning matters under investigation at the March 10-11, 2009, hearing on charges filed against the Claimant. The claim will be sustained. The Claimant is entitled to be made whole for all wage losses incurred by him as a result of the present charges, including for the time that he was withheld from service pending the results of the Investigation.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made. The Carrier is ordered to make the Award effective on or before 30 days following the date the signed Award is transmitted to the parties.

Sinclair Kossoff, Referee & Neutral Member

Chicago, Illinois
September 11, 2009