

PUBLIC LAW BOARD NO. 7194

**AWARD NO. 6
CASE NO. 6**

PARTIES TO THE DISPUTE:

Brotherhood of Maintenance of Way Employes Division – IBT Rail Conference
vs.
Union Pacific Railroad Company

ARBITRATOR: Janice K. Frankman

DECISION: Claim sustained

STATEMENT OF CLAIM:

1. The dismissal of Truck Driver Ryan D. Thomas for violation of Union Pacific General Code of Operating Rules 1.6 (Conduct) Parts 1, 2, 3 and 4 and 1.2.5 (Reporting) in connection with a personal injury sustained by him on August 18, 2006 and withholding information on his employment application is based on unproven charges, unjust, unwarranted, excessive and in violation of the Agreement (Carrier's File 1467510D SPW).
2. As a consequence of the unjust dismissal, we respectfully request that Mr. Thomas be exonerated of all charges, reinstated to the service of the Carrier on his former position with seniority and all other rights restored unimpaired, compensated for all wage loss suffered by him since his removal from service and all alleged charge(s) be expunged from his record.

FINDINGS:

The Board, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employes within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties; that the Board has jurisdiction over the dispute herein; and that the parties were given due notice of the hearing.

Claimant commenced service with Carrier August 8, 2005. He holds seniority rights in various classes within the Track Sub-department, Indio District, Los Angeles Division. He was assigned as Laborer Operator, headquartered at Beaumont California, and was employed as a Truck Driver on Gang No. 8429, Bertram, California, near Milepost 646.1, on the Yuma Subdivision on August 18, 2006, the date of the incident in question. He was assessed with Level 5 discipline and dismissed from his position on October 27, 2006.

Under Carrier's Operating Rules employees must not be careless of the safety of themselves or others, negligent, insubordinate or dishonest. An employee must immediately report to the proper manager all injuries while on duty and report to his manager follow-up visits to any doctor or medical care provider.

Claimant injured a finger with a sledge hammer while setting a spike in stock point rail. His co-workers including his foreman were aware of the injury. They gave him some ice to

address swelling. One of his co-workers drove the truck back to headquarters at the end of their shift. MTM Clark came to the headquarters site to examine the boom truck. Claimant was in the office on the telephone. He had received a call that his infant son was ill and was being taken to a hospital. He was not concerned about his injury and did not report it to MTM nor did he respond to MTM when asked if everything was all right. His son was in the hospital the following two days, Saturday and Sunday. Claimant spoke with MTM both days to inquire about training for a promotion and to tell him that he would not be working on Monday when his son was being released from the hospital.

Claimant's finger continued to bother him so he was seen in a hospital emergency room. An x-ray was taken and he was told that he had a hairline fracture. He was not treated. He returned to work on August 22. His finger bothered to him when he swung the sledge hammer. He complained to his foreman on the job that day, who asked him when he hurt his finger and whether he wanted to see a doctor. He told the foreman that he had hurt it on Friday. The foreman reported the injury to MTM Clark who came out to the worksite with MTM Gonzales to talk with Claimant. They reenacted the injury and told Claimant he was not performing the procedure properly to avoid injury. They asked him if he wanted to see a doctor and he declined. The following day they required him to be seen. MTM and Claimant went to the doctor together. The doctor did not see a fracture but he put Claimant's finger in a splint to avoid bumping and injuring it further. He confirmed that the vibration of the sledge hammer could disturb the injury. Following the appointment, MTM and Claimant returned to the office where MTM received a call from someone who told him to remove Claimant from service. Claimant was not told the reason for the action. He was told he would receive paperwork in following days.

Carrier's NOI dated August 28, 2006, cited alleged violation of GCOR Rules 1.6, Parts 1, 2, 3 and 4 and 1.2.5, noting "you allegedly injured yourself and first reported to MTM on the afternoon of August 22, 2006." Claimant was directed to an investigation on Thursday, September 14, 2006, and was advised that if found in violation of the cited Rules, Level 5 discipline would be assessed and he would be dismissed. He was advised he was being withheld from service pending the outcome of the investigation.

The Investigation hearing was held on September 28, having been postponed by Carrier. Claimant requested that his co-workers be called to testify and was told that there would be a response to his request. By Notification dated October 27, 2006, Level 5 discipline was assessed and Claimant was dismissed from his position. Conducting Manager Henry Frates wrote as follows:

.....you injured yourself and first reported it to MTM on the afternoon of August 22, 2006. In addition, the evidence presented in this investigation led to the discovery of other evidence that indicates that you withheld pertinent information on your application for employment with Union Pacific. Had this information been available it was of such a nature that you would not have been offered employment if Union Pacific had had timely knowledge of it.

Your actions have indicated a violation of Rule 1.6 (Conduct), Parts 1, 2, 3 and 4. and Rule 1.2.5

Organization challenged the discipline procedurally and on its merits. It argues Carrier has denied Claimant due process and has violated parties' Agreement, denying him a full, fair and impartial hearing. It points to the investigation transcript which contains no evidence of

“pertinent information on (Claimant’s) application” cited in the Notification of Discipline letter as a basis for Carrier’s action. It argues that the process is flawed and requires withdrawal of the discipline. It further argues Carrier has not demonstrated Claimant violated Rules cited in NOI. It asserts that his injury was known immediately and points to failure of Conducting Manager to call Claimant’s co-workers to testify as requested.

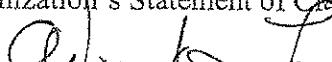
Carrier argues Claimant was provided with a full, fair and impartial hearing, and that he failed to report his injury to his manager until four days after he was injured, thereby violating Rules 1.6 and 1.2.5. It asserts that evidence was discovered during the investigation that he had withheld information in his application which, if known, would have resulted in his not being hired.

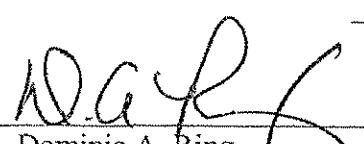
This Board is charged with considering Organization’s appeal from the investigation of the matter noticed to Claimant on August 28, 2006. Its review is confined to the record made at investigation, including issues raised, sworn testimony provided and documentary evidence received. No document was offered into evidence, and the transcript record made at the investigation fails to note or reveal any pertinent information withheld on Claimant’s application for employment with Carrier. There was no reference to the application, and there was no evidence or testimony which addressed any matter not set out in the August 28, NOI. Even if new and chargeable evidence had been discovered at the investigation, due process requires notice to Claimant and Organization and an opportunity to be heard. Carrier’s Notice of Assessment of Discipline was the first notice to Organization and Claimant that there was a new issue raised in the course of the investigation. The Notice was non-specific and too late for Claimant to be heard.

Carrier expressly and improperly based its dismissal of Claimant on the “newly discovered pertinent evidence”. Organization is correct that the process was corrupted by Carrier’s error and violates their CBA. Claimant is properly reinstated on that basis alone. Nonetheless, it is appropriate to observe that, notwithstanding the error, Carrier did not provide substantial evidence that Claimant violated Rule 1.6, Parts 1-4. There was agreement at the investigation that the focus was on failure to report the injury. Consequently, Conducting Manager’s failure to address Claimant’s request for testimony from his co-workers was not a fatal error. The record reveals no doubt that they and his foreman knew about the injury immediately. Although Claimant testified that he believed he had complied with the reporting Rule when he reported to his foreman, there is evidence that he knew or should have known that he was required to report the injury to his MTM directly and immediately. Violation of GCOR Rule 1.2.5 is an UPGRADE Level 2 offense which, in this case, appears to be appropriate for counseling. Claimant, however, is properly reinstated without reduced discipline.

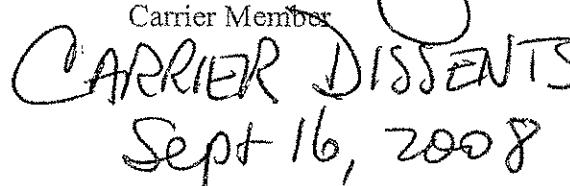
AWARD

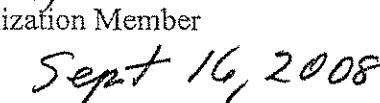
Claim sustained. Claimant shall be reinstated to the service with pay for time lost, and shall be made whole consistent with Organization’s Statement of Claim, paragraph 2.


Janice K. Frankman, Chairperson
Neutral Member


Dominic A. Ring
Carrier Member


Timothy W. Kreke
Organization Member


CARRIER DISSENTS
Sept 16, 2008


Sept 16, 2008