

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 7258

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES)	
)	Case No. 25
and)	
)	Award No. 25
UNION PACIFIC RAILROAD COMPANY)	
)	

Richard K. Hanft, Chairman & Neutral Member
T. W. Kreke, Employee Member
D. A. Ring, Carrier Member

Hearing Date: May 1, 2009

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

1. The dismissal of Welder Robert D. Abel for violation of GCOR Rules 1.6 (Conduct) in connection with providing dishonest testimony during an investigation on April 11, 2008 is based on unproven charges, unjust, unwarranted and in violation of the Agreement (Carrier's File 1505969).
2. As a consequence of Part 1 above, we request that Mr. Abel be immediately reinstated to the service of the Carrier on his former position with his seniority and all other rights restored unimpaired and that the letter of dismissal also be expunged from his personal record. In addition, Claimant Abel shall also be compensated for net wage loss, both straight time and overtime and benefit loss suffered by him since his wrongful and unwarranted removal from service and subsequent dismissal "

FINDINGS:

Public Law Board No. 7258 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 April 22, 2008, 2008 Claimant was instructed to report for formal investigation on May 1, 2008 concerning a charge that he gave dishonest testimony in a prior investigation in possible violation of GCOR Rule 1.6. The hearing was convened as scheduled on May 1 and held to its conclusion. By letter dated May 20, 2008 Claimant was notified that a substantial degree of evidence was presented to warrant sustaining the charges and as a result Claimant was assessed a Level 5 discipline and dismissed from service. Claimant's dismissal was appealed by

the Organization on July 7, 2008 and denied by Carrier on August 27, 2008. That denial was appealed on September 24, 2008 and denied by Carrier on November 21, 2008. The claim was discussed between the parties in conference on February 3, 2009 without resolution.

The record reveals that Claimant provided testimony at an investigation held April 11, 2008 to the effect that his manager had threatened Claimant's entire gang that if Claimant turned in an injury report that the gang would be abolished. The charging officer in this matter, Director of Bridge Maintenance J. S. Mancuso ("DBM" or "Director") read into the record the specific testimony that is the basis of the instant charge as follows:

"...And the parts of interest start on Line 10, Mr. Below asking the question and Mr. Abel responding.

Question: And did he speak to the whole gang about that incident?

Answer: Yes he did.

Question: Who was present during that?

Answer: Our foreman, Felix Borrueal, Dave Longo, Nestor Chairez, Shelly Culloty and Mike-Mike Peyon, I think it is.

Question: And yourself?

Answer: And myself.

Question: And what was discussed about the incident?

Answer: What was discussed was that if I was to file an injury report, that the manager, Russell Young, would abolish the gang and that there would be nowhere else to go except Texas for any employment because he would not - once the gang - once he abolished the gang - excuse me - he would not put up any positions in California, forcing all these families to move to relocate to Texas. And that is when he said to me, how's that going to make you feel, R. D.?

Question: And he said that to you implying that you would be the cause of these other families' strife?

Answer: Yes.

Question: What about the guys on the gang? Did they urge you not to turn in the accident?

... Answer: Every one of them did. Not every one of them, I think - yes, they did.

Question: Every one of them?

Answer: I'm pretty sure, yes, every one of them said don't turn it in. Yes, every one of them."

That testimony was contradicted by the testimony of the Manager of Bridge Maintenance ("MBM") which was also read into the record as follows:

"Line 13, Question: Have you ever- because of this incident, 2006, July and August, have you ever threatened a gang if they did turn in any kind of accident report against this incident? Was the gang threatened in any way by you?

Answer: No, I have no reason to threaten a gang for a single person failing to comply with the instruction of UP's policy of reporting a personal injury. Upon notification of a re- in- of a injury report, there is no option for me not to report it."

The Director testified that the above-quoted contradicting testimony was what prompted him to investigate the matter here under consideration and to ultimately charge the Claimant with providing dishonest testimony at that investigation. The Director further testified that upon being apprised of the conflicting testimony by the hearing officer that conducted that investigation and reviewing the transcript of the hearing when it became available, he interviewed four other members of the gang who were present on July 31, 2006: Felix Borrue, the gang's foreman, Mike Payen, Dave Longo and Nestor Chairez.

The Director explained that he asked each of Claimant's co-workers the same questions: Did Mr. Young threaten the gang with abolishment if Mr. Abel turned in the accident? Did you ever tell Mr. Abel not to turn in an accident? Did you hear anyone tell Mr. Abel not to turn in an accident? The Director stated that the answers that he received in response to each of the above questions from each of the co-workers led him to charge the Claimant with giving dishonest testimony.

Those same four co-workers testified at this hearing as follows:

Mr. M. A. Payen testified:

Question: ... "Were you present when Mr. Young came to address the gang after Mr. Abel had allegedly sore neck?"

Answer: "Yes"

Question: "Were you threatened or was the gang threatened by Mr. Young, to your knowledge?"

Answer: "No."

Mr. F. M. Borrue! testified:

Question: ... "Were you there when Mr. Russell Young came to speak to the gang after Mr. Abel allegedly had a sore neck?"

Answer: "That's correct, I was there."

...

Question: ... "Okay, at any time while Mr. Young was there was the gang's job threatened?"

Answer: "No."

...

Question: "Did anyone on the gang, in your presence, ask Mr. Abel not to report the sore neck as an accident?"

Answer: "Not in my presence, no sir. No."

Mr. D. F. Longo testified:

Question: ... "Were you present when Mr. Russell Young came down at the end of July to address Gang 8014?"

Answer: "Yes."

Question: "When Mr. Russell Young arrived, do you remember if he spoke to the group

or if he spoke to everybody individually?

Answer: "I remember he spoke to the group. After the group disbursed, he did speak to individuals separately."

...

Question: ... "Was there a threat of any kind toward abolishing the gang?"

Answer: "No."

...

Question: ... "Did you or anybody else on the gang, in your presence, ask Mr. Abel not to turn in an accident?"

Answer: "Not to my knowledge."

Mr. N. H. Chairez testified:

Question: "Okay, do you have any knowledge of Mr. Young threatening that particular gang or you at any time?"

Answer: "No."

...

Question: ... "Does any members of the gang uh- did any of them ask you not- or did you or any members of the gang ask Mr. Abel not to report a personal injury?"

Answer: "No."

Question: "Did you hear any threat to the abolishment of a gang if the personal injury was reported?"

Answer: "No."

It should be noted, however, that Mr. Chairez also testified repeatedly that he could not recall the events of that day and could not remember the MBM even being there. Nevertheless, Claimant testified that every member of the gang urged him not to turn in an accident report and Mr. Chairez testified that he never did so.

Claimant's testimony was, however, corroborated by the remaining member of the gang, S. J. Culloty. She testified that the MBM talked to the gang both individually and as a group. She recalled that on July 31, 2006 the MBM showed up and told Claimant that if he turned in an injury claim "that he would abolish our jobs...I believe he said it out loud to all of us."

Moreover, Ms. Culloty testified in regard to other members of the gang asking Claimant not to turn in an accident report as follows:

Question: "Whom asked uh- who asked Mr. Abel not to turn in an accident report?"

Answer: "I can remember one in particular that was very, very afraid and that was Dave Longo and he begged us please don't turn it in, please don't turn it in; I don't have anywhere else to go...and I believe Felix Borrueal asked us not to also." Both Mr. Longo and Mr. Borrueal denied asking or witnessing anyone else on the gang asking Claimant not to make out an accident report.

Further Ms. Culloty testified, when asked:

Question: "Okay, all right. Did Mr. Young state that he would abolish the gang and there would be nowhere else to go except for Texas for employment because he would not, once abolished, the gang would not be put up any- any- he would not put up any positions in California forcing all of these families to move, to relocate to Texas?"

Answer: "Yeah. Something like that, yes. That was part of his harassment, yes, threats."

Clearly, there was divergent testimony given in this matter and assessing the content of that testimony, one side of the story must be true and the other side false. There is no middle ground, either the MBM made a threat or he didn't. Either co-workers asked Claimant not to file an accident report or they didn't. Three of the five co-workers working with Claimant on July 31, 2006 appeared at the investigation and directly and concisely testified that the MBM never threatened to abolish the gang corroborating the MBM's testimony. Moreover, four of five co-workers testified that nobody asked Claimant not to turn in accident report..

On the other hand, the Claimant testified that the MBM threatened the entire gang with abolishment if he were to turn in an accident report and that every person on the gang urged him not to turn in the report. His testimony was corroborated by the fifth co-worker on that gang.

While the Organization contends that there was not a shred of evidence presented to lead to the conclusion that Claimant was dishonest, we find that there was substantial evidence

presented in the testimony of the other co-workers requiring the hearing officer to make a credibility determination. The hearing officer reasonably, based on the transcript of the hearing, credited the testimony of those who testified that their manager had not threatened the gang and that they did not urge Claimant not to turn in an accident report.

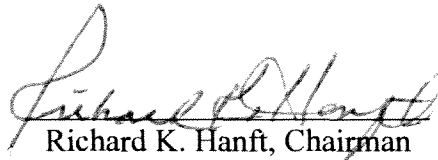
As an appellate body, we have not seen the witnesses testify and are unable to assess the demeanor or credibility of the witnesses giving testimony. The hearing officer observed the testimony and received the evidence first hand. In this instance, the hearing officer weighed the conflicting testimony, the evidence and the inferences and came to a conclusion. For that reason, we defer to the credibility determinations made on the property to credit the testimony of Borrue, Long, Chairez and Payen over that of the Claimant and his corroborating witness. Hence, we find that the determination that the Claimant gave dishonest testimony is supported by substantial evidence.

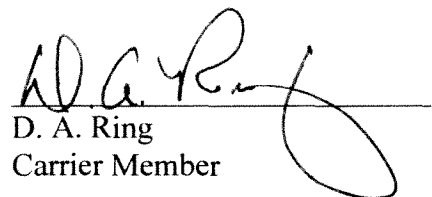
The Organization objected at the investigation to the fact that the MBM was not present to testify as he was the accuser and the Claimant should have had the right to face him, question him and challenge him. As the hearing officer explained on the property in response to the objection, the MBM was not the accuser in this matter, the charging officer, Mr. Mancuso, was. Mr. Mancuso did testify and was cross-examined by both of the Organization's representatives. Moreover, if the Organization felt it was necessary to question the MBM, they should have, or could have, either made a request that he testify or asked for a recess to compel him to testify at the Organization's expense. (*See Third Division Award 33982 [Rubin]*).


Finally, the Organization asserts that because Claimant's testimony was not refuted, it must be accepted as fact. To the contrary, we find that Claimant's assertions were refuted by MBM Young in Case 24 previously heard by this Board and by three of Claimant's co-workers in this matter. Hence, we find this argument unpersuasive.

AWARD

Claim denied.


Richard K. Hanft, Chairman


D. A. Ring
Carrier Member


T. W. Kreke
Employee Member
Sept. 9, 2009

Dated at Chicago, Illinois, August 25, 2009

Sept 9 2009