

AWARD NO. 24

CASE NO. 25

PARTIES TO THE DISPUTE

Brotherhood of Maintenance of Way Employees

and

Chicago and North Western Transportation Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of Ismael A. Perez was based upon unproven charges (Carrier's File D-11-1-334).
- (2) Claimant Perez be reinstated with all rights unimpaired and compensated for all time lost because of the violation referred to within Part (1) of this claim."

OPINION OF BOARD:

Claimant Ismael A. Perez was hired as a Track Laborer on November 18, 1974, but was furloughed after only about one month of employment. During this initial period of brief employment he was not given a physical examination. He was recalled in August, 1975, and instructed by Carrier to report for a physical examination and back X-ray. On August 21, 1975, an individual identifying himself as Ismael Perez reported to the Company physician, Dr. Mueller, who gave him a physical examination. The examinee, on August 21, 1975, was a man 5'10-3/4" tall who weighed 189 pounds. He signed the report of examination in the following signature: "Ismael Prez A." At the conclusion of the physical examination, Dr. Mueller indicated that the examinee was qualified to fill the position of "Track Laborer, pending results of back X-rays." The individual was sent to Community General Hospital for back X-rays which, when processed, showed the back to be

entirely normal; specifically, the L-5 transverse processes in the lower back showed no irregularity. On the basis of the physical examination and X-rays of August 21, 1975, Claimant was found to be qualified for employment as a Track Laborer.

Claimant was again furloughed on November 28, 1975 but he was recalled in March, 1976 and instructed to submit to another medical examination. On March 12, 1976, an individual identified as Ismael Perez was examined by Company Physician, Dr. Radd. The examinee was found to be 5'9" tall and to weigh 140 pounds. He signed the medical report of examination with the following signature: "Ismael Perez." Under the "Remarks" section of the examination form, the Doctor entered: "Patient states he had X-rays in Stirling when he was examined last year." Dr. Radd did not take another X-ray during the examination of March, 1976. Following that examination, Claimant re-entered service as a track man on March 15, 1976.

On June 15, 1976, Claimant was injured and after returning to work, he was again injured on July 9, 1976. Following the second injury, Claimant was again examined on July 29, 1976, including back X-rays. Comparison of the July 29, 1976 X-rays with those taken on August 21, 1975 suggested that they were X-rays of different people. Whereas the August 21, 1975 X-rays showed a normal back, the X-rays taken on July 29, 1976 show a "sacralized L-5 right transverse process with a false joint." It is undisputed on the record before us that this latter condition is a birth defect. Further examination of Claimant's medical records at that time revealed the above-described discrepancies between the signature, height and weight of the person examined on August 21, 1975 and all other known records involving Claimant. Thereafter, under date of August 26, 1976, the Claimant was advised to report for a formal investigation on charges set forth as follows:

"Your responsibility for your failure to take a pre-employment physical examination on or about August 21, 1975, when in lieu of such examination some other individual reported and was examined using your name and identification."

Following a hearing on September 2, 1976, at which Claimant was represented, he was dismissed from the services of Carrier.

The Organization on Claimant's behalf appealed the dismissal decision and sought his reinstatement, together with compensation at the straight-time rate for all time lost. During handling of the claim, the Organization suggested that Claimant be given the opportunity to take another physical. In the meantime, Claimant had retained outside counsel to process other claims against Carrier, apparently arising out of his injuries. With the concurrence of Claimant's attorneys, he was examined again with back X-rays by Dr. James Stack, an orthopedic surgeon. With respect to the X-rays, Dr. Stack reported as follows: "I reviewed again the three sets of X-rays. In the lumbar spine X-rays made on August 21, 1975, at Stirling, Illinois, the spine was considered to be within normal limits. In the X-rays dated July 29, 1976 and August 2, 1977, taken in the terminal dispensary, we see a sacralization of the right transverse process with a false joint. It is obvious that the films of 1976 and 1977 are not of the same person as those made in 1975."

Careful review of the record establishes beyond doubt that the signature on the medical examination of August 21, 1975 is not that of Claimant, Ismael A. Perez. Not only is the writing decidedly different from that of other documents known and acknowledged to be signed by Claimant, but his name is not even spelled correctly on the August 21, 1975 document. At the investigation, Claimant at first said the signature was his and that he sometimes printed like that. When pressed, however, he finally conceded that it was not his signature, then again equivocated, then finally decided it was not his. The record establishes beyond serious doubt that Claimant is a slightly-built man and that he was 5'9" tall and weighed 140 pounds in March, 1976. At the hearing he gave his weight at between 135 and 140

pounds and said that he has never weighed more than 175 pounds. The individual who took the examination on August 21, 1975 was nearly 5'11" tall and weighed 189 pounds. The discrepancy in physical stature between Claimant and that individual of some 2 inches in height and some 50 pounds in weight remains unexplained on the record.

Finally, we are convinced beyond serious doubt that the X-ray of August 21, 1975 of an examinee identified as Claimant is not in fact his X-ray.

In the face of the foregoing evidence, Claimant insists that he did, in fact, take the physical examination and X-ray on August 21, 1975, and flatly denies that anyone acted in his place. The Organization maintains that the discrepancies may be explained by a combination of human and/or mechanical error. Of course, it is not beyond the realm of possibility that records could be lost or misidentified, that scales and measuring devices could be off by as much as 2 inches and 50 pounds, or that Claimant could have altered his signature and the spelling of his name dramatically for a single day. We do not deal here with statistical probabilities, however, nor with a standard of proof which requires persuasion beyond any doubt. Carrier has adduced substantial record evidence, albeit circumstantial, that Claimant did not take the physical examination and X-rays on August 21, 1975, but rather that someone else took them in his stead. Nor can we find that Carrier erred in concluding that the August 21, 1975 transaction was tantamount to falsification of an employment application. A number of awards have held that the discharge penalty is not unreasonable or inappropriately severe for such falsification, and we can find no justification on the record before us to reverse the dismissal of Claimant. See Third Division Awards No. 4328, 4391, 5665, 5994, 10090, 11328, and 18475.

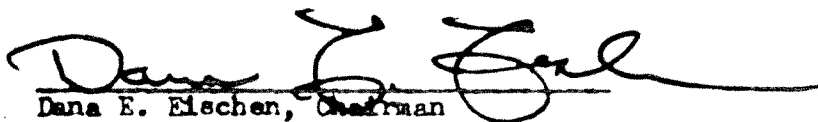
FINDINGS:


Public Law Board No. 1844, upon the whole record and all of the evidence, finds and holds as follows:

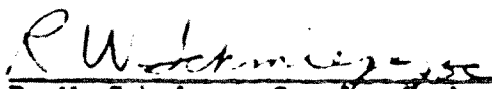
1. That the Carrier and Employee involved in this dispute are, respectively, Carrier and Employee within the meaning of the Railway Labor Act;
2. that the Board has jurisdiction over the dispute involved herein;
- and
3. that the Agreement was not violated.

AWARD

Claim denied.


Dana E. Eischen, Chairman


O. M. Berge, Employee Member


R. W. Schmiede, Carrier Member

Dated: April 11, 1978