

PUBLIC LAW BOARD NO. 6159

Case No. 29
Award No. 29
Carrier File No. 1170132
UTU File No. 1570-30-5494-99D
Claimant T. D. Gonzales

PARTIES TO DISPUTE:

UNITED TRANSPORTATION UNION
AND
UNION PACIFIC RAILROAD COMPANY

Statement of Claim:

Appeal on behalf of Brakeman T. D. Gonzalez, Roseville Division, for removal of a Level 5 Discipline assessment, and for replacement of wage loss resulting from his dismissal from service by letter dated January 28, 1999 (Petitioner's Exhibit A) until returned to service with seniority unimpaired. In addition, we request replacement of wage loss resulting from his attending an investigation on January 15, 1999. Finally, we ask that this incident be expunged from Mr. Gonzalez' personal record.

Findings:

Upon the whole record and all the evidence, the Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted by agreement and has jurisdiction of the parties and the subject matter and the parties were given due notice of the hearing held.

The Claimant, Brakeman Gonzalez, began service with the Carrier on June 6, 1969 as a Switchman. He became a Brakeman on September 21, 1972.

By hand-delivered letter dated December 1, 1998, the Claimant was advised to report for a formal hearing to be held at the conference room at 1600 Vernon Street, Roseville, California on Wednesday, December 9, 1998. The purpose of the hearing was to determine if the Claimant had failed to immediately report a personal injury to the proper manager and also failed to file the required form. If determined guilty of the charges, the Claimant would be in violation of cited Rule 1.2.5 of Union Pacific Rules, effective April 10, 1994.

According to the Claimant, he was performing service as a Brakeman on November 23, 1998, when he re-aggravated a previous injury. He sought medical attention on November 24, 1998, but, did not communicate his status to the Manager of Train Operations, L. E. Wiseman until November 30, 1998. On December 1, 1998, the Claimant was interviewed by the Director of Terminal Operations, T. M. Ray who, following the interview, presented the above charge letter to the Claimant. Allegedly the Claimant then exclaimed that if they were going to charge him with reporting the injury late, he would change his story and say that he had reported the injury to a supervisor who asked him not to file a report. However, whether he made that particular statement or not, he did meet with his Local Chairman in the hallway after he was given the charge letter. After this discussion with his Local Chairman, the two men returned to the office. On December 10, 1998, the Claimant signed a waiver of investigation and accepted a Level 2 Discipline for the late filing of the injury report.

By certified letter dated December 14, 1998, the Claimant was notified that he was to attend an Investigation. The purpose of the investigation was to determine his guilt in violating Rule 1.6 of the Union Pacific Rules, effective April 10, 1994. The reason for the charge was the fact the Claimant was dishonest during the aforementioned investigation because he said he was going to change his story and said he reported the injury and was told to cover it up. The Carrier cited the following rule:

Rule 1.6 Conduct

Employees must not be:

4. Dishonest.

Any act of . . . misconduct or willful disregard or negligence affecting the interest of the Company or its employees is sufficient cause for dismissal and must be reported.

Indifference to duty, or to the performance of duty, will not be condoned.

An investigation was held on January 15, 1998. The Carrier reviewed the transcript of the hearing and by letter dated January 28, 1998, the Claimant was issued a Level 5 Discipline and dismissed.

CARRIER'S POSITION

The Carrier contends that during the initial part of the interview the Claimant denied having reported his injury to Claims Agent Raj Deo. They say it was only after he received the notice of investigation that he changed his story and attempted to implicate

Deo in a cover-up. The Carrier insists it was only when the Claimant realized he would be held accountable for such statements did he attempt to rehabilitate himself.

The Carrier argues that the late reporting of the injury and the charge of dishonesty are two different issues. They contend the Claimant was given every opportunity to give his version of the story. They contend the penalty assessed was reasonable and proper. They assert there is no evidence to suggest the Claimant was prejudged simply because the Director of Terminal Operations was prepared to issue a notice of charge when it became apparent the Claimant would admit he had not reported the injury as required by rule.

ORGANIZATION'S POSITION

The Organization argues that the charge placed against the Claimant constitutes double jeopardy. They further contend the Carrier failed to meet its burden of proof when the conflicting testimony is considered.

The letter of dismissal accuses the Claimant of being dishonest on two occasions, however, the Organization contends in the first instance, the Claimant signed a letter of waiver and accepted punishment for filing a late injury report. The "changed story" was not an issue since the Claimant accepted discipline for the late filing.

As to the contention that the Claimant was dishonest in his Injury Report, Form 52032, the Carrier has not met its burden claims the Organization. They assert that not only did the manager assist the Claimant in filling out the report, but, the Claimant was consistent in revealing that he had aggravated an existing injury. Not only did he tell various individuals that, but, he indicated that on Form 52032.

The Organization argues that this is a case of entrapment. They point out that first the Carrier encourages him to fill out an injury report form. Then, they say, after the form is completed, the Carrier serves a notice of investigation for filing the report late. Subsequently, they give him an offer to waive the investigation and accept a Level 2 discipline and then charged him with dishonesty. The Organization argues it is clear the Carrier had a vendetta against the Claimant and set him up.

DECISION

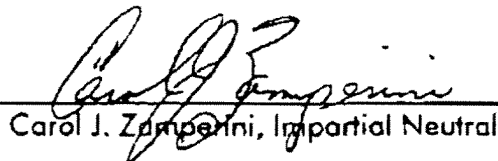
The Board has reviewed the transcript of this case carefully. There were two incidents of dishonesty referenced by the Carrier in the charges against the Claimant. The first was that he was dishonest when he changed his story during the interview of December 1, 1998. The second was that he was dishonest in completing Form 52032 concerning a personal injury he sustained on November 23, 1998.

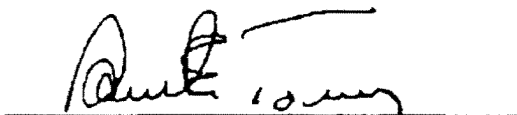
As to the first charge of dishonesty, it was a moot point. The Claimant, while stating that he was going to change his story and claim he reported the injury to Mr. Deo, basically recanted that threat after he spoke with his representative and agreed to the waiver accepting a Level 2 Discipline. Even though he may have been less than forthright at the hearing regarding this subject, the fact of the matter is it should never have been an issue. The Claimant had already admitted that he had failed to report the injury in a timely manner and accepted his penalty. Furthermore, the response of the Claimant at the interview was understandable, even though regrettable and unacceptable. He was not given any forewarning that he would be charged with a late filing. He agreed to file the form and was told he could do so. Only after he filled out the form, was he told he would be charged with late filing. He then reacted by conjuring up a defense. He felt he had been had, whether that was the intent of management or not. However, after consulting with Union Representation, he realized he should accept the waiver and go forward from there. The purpose of a waiver is to allow the Claimant to accept responsibility, take the penalty and resume his status. In signing the waiver, the Claimant absolved everyone else of blame in the incident. The matter regarding any change in his story should have died at this point.

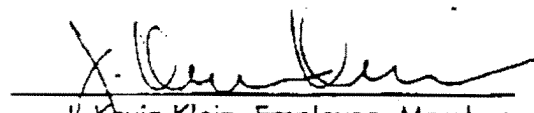
As to the second charge of dishonesty, there is simply no proof. There was no evidence which demonstrated that the Claimant lied about being injured on November 23, 1998. Furthermore, there was no evidence that his injury was not an aggravation of a previous injury. Even the testimony of Mr. Ray indicates there was nothing on Form 52032 that stuck out as being dishonest. In view of the Claimant's testimony that he represented this injury as an aggravation to others and insisted it to be an aggravation on Form 52032, it would seem to this Board that he is precluded from raising it as a new injury in the future. Furthermore, the waiver he signed in this instance will remain a part of his record.

AWARD

The claim is sustained.


Carol J. Zamparini, Impartial Neutral


Daniel E. Torrey, Carrier Member


J. Kevin Klein, Employee Member

Submitted this 31st day of May, 1999.