

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD 6302

NMB NO. 192
AWARD NO. 186

PARTIES TO DISPUTE

CARRIER

Union Pacific Railroad

Carrier's File

1529896

AND

ORGANIZATION

Brotherhood of Maintenance of Way Employees
Division of International Brotherhood of Teamsters

System File

R-0948U-310

STATEMENT OF CLAIM

1. The discipline (Level 5 – dismissal) of Mr. C. Ross issued by letter dated December 1, 2009 in connection with his alleged violation of General Code of Operating Rules 1.6 (Conduct, Items 4 and 5) as promulgated by the General Code of Operating Rules (GCOR) as adopted and modified by the Union Pacific Railroad Company was unjust, capricious, based upon unproven charges and in violation of the Agreement.
2. As a consequence of the violation outlined in Part 1 above, Claimant Ross must have the charges against him withdrawn and removed from his record, and he must be made whole for the lost compensation, benefits and mileage, at the applicable rate of pay.

STATEMENT OF BACKGROUND

Claimant was first employed by the Carrier on September 27, 2005. At the time the events occurred that resulted in Claimant's dismissal and subsequently the filing of the subject claim, Claimant was employed as a Laborer on Gang No. 4750, Council Bluffs, Iowa. On the evening of November 2, 2009, at approximately 2230 hours (10:30 p.m.) a derailment occurred creating an emergency situation requiring the need to summon employees, Claimant being one among them, to work throughout the remainder of the night and into the next day, November 3, 2009, completing their work at around

midnight. While Claimant was setting spikes on the track he purportedly accidentally struck the middle finger of his left hand with a hammer. According to the record evidence, Claimant confided in only one (1) of six (6) co-workers he worked alongside of during a sixteen (16) hour shift in attending to the work of the derailment that he injured himself. That co-worker, Ron Dale advised him to inform a manager of his injury but Claimant responded he did not want to report the injury because of it becoming a "big deal". According to a written statement, Dale reported his interchange with Claimant about the injury occurred sometime in and around 7:00 to 8:30 p.m. on November 3, 2009.

The record evidence reflects that on the following day, November 4, 2009, Claimant sought medical assistance for his injured finger by visiting the Methodist Physicians Clinic located in Omaha, Nebraska. At the clinic, physician, Susan Keasling attended to Claimant and in recorded medical notes she indicated that Claimant had hit his left middle finger with a hammer on Friday, that it was swollen and giving him pain. In other notes Dr. Keasling recorded the following:

Hit left middle finger with hammer 5 days ago at work. Has been taking Tylenol. Pain getting worse. He does railroad work. [Condition] bleeding; numbness; and throbbing pain.

Dr. Keasling reported in her written notes of Claimant's visit to the Clinic that he had his left middle finger x-rayed, that she splinted the injured finger and gave him a prescription for Vicodin for his pain and a refill for the Vicodin and another drug, Sunvastin. In addition, Dr. Keasling gave him a written medical note excusing him from work that day and the next two (2) days, November 5, and 6, 2009. In accord with this medical note excusing him from work for the three (3) days referenced, Claimant phoned Manager of Track Maintenance, R. A. Read on November 4th and informed Read he would not be reporting to work that day. According to Read, Claimant did not mention in this telephone conversation that the reason he was reporting off from work was because he had suffered an on-duty injury. On November 5th, Claimant called Read and again reported off from work but this time he informed Read he had hit his finger with a hammer without answering Read's inquiry as to when and where the injury had occurred. In this same telephone call, Claimant also had asked Read if he had been bumped and was informed he had not been bumped. On November 6th, Claimant called Read to report off from work informing Read his finger was wrapped and inquiring again if he had been bumped. As was the case with the second phone call the day before, Claimant did not respond to Read's inquiry as to what had caused the injury he sustained. According to the record evidence, Claimant was hoping he would be bumped in order that he might not have to report off from work on any additional days while recovering from his injury.

The record evidence reflects Claimant next contacted Read three (3) days later on November 9, 2009, and informed Read he would be on the property the following day

and asked Read if he had been bumped to which Read responded he had not but was advised by Read he needed to protect himself in case another employee did bump him. As he indicated to Read, Claimant did come on the property November 10, 2009, not to report to work but rather to have his picture taken for a replacement ID badge as the picture on his old badge had been rubbed away. Administrative Aide, Ellen B. Willer, the employee who took Claimant's picture for the replacement badge, reported in a written statement regarding the circumstances of her taking his picture that Claimant did not look hurt, nor was he wearing any bandages that were visible. Also on November 10th, Claimant was informed that he had been bumped from his assignment.

On November 12, 2009, on a follow-up consultation with his doctor, Claimant was advised that because his injured finger was still swollen it was not possible to determine an accurate prognosis and that it was possible he could lose his finger. Since he had yet to file a written injury report with the Carrier, his doctor urged him to file such report so that he would not be left without compensatory recourse in the event he did lose his finger. In response to his doctor's advice, Claimant contacted Read and apprised him he was coming into the Council Bluffs Superintendent's Office to fill out the required 52032 injury report. When Claimant met with Read in the office that day, he presented Read with the medical note dated November 4, 2009 that was given to him by Dr. Keasling. Since Claimant had indicated on the Report of Personal Injury form November 3, 2009 as the date he sustained the injury, and it was now nine (9) days after the date of injury he was just then officially reporting the injury, Read, on the spot, issued Claimant a Level 3 Discipline of a five (5) day suspension under Carrier's UPGRADE disciplinary policy for violation of GCOR Rule 1.2.5 for late reporting of an injury. A review of the subject Discipline Calculation Worksheet reflects that Claimant consented to waiving formal hearing of the five (5) day suspension. It is also noted from a review of both the Injury Report and the Discipline Worksheet that Claimant evidenced difficulty in specifying the correct dates on the forms, to wit: on the Injury Report form, Claimant indicated the date of injury to be 10/3/09 instead of November 3 and on the Discipline Worksheet he initially indicated the date of signing the Waiver as 10/11/09 which was corrected and written over with the proper date of 11/12/09. The date on the Injury Report form on the other hand was not corrected.

In a meeting Carrier convened to review Claimant's waiver of a formal hearing in connection with his disciplinary five (5) day suspension, apparently called by General Superintendent Karol A. Burchfield due to a Memorandum she received dated November 12, 2009 from Administrative Aide Willer in which Willer apprised her she had taken the call from Claimant the morning of November 12th, which was the same call he also talked with Read before coming into the office to fill out the injury report form, wherein, Claimant informed her he had gotten hurt the night of the derailment when he was using a hammer and that he had missed three (3) days of work. Those three (3) days were November 7, 8, and 9 that was not covered by the medical excuse given to him by Dr. Keasling and which days he had not been bumped from his position. Since he had been bumped beginning November 10, 2009, the days going forward

were not days he had to report off from work and missed. At the end of the Memorandum, Willer apprised Burchfield that Claimant had come on the property to see her to have his picture taken on November 10, 2009 and that he never mentioned anything to her on that date which was just two (2) days before she talked with Claimant on the telephone about getting hurt on November 3, 2009. In reviewing the matter of Claimant's late reporting of his injury, the five (5) day suspension that was issued to him by Read, and Willer's Memorandum of November 12, 2009 in which she indicated she had seen Claimant on November 10, 2009 and he had made no mention of having incurred an injury on November 3, 2009 then but had indicated such to her two (2) days later in a telephone call, Burchfield voiced the opinion that rather than a five (5) day suspension, Claimant's actions warranted the discipline of dismissal. Burchfield's opinion apparently launched a further review of Claimant's late reporting of his injury which review entailed obtaining a copy with Claimant's consent of Dr. Keasling's medical report pertaining to having seen and attended to Claimant's injury on November 4, 2009. In his review of Dr. Keasling's medical report, Read became aware that Keasling noted the injury had occurred on a Friday and that she recorded the injury had happened 5 days ago. It is noted that these two notations comport with one another as November 4, 2009 was a Wednesday and that five (5) days before November 4, 2009 was October 30, 2009 a Friday. In addition to reviewing Dr. Keasling's medical report which Dr. Keasling verified as being complete and accurate based on her interview with Claimant, Read set about interviewing those employees who worked with or supervised Claimant the night of the derailment and the occurrence of Claimant's alleged injury. As noted elsewhere above, only one (1) of six (6) co-workers interviewed by Read and who submitted written statements to Read, indicated that Claimant had indicated he had been injured and that employee was Ron Dale.

As a result of the information gleaned by Read in his review of Claimant's injury, to wit: the resulting discrepancy in dates as to when the injury incurred; the number of co-workers who did not know about the injury at the time of its occurrence; and the reason unknown to Carrier as to why Claimant failed to report the injury immediately, Carrier issued Claimant Notice of Investigation on November 16, 2009, to report for investigation to be held on November 23, 2009 to "develop the facts and place responsibility, if any, that while employed as a Laborer on Gang 4750, Council Bluffs, Iowa, you allegedly were dishonest in the reporting of an on-duty personal injury which allegedly occurred on November 3, 2009". Claimant was apprised by this Notice that if the allegations were substantiated it would constitute a violation of Rule 1.6 (Conduct), Item 4 (Dishonest) and Item 5 (Immoral) among others of the General Code of Operating Rules, and that if found to be in violation of the alleged charge, the discipline assessed might be Level 5 and might result in his permanent dismissal. In the meantime Claimant was apprised he was being withheld from service. The investigative hearing was held as scheduled on November 23, 2009 and on December 1, 2009, General Superintendent Burchfield notified Claimant by Certified Mail that the charges against him had been sustained in that it had been determined upon the evidence adduced at the hearing he had been dishonest in the reporting of an on-duty personal

injury which allegedly occurred on November 3, 2009. As a result of this determination, Claimant was apprised he had been assessed a Level 5 discipline of dismissal from service effective December 1, 2009.

In response to the Level 5 discipline assessed Claimant, the Organization filed a timely claim contesting the discipline. As the Parties were unable to resolve the matter of Claimant's dismissal in the handling of the claim on the property, the subject discipline now comes before the Board for its consideration.

CARRIER'S POSITION

Carrier asserts the record evidence clearly and unequivocally compels the conclusion that the assessed charge was proper and should not be altered, modified, or set aside in any manner. Given the evidence and testimony presented during the formal investigation, Carrier states it remains its firm position Claimant deceptively and dishonestly portrayed an injury as having occurred on-duty on November 3, 2009, when an impartial medical document established that the injury had occurred some five (5) days prior on a Friday, October 30, 2009.

Additionally, Carrier notes substantial witness testimony established that the Claimant had not indicated that he was injured on the day in question, nor had he exhibited signs of having been injured on November 3, 2009. As for Claimant's star witness, Ron Dale, who reported in a written statement that Claimant had confided in him that he had injured his hand while at work on November 3rd, Carrier notes that when Dale proffered live testimony at the investigation, he related that Claimant had not indicated to him when the injury had actually occurred. Since there was no showing anywhere in the whole of the record evidence as to when the injury occurred, or for that matter, even if it had occurred, Carrier relates it found that Claimant was deceptive and dishonest in his reporting of the alleged incurrence of injury on November 3, 2009.

Carrier asserts the assessed discipline of dismissal was reasonable and warranted in view of the nature of the violation and the fact that it was issued in strict accordance with its UPGRADE discipline policy. Carrier maintains the assessed discipline was not harsh, excessive, or draconian and was based upon violation of a fundamental employment rule in which employees are expected to be honest and forthright in all of their dealings with it. Carrier avers that when the assessed discipline is subjected to the filter of the standards for review set forth by Referee Dana Eischen in Third Division Award No. 27867 the answers to the standards are as follows: 1) **Yes**, Claimant received a full and fair investigation with due notice of charges, opportunity to defend self, and to have representation; 2) **Yes**, Carrier did show by substantial evidence that Claimant was culpable of the charged violation; and 3) **No**, the penalty imposed was not arbitrary, capricious, discriminatory, or unreasonably harsh given the prevailing fact and circumstances of Claimant's case.

As Carrier maintains Claimant's actions were directly contrary to the requirements of Rule 1.6 (Conduct), and that he was afforded all of his due process rights, Carrier requests the Board to uphold the properly assessed progressive discipline of dismissal.

ORGANIZATION'S POSITION

The Organization submits Carrier committed a flagrant violation of Rule 48 of the Agreement by depriving Claimant of a fair and impartial investigation when it assigned General Superintendent, Karol Burchfield to be the deciding official in determining that dismissal was warranted based on the evidence adduced at the hearing as Burchfield had pre-judged Claimant's guilt and voiced her opinion Claimant should be fired even prior to date he was cited for investigation and too, Burchfield was not part of nor did she attend the investigation. The Organization argues this flagrant violation of Rule 48 should be sufficient in itself for the Board to rule to sustain the claim without need to address the merits.

However, should the Board determine to address the merits, the Organization asserts that Carrier failed to prove the charges against Claimant as it posits that in cases of alleged misconduct involving commission of dishonest acts, the standard of proof required to support such charge of misconduct is clear and convincing evidence, a standard of proof greater than the standard of substantial as promulgated by Referee Eischen in Third Division Award 27867. Notwithstanding its position of a higher standard of proof required to support a charge of a violation of GCOR Rule 1.6 Item 4 (Dishonest Conduct), the Organization submits that even when the facts and circumstances are subjected to the lower standard of proof of substantial, Carrier has failed in its burden of proof to support its position that Claimant committed a dishonest act in claiming he incurred the on-duty injury on November 3, 2009. The Organization argues the entire case against Claimant rests solely on discrepancy of dates between those reported by Claimant, himself and those reported on the medical documentation recorded by Dr. Susan Keasling. The Organization submits this discrepancy can be explained by the fact, that for whatever reason it was simply a result of miscommunication between Claimant and Dr. Keasling and between Claimant and the employee he had assist him to read and complete the injury report form. This explanation of the discrepant dates dispels Carrier's position that Claimant knowingly acted to deceive Carrier by deliberately lying about his injury and the date he incurred the injury. Rather, Claimant innocently made a mistake pertaining to the chronology of events in connection with having sustained his injury.

Based on the argument advanced hereinabove, the Organization requests the Board to sustain the claim as presented and to award Claimant a make whole remedy.

FINDINGS

Public Law Board No. 6302, upon the whole record and all 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.

The Board concurs in Carrier's position that in evaluating the evidence the way in which it evaluated the evidence, the facts to support Claimant's case just does not compute. However, the Board is persuaded that the facts are susceptible to a different interpretation other than how Carrier interpreted them that at least renders them more comprehensible and less of a problem in discerning whether or not Claimant engaged in an act of deception as opposed to simply making an honest mistake.

Contrary to Carrier's suspicion that Claimant may not have sustained the on-duty injury to his hand he maintains he sustained, the Board is persuaded by the medical documentation recorded by Dr. Keasling that, in fact, there can be no dispute, that Claimant did injure his middle finger of his left hand and that the injury was serious in that Dr. Keasling had Claimant's hand x-rayed, she then splinted the subject finger, and prescribed the drug Vicodin to address his pain. This evidence in our view establishes without doubt that Claimant did injure his hand and that he sought medical attention to attend to this injury on November 4, 2009, which date is also without doubt. Carrier relies on Dr. Keasling's notations that Claimant sustained the injury on a Friday and that the Friday was five (5) days prior to the date she attended to Claimant. An examination of the November 2009 calendar supports Dr. Keasling's notations that five (5) days earlier from November 4th a Wednesday fell on October 30, 2009, a Friday. However, if these dates are to be accepted as representing the truth of the matter as Carrier so accepted them, the question arises as to how Claimant could have managed to perform the duties of his job on the prior days but especially the very taxing duties he had to perform pertaining to the derailment with such a serious injury to his hand. The Board is very dubious that Claimant could have gone five (5) days bearing such a serious injury by continuing to perform the duties of his job and not seeking medical attention for this length of time. It seems to the Board that even though Claimant confided in only one (1) of six (6) co-workers he had injured his hand, we find it significant that he divulged this information on November 3, 2009 while working the derailment rather than on a previous day going back to Friday, October 30, 2009. We also find that Claimant's reluctance and reticence to file an injury report goes to great lengths to explain the reason why he would confide only to one of his co-workers that he had sustained an injury to his hand. Additionally, we find it not implausible under what appears to be convoluted circumstances that miscommunications occurred between himself and Dr. Keasling regarding when he sustained the injury and miscommunications that occurred between himself and the co-worker he relied on to lend him assistance in filling out and completing the injury report. .

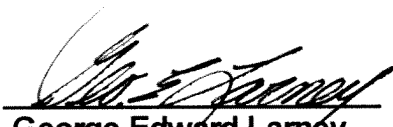
The above stated findings persuade us that there was no motivation on Claimant's part to engage in acts of deception and dishonesty relative to his claim of sustaining an on-duty injury and his late reporting of said injury. Rather, we are convinced that Claimant simply committed a series of errors in relation to communicating the proper and accurate information to both the Clinic physician, Dr. Keasling who attended to his injury and to Track Manager Read. Accordingly, in finding Claimant not to have engaged in any act of deception and dishonesty, we rule to convert his dismissal into a suspension the length of which is to cover his absence from the time he was held out of service pending formal investigation to the time of his reinstatement to service. Claimant shall not be entitled to any back pay or other benefits he might have been entitled to receive had he not been dismissed, but he shall return to service with seniority unimpaired.

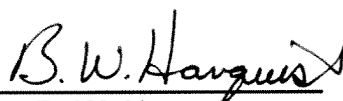
Notwithstanding our decision in this case based on giving Claimant the maximum benefit of doubt, we caution Claimant that should he ever sustain an on-duty injury in the future, he is obligated to comply with Carrier rules to immediately report the injury and to timely file an accurate injury report.

This Award is to become effective within sixty (60) days from the date signed by the Parties.

AWARD

Claim Sustained as per Findings


George Edward Lamey
Neutral Member & Chairman


B. W. Hanquist
Carrier Member


T. W. Kreke
Employee Member

Chicago, Illinois

Date: Dec 19, 2011