

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD 6302

NMB NO. 193

AWARD NO. 187

PARTIES TO DISPUTE

CARRIER

Union Pacific Railroad

Carrier's File

1530692

AND

ORGANIZATION

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

System File

C-0948U-161

STATEMENT OF CLAIM

1. The Carrier's discipline (Level 5 – dismissal) of Mr. Todd Ostrovsky issued by letter dated December 15, 2009 in connection with alleged violation of Rule 1.6 (Conduct), as contained in the General Code of Operating Rules, was unjust, capricious, based upon unproven charges and in violation of the Agreement.
2. As a consequence of the Carrier's violation referred to in Part 1 above, Mr. Ostrovsky shall be reinstated to service with the Union Pacific Railroad Company with all seniority, benefits and vacation rights restored unimpaired as well as hourly compensation for time lost due to the carrier's actions in this case.

STATEMENT OF BACKGROUND

On October 21, 2009, at approximately 1540 hours (3:40 p.m.), Claimant, Todd Ostrovsky while employed as a Sectionman on Gang 6051 at Helper, Utah near Milepost 626.40 alleged that, as he was attempting to dismount from the rear bumper of the stationary large section truck while maintaining a three point contact, he incurred an on-duty injury as a result of losing his balance and falling backward striking his left buttock on the truck's pintle hitch before falling to the ground. Section Foreman, Richard Gallegos apprised Manager Track Maintenance, J. C. Flynn Claimant alleged he had injured himself and, in turn, Flynn asked Claimant if he wanted to seek medical attention to which he responded he did. Flynn then drove Claimant to the Emergency

Room at Castleview Hospital located in Price, Utah where he was examined by a physician and x-rayed. The physician's prognosis was that Claimant might have suffered a herniated disc in his back and ordered that an MRI be conducted on Claimant in the near future. Thereafter, Claimant was excused from further work while his medical issues were attended to.

In accord with Carrier's long-standing safety practices, the day following Claimant's alleged accident and resultant on-duty injury, alleged because there were no eye-witnesses to Claimant's having fallen off the section truck, Carrier convened a team of officials to conduct a re-enactment of Claimant's fall from the truck based on Claimant's description of how the accident happened. Carrier explained it performs re-enactments of accidents that result in on-duty injuries as a means of determining what, if anything can be changed or corrected to prevent any such future accidents of the same or identical nature. The re-enactment team physically repeated mounting and dismounting of the rear bumper of the section truck in attempting to recreate the circumstances of the accident as described by Claimant but was unable to replicate it. By failing to replicate the accident as described by Claimant even after a number of attempts, the re-enactment team concluded that had Claimant maintained a three point contact with his right hand on the grab iron as he alleged, he would have physically swung to the right of the rear bumper of the section truck thereby missing hitting his back on the pintle hitch as he descended to the ground.

Since there were no eye-witnesses to Claimant having fallen from the truck, based on the findings of the re-enactment team, Carrier further concluded Claimant had concocted the accident and, by so doing, falsified the claim of his injury. As a result, Carrier cited Claimant for formal investigation by Notice dated November 13, 2009 for the purpose of determining whether he had violated GCOR Rule 1.6 (Conduct) for failing to perform his work duties in a safe manner. Carrier apprised Claimant that if he were found to have violated Rule 1.6, the discipline assessed under its UPGRADE Discipline Policy might be at Level 5, thereby resulting in permanent dismissal. By this Notice of Investigation, Claimant was directed to report for the investigation on Friday morning, 9:00 a.m. on November 20, 2009.

In the course of preparing its case for the November 20, 2009 investigation, Carrier hired a private investigator (PI) to perform surveillance of Claimant which entailed following him undercover and taking pictures of him as a way of determining whether he had faked the injury he alleged he had incurred by falling from the section truck and striking his back on the pintle hitch. Additionally, in preparing its case for the November 20, 2009 investigation, Carrier discovered Claimant had been untruthful pertaining to answers he specified on his pre-employment application regarding his medical history and whether he had ever been convicted of a crime. As to his medical history, Claimant indicated during the pre-employment process that he had not suffered any musculoskeletal injuries but documentation obtained by Carrier reflected he filed an insurance claim in connection with a neck and back injury he sustained from an

automobile injury. As to any prior convictions pertaining to breaking the law, Carrier obtained information showing that Claimant had not disclosed on his pre-employment application that he had a May 4, 1994 felony conviction for burglary in the Superior Court of California, County of Ventura. In light of this information Carrier formed the opinion Claimant had not been honest and forthcoming during the pre-employment application process. As a result, on November 18, 2009, Carrier revised the initial Notice of Investigation to include having falsified reports and, through mutual agreement with the Organization, the formal investigation set to convene November 20, 2009 was moved to the later date of December 1, 2009. Carrier notified Claimant of the rescheduled investigation by letter sent via UPS Second Day Air which Claimant signed acknowledging receipt of the letter.

By letter dated November 17, 2009 from Michael D. Milligan, M.D. directed to, To Whom It May Concern, Dr. Milligan advised that Claimant is unable to sit or remain in any position for extended periods of time due to marked pain associated with a recent injury. Dr. Milligan further stated, Claimant's injury and pain preclude him from being able to drive for any prolonged period of time and expressed his belief that Claimant's pain and discomfort will make it particularly difficult for him to travel extended distances even as a passenger. It is noted that Claimant resided in Las Vegas and the investigation was scheduled to be held in Price, Utah. By letter dated November 30, 2009 from Claimant's wife directed to, To Whom It May Concern, Claimant's wife Amy advised he would not attend the December 1, 2009 investigation and medically he could not attend any such meetings in the near future due to the on-the-job injury sustained on October 21, 2009. Wife Amy stated Claimant was on medicines that would be considered DUI illegal if he drove and asserted he is physically unable to drive or sit that long for the travel from Las Vegas to Price, Utah. Wife Amy further advised that Claimant had undergone one minor surgery and was readying for another one the following week and that if both minor surgeries did not alleviate his pain it was the opinion of the orthopedic surgeon Claimant would be looking at major surgery to address the problem of his herniated discs.

At the outset of commencement of the December 1, 2009 investigation, Claimant's Organization representative P.O. Scott moved to postpone the investigation indefinitely due to Claimant's medical issues preventing his interstate travel to the hearing location. Carrier's Hearing Officer, W. C. Bennett overruled the Organization's request to postpone and the investigation was held with Claimant in absentia. By Notice of Discipline dated and issued December 15, 2009, Carrier apprised Claimant that upon review and consideration of all the testimony and evidence set forth in the hearing transcript, it was determined that more than a substantial degree of evidence was presented to warrant sustaining all charges brought against him and accordingly, he was assessed the Level 5 discipline of dismissal from service. Following Carrier's action to dismiss Claimant, the Organization timely filed the subject claim which is now before the Board.

CARRIER'S POSITION

Carrier submits that it adhered to the now well established standards for review of discipline set forth by Referee Dana Eischen in Third Division Award No. 27867 in determining Claimant's culpability of the charged misconduct and assessing discipline commensurate with the misconduct committed. Carrier asserts that testimony presented during the formal investigation established the charge that Claimant had not only devised an on-duty injury but also established the charge he had falsified information provided and submitted as part of his employment application. With regard to the former charge of having devised an on-duty injury, photographs taken of Claimant by a private investigator subsequent to the alleged on-duty accident show Claimant in various lifting and physically moving activities including entering and exiting a vehicle and driving a vehicle, contrary to the pain Claimant alleged he was suffering. As to the latter charge of providing false information on his pre-employment application, Carrier notes the Organization did not refute the documentation supporting this charge.

Carrier argues there were no procedural errors and no affirmative defenses raised by the Organization that would warrant voiding the discipline imposed here of dismissal under its UPGRADE discipline policy which has consistently been deemed by Boards as being a valid and fair exercise of its inherent managerial rights. Carrier notes the UPGRADE (Union Pacific General Rules for Administering Discipline) policy was implemented to avoid discretionary judgments of discipline and argues it would be improper for a Board to tamper with the mechanics of the policy. Carrier argues that commission of the misconduct of dishonesty and deceptiveness by employees such as the misconduct engaged in by Claimant in the instant case has been found by many Boards to warrant imposing the most severe degree of discipline of dismissal as such misconduct violates the most fundamental employment rule which expects employees to be honest and forthright in all of their dealings and interactions with the Carrier. Carrier submits that a careful reading of the transcript reveals no instance in which Claimant's rights were violated. Carrier avers that Claimant received a fair and impartial hearing and that the investigation was held in a timely manner. As such, Carrier takes issue with the Organization's contention it violated the controlling Agreement by holding the investigation in Claimant's absence. As photographic evidence showing Claimant engaged in everyday activities at home following the purported on-the-job injury, Carrier argues it is clear Claimant made a conscious and deliberate decision not to attend the investigation to defend his position. In support of its position that holding a hearing in absentia of a claimant does not constitute a contractual violation, Carrier cites prior Board Awards standing for the proposition that in the railroad industry it is well established that a properly notified employee may not avoid disciplinary consequences by failing to attend an investigation. Additionally, the controlling Agreement does not impose an obligation on the part of the Carrier to postpone an investigation indefinitely as was requested here. Carrier asserts Claimant had knowledge of the scheduled

investigation and the charges he was alleged as having violated and for reasons only known to him, he chose not to attend the investigation.

Carrier argues that contrary to the Organization's position, Claimant was not dismissed for reporting the subject alleged on-the-job injury. Rather, Claimant was dismissed for deceptively and dishonestly omitting required information during the pre-employment process as well as, for devising he had incurred the subject injury which could not be substantiated through re-enactment of the asserted accident in accord with how it happened as specified by Claimant and, which injury was contradicted by photographic evidence.

In sum, Carrier asserts it has proven by substantial evidence Claimant violated Rule 1.6 (Conduct) and in so doing, his dismissal from service was warranted and proper under all the prevailing circumstances. In having met its burden of proof, Carrier requests the Board to sustain the disciplinary action of dismissal.

ORGANIZATION'S POSITION

The Organization contends, contrary to the Carrier's position that Claimant was denied his due process right to a fair and impartial hearing as a result of Carrier's ruling to deny its timely motion to postpone the hearing indefinitely due to Claimant's medical condition and to proceed in holding the investigation in Claimant's absence. The Organization submits Carrier's decision to try Claimant in absentia denied Claimant the fundamental opportunity to defend himself in that he was prevented from facing and cross-examining Carrier witnesses, prevented from presenting evidence in his possession or control, and prevented from proffering testimony on his own behalf. Because denial of such rights afforded employees underscore the very heart of due process, Carrier's wholesale denial of these rights to Claimant in this case so vitiates due process that it constitutes a fatal flaw thereby necessitating nothing less than the Board sustaining the instant claim as presented without the need to address the merits.

Without prejudice to its position this claim should be sustained on the basis of the procedural error of denying Claimant his due process right to a fair and impartial hearing, the Organization argues Carrier failed to meet its burden of proving the initial charge Claimant violated GCOR Rule 1.6 (Conduct) by failing to perform his duties in an unsafe manner and the related charge he faked an on-duty injury. Carrier was unable to show by any credible substantial evidence that he failed to perform his job in an unsafe manner and, with respect to the related charge of faking an injury, such charge was refuted by medical documentation that Claimant's on-the-job accident resulted in injury to his discs when his backside was struck by the pintle hitch during his fall from the section truck. The Organization argues that Carrier's failure to re-enact Claimant's accident as described by Claimant cannot be deemed to constitute substantial evidence to refute Claimant's assertion he maintained the required safety procedure of a three

point contact with his right hand on the grab iron when dismounting the rear bumper of the section truck. Likewise, the Organization argues the photographic evidence of Claimant performing everyday activities while at home subsequent to sustaining the on-duty injury to his back cannot and should not be deemed to trump the documented medical evidence that, in fact, he did incur the injury he alleges he incurred. Additionally, the photographs showing Claimant moving about in the performance of activities fails to counter the specific nature of his limitations as a result of the injury incurred which primarily was an incapacitation to remain immobile for any length of time and an inability to drive a motor vehicle as a result of the medication he was taking for pain.

As to the charge added in the revised Notice of Discipline that Claimant falsified "reports", the Organization maintains that the way in which the charge was stated referred to the report Claimant filed relating to the accident occurrence on October 21, 2009 that resulted in his on-duty injury and bore no relation to the allegation he falsified information on his employment application. As such, Claimant's alleged employment falsifications which were never properly noticed to Claimant or the Organization are not, the Organization argues, properly before the Board as the discipline imposed here by the Carrier is premised explicitly and specifically upon Claimant's alleged report falsifications on October 21, 2009 and not on any other date. That being the case, the Organization asserts the Board is precluded from considering all matters dealing with Claimant's employment application since the charge of report falsification clearly referenced the injury report filed by Claimant on October 21, 2009 and had nothing to do with his employment application he submitted in August of 2008. The Organization argues Carrier failed in its burden to prove the accident complained of by Claimant never happened and certainly failed to prove Claimant engaged in the falsification of his employment application on October 21, 2009, the only relevant date in connection with the charges. Since the matter of Claimant's employment application allegedly occurred in August of 2008 and not in connection with the charges relative to the events of October 21, 2009, the Organization argues the matters associated with Claimant's employment application raised here by Carrier clearly falls outside the scope of the Board's review of the instant claim.

In sum, the Organization posits that in assessing Claimant the ultimate disciplinary action of dismissal it did so not by satisfying the required standard of proof of substantial evidence incumbent upon it, but rather solely on the basis of mere speculation and conjecture which runs counter to long-standing and well established arbitral authority anchored in numerous Board and Division Awards rendered over many years. The Organization submits that due to the fact Carrier's denial to afford Claimant his due process right of a fair and impartial hearing constituted a fatal procedural flaw, the merits should be deemed by the Board to be immaterial and, as a result, should not be addressed by the Board. Accordingly, the Organization requests the Board to sustain the claim in its entirety.

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.

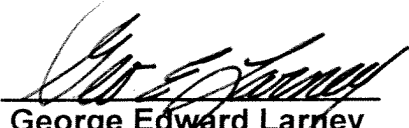
The Board concurs in the Organization's position that the Carrier did not show by substantial evidence that Claimant faked an on-the-job injury associated with an on-duty accident that allegedly occurred on October 21, 2009. However, as imprecisely stated as the added charge of falsifying reports was stated by Carrier in its amended Notice of Discipline dated November 18, 2009, it cannot be gainsaid from the documentation obtained by Carrier in preparation for the December 1, 2009 investigative hearing that the charge of report falsification was confined specifically and solely to the injury report filed by Claimant in connection with the on-duty accident that allegedly occurred on October 21, 2009, as the Organization so asserts. To the contrary, the record evidence clearly establishes that the additional charge was added to the alleged violations committed by Claimant only at the time when such falsification of Claimant's employment application was serendipitously discovered by Carrier. Further, the Board does not concur in the Organization's position that the charge of Claimant having falsified some information on his employment application submitted in August, 2008 falls outside the parameters of this Board's authority to address the charge as the Board dispels the notion, as intimated by the Organization that there is a Statute of Limitation on the commission of lying on an official document such as an employment application.

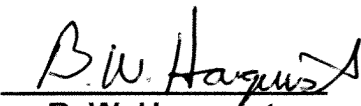
In submission of the Health Form he was required to fill out as part of the pre-employment process, Claimant certified that all of the answers and information he provided on the health history form were true and complete. Additionally, Claimant acknowledged he understood that any false information, misrepresentation or omission would disqualify him from further consideration of employment. Claimant further acknowledged that at any later date the information he provided on the health history form was discovered to be untrue, incomplete or misleading, he understood the offer of employment would be revoked or, his employment would be terminated. The fact that the Carrier held the investigation in absentia of Claimant which the Board recognizes is a very rare occurrence, is not found by us under all the prevailing circumstances to have constituted a fatal flaw to Carrier's case as so argued by the Organization, since even had Claimant attended the hearing and afforded the opportunity to present evidence and testimony in his own behalf, he could not have successfully refuted the documentary evidence of his having falsified his health history record nor the fact that he lied by omitting he had been arrested and convicted of a felony and served a 45 day jail term.

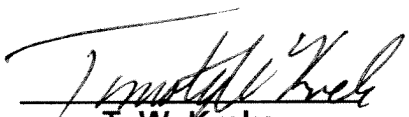
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As has been found and stated numerous times by many Boards over decades, commission of dishonest and deceptive acts by employees serves to sever the bonds of trust between them and their employer, and once such acts are committed, the employees are beyond correcting and rehabilitating their workplace behavior which is the mainstay and entire purpose of progressive discipline. Thus, the only disciplinary option available when acts of dishonesty and deceptiveness are proven by substantial evidence free of any extant motive to discriminate, be arbitrary, or be excessive in assessing discipline on the part of an employer, is to terminate the employment of the offending employee. The Board finds that Claimant's acts of dishonesty and deceptiveness warranted his dismissal from service of the Carrier and that the discipline of dismissal was commensurate with his charged offenses.

AWARDClaim Denied


George Edward Larney
Neutral Member & Chairman


B. W. Hanquist
Carrier Member


T. W. Kreke
Employee Member

Chicago, Illinois

Date: July 20, 2011