

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD 6302

NMB NO. 205

AWARD NO. 190

PARTIES TO DISPUTE

CARRIER

Union Pacific Railroad

Carrier's File

1543788

AND

ORGANIZATION

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

System File

D-1048U-213

STATEMENT OF CLAIM

1. The Level 5 dismissal of Sectionman James E. Wanklyn for violation of Rule 1.6, Part 4 (Dishonest) in connection with his failure to honestly report the details of an alleged personal injury purportedly occurring on July 27, 2010 is based on unproven charges, unjust, unwarranted and in violation of the Agreement.
2. As a consequence of the violation referred to in Part 1 above, we request that the discipline be reversed and Mr. Wanklyn be made whole as if there had been no discipline issued and no dismissal from service. His record shall be expunged of any mention of this discipline and he shall be paid for all hours that he would have worked absent the dismissal, including overtime and he shall be reimbursed for time lost attending the hearing.

STATEMENT OF BACKGROUND

At the time of the events giving rise to Claimant's dismissal from service of the Carrier, Claimant had accumulated more than seventeen (17) years of credited service and was regularly assigned as a Sectionman working in the vicinity of Seneca, Kansas under the direct supervision of Foreman Robert J. Kenworthy.

On Monday, July 26, 2010, Foreman Kenworthy conveying instructions he received from Track Inspector, M. Young informed Claimant and Truck Driver, Tim Hiltibrand that track sections at Mile Post 64.30 (between Oneida and Sabetha), Mile Post 66.40 (between Oneida and Sabetha), Mile Post 89.30 (by Axtell) and Mile Post 104.70 (by Home City) needed to be tamped down. Tamping the track required Claimant, Hiltibrand and Foreman Kenworthy to raise the track in order to put ballast underneath the track ties using a hydraulic track jack, a tampering bar, and shunts to accomplish the work assignment. As the locations of the four (4) Mile Posts were spread out over a lengthy portion of Kenworthy's assigned territory, completing the work required extensive travel back and forth. According to the Organization, all three (3) employees shared the tamping work equally in order to complete their assignment. While working at Mile Post 89.30, in the course of using the tamping bar to tamp down the track, Claimant felt a sharp pain in his left shoulder that traveled down his left arm. Claimant disregarded the pain and successfully completed the scheduled tamping work for the remainder of the work day.

On the following day, July 27, 2010, Foreman Kenworthy, Claimant and Hiltibrand were assigned the work of cutting brush from the tow path of the track at selected spots between Mile Posts 43.20 and 57.0 between Sabetha and Hiawatha Subdivision. The work entailed one man cutting brush with a chain saw and the other two (2) men removing the brush off the ground from the tow path. All three (3) men performed this work for the entire day without incident.

On Wednesday, July 28, 2010, Claimant called Kenworthy and informed him he needed the day off and therefore he would not be reporting to work. Although he did not inform Kenworthy of the reason he was reporting off from work, according to the Organization, Claimant hoped staying at home for the day would make his arm and neck get better. On Thursday, July 29, 2010, Claimant called Manager of Track Maintenance, Joe Guatney he would not be reporting to work and according to Guatney, the reason Claimant provided him for his absence from work that day was, he was "putting up hay" that day on the family farm. However, according to a notarized handwritten note dated August 13, 2010 by Claimant's parents, Claimant did not engage in any help on the farm on either July 28 or 29, 2010.

On Friday, July 30, 2010, Claimant reported to work on time as scheduled and worked the entire day. On that day, Kenworthy, Claimant, and Hiltibrand followed a detector car to obtain track and time so it could occupy track and perform inspections. This work assignment did not require a significant amount of physical work and said work assignment was accomplished for the entire day without incident. Following completion of the work day, Claimant still feeling the pain he experienced in his left shoulder and left arm from tamping down track on Monday, July 26th, sought medical assistance at Frankfort Clinic and was examined by a Dr. Timothy Minges. Claimant was diagnosed as having a pinched nerve and Dr. Minges prescribed pain medication to alleviate his pain.

On Monday, August 2, 2010 upon arriving at work, Claimant informed Kenworthy he needed to speak to Manager of Track Maintenance, Daniel Wurdeman regarding the injury to his left shoulder and the diagnosis he received the previous Friday by Dr. Minges of a pinched nerve. Kenworthy summoned Wurdeman to come to Seneca and upon his arrival, Wurdeman met with Claimant in his (Wurdeman's) truck and after asking him some questions regarding his injury, Wurdeman requested Claimant to fill out the required injury report. According to the Organization, Claimant imparted to Wurdeman and also indicated on the injury report that he had sustained the injury on Tuesday, July 27th rather than on Monday, July 26th. Following completion of the injury report, Wurdeman instructed Claimant to go home for the balance of the work day so as to rest and get healed.

On Monday, August 9, 2010, one (1) week to the day after meeting with Wurdeman and submitting the injury report, Claimant received from Wurdeman a Notice of Investigation which reads in pertinent part as follows:

Please report on August 16, 2010 at 1000 hours , for investigation and hearing on charges to develop the facts and place responsibility, if any, that while employed as Sectionman on Gang 5997, at Seneca, Kansas near Milepost 77, at approximately 0730 hours, on August 2, 2010, you allegedly failed to honestly report details of an alleged personal injury purportedly occurring on July 27, 2010.

These allegations, if substantiated, would constitute a violation of Rule 1.6, Part 4 (Dishonest), as contained in the General Code of Operating Rules (GCOR), effective April 7, 2010. Please be advised that if you are found to be in violation of this alleged charge, the discipline assessment may be a Level 5, and under the Carrier's UPGRADE Discipline Policy may result in permanent dismissal.

You are being withheld from service pending the results of this investigation and hearing.

The investigation was held as scheduled on August 16th and by Notification of Discipline Assessed dated August 27, 2010, Claimant was apprised by Superintendent, D. R. Witthaus that upon his careful review and consideration of all the testimony contained in the hearing transcript, he had found more than a substantial degree of evidence presented to warrant sustaining the charges brought against him of having violated GCOR Rule 1.6 (4) (Dishonest). Accordingly, Witthaus further apprised Claimant he was being assessed a Level 5 discipline under Carrier's UPGRADE Discipline Policy resulting in his dismissal from its service. Thereafter, the Organization on behalf of the Claimant filed the subject claim which is now before the Board for final disposition as the Parties were unsuccessful in reaching a settlement on the property.

CARRIER'S POSITION

Carrier asserts substantial evidence clearly proves Claimant did not sustain the bodily injury he claims to have incurred on Tuesday, July 27, 2010, as first reported by him in filing the very late injury report on August 2, 2010 and subsequently testified to by him at the investigation as having occurred on Monday, July 26, 2010. Carrier argues that had Claimant incurred an on-duty injury as he now claims he incurred, he would have reported it immediately and filled out the appropriate injury report, Form 52032. At the investigation hearing Claimant acknowledged he took his annual rules examination, therefore admitting he was aware of his responsibility to comply with the provisions of Rule 1.2.5 which imposes the following requirement:

All cases of personal injury, while on duty or on company property, must be immediately reported to the proper manager and the prescribed form completed.

Carrier asserts the record evidence shows without doubt that Claimant did not sustain an on-duty injury on July 27, 2010 as reported by him on his injury report since on that date, the Gang of which he was a member did not perform the work of tamping down track. Moreover, Claimant admits in his testimony at the investigation that on July 29, 2010 when he reported off from work he told MTM Gautney the reason was, that he was putting up hay that day on the farm. Carrier argues that had Claimant suffered the injury to his shoulder he claimed he had incurred, it is suspect that he would have had the ability to perform the chore of putting up hay.

Additionally, Carrier asserts the argument advanced by the Organization that Claimant failed to file a timely on-duty accident report was due to a perception on his part that reporting an injury would result in "unwanted consequences" is simply non-meritorious since even Organization witnesses who have many years of service seniority testified they know of no cases where an employee has been penalized as a result of reporting an on-duty accident/injury.

Based on the foregoing argument asserted, in successfully meeting its burden of proof, Carrier respectfully requests the Board to sustain the disciplinary dismissal of Claimant.

ORGANIZATION'S POSITION

The Organization submits that in addition to failing to meet its burden of proof that Claimant violated GCOR Rule 1.6 (4) (Dishonesty), in reporting details of an on-duty injury, the Carrier violated Rule 48 (o) of the Agreement by withholding Claimant from service prior to affording him a fair and impartial hearing. On that procedural basis alone, the Organization argues the instant claim must be sustained in full. With regard to withholding Claimant from service pending the decision of the investigation hearing,

the Organization asserts Claimant was suspended and, in effect, was disciplined prior to and without a fair and impartial hearing. The Organization submits that in so disciplining Claimant this had the effect of a prejudgment of his guilt before appearing at the investigation and presenting his defense.

As to Claimant's not immediately reporting his on-duty injury, the Organization asserts it was not apparent to him at the time he incurred the pain in his shoulder and arm that he had, in fact, sustained an injury. This only became apparent to Claimant when he concluded that he needed to report off from work a day or two in order to give his shoulder a rest. However, in resting his shoulder for two (2) consecutive days and then returning to work, he again experienced pain in his shoulder at the end of the work day which prompted him to seek medical assistance. When the medical examination revealed he had a pinched nerve and was prescribed medication to address his ongoing pain, the Organization submits he then immediately complied with the requirement of filing an on-duty injury report as he now had medical confirmation he had, in fact, sustained an on-duty injury. While the Organization acknowledges the record evidence establishes that Claimant could not have sustained the injury he reported as having sustained on July 27, 2010, the Organization argues it is obvious that this was simply a mistake on his part since the work assignment of tamping down track he attributed to performing when he sustained the injury was work that occurred on July 26, 2010. Thus, the Organization asserts, Claimant, if guilty of violating any rule is culpable only of not reporting his on-duty injury at the time it happened regardless of whether he believed he had incurred an on-duty injury or not.

Based on the foregoing argument asserted, 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.

Since we find the merits of the case not to be influenced pro or con by the procedural argument raised here by the Organization, we shall not address whether or not the Carrier violated Rule 48 (o) of the controlling agreement by withholding Claimant from service prior to convening the investigation hearing.

The Board is persuaded by the Organization's position that Claimant made a mistake in wrongly identifying July 27, 2010 on the written injury report as the date he sustained his on-duty injury. It is quite clear from the medical report that comprises part of the

written record evidence in this case, that Claimant did sustain an injury to his shoulder when he was performing the work of tamping down track on July 26, 2010. However, even though he was not sure at the time he had sustained said injury, he was nevertheless obligated by Rule 1.2.5 to immediately report the injury to Carrier. By not complying with the Rule, Claimant left himself open to the very charges that were alleged against him here, specifically that he committed an act of falsifying an injury and therefore engaged in deceptive and dishonest behavior. We are of the view that Claimant should have known what his responsibility and obligation was under Rule 1.2.5 as he had recently been examined on the rules and has been an employee for seventeen plus (17 +) years, a substantial period of time within which to become familiar with such an important rule even if he had not been subjected to a relatively recent review and examination of Carrier's rules including Rule 1.2.5.

We are perplexed by the conflicting testimony regarding whether Claimant performed the work on the farm of "putting up" hay on Thursday, July 29, 2010 when that was a scheduled work day since the rationale for not reporting for work either that day or the previous day, July 28, 2010 was to rest his shoulder and to ease his pain. If he in fact did engage in putting up hay on the farm the day before returning to work, it was poor judgment on his part since that would obviously have aggravated his condition to the point of causing him to seek the medical attention he sought after the conclusion of the work day on Friday, July 30, 2010. Since we are not totally convinced he engaged in performing the work of putting up hay, we find to give Claimant the benefit of doubt in resolving this conflict in testimony.

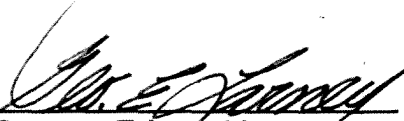
We are persuaded in light of all the given circumstances surrounding this claim to rule to reinstate Claimant to his employment with seniority unimpaired but without any backpay or other benefits to which he would have been entitled had he not been dismissed from service. We trust that Claimant has learned this very costly lesson that he needs to comply with all of Carrier's rules especially one that involves the very serious obligation incumbent on all employees to immediately report an on-duty injury even in cases where the injury is not immediately known but suspected as was the case here.

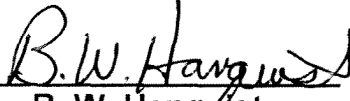
This Award is to become effective within thirty (30) days from the date signed by the Parties.


AWARD NO. 190

AWARD

Claim Sustained as per Findings


George Edward Larney
Neutral Member & Chairman


B. W. Hanquist
Carrier Member


T. W. Kreke
Employee Member

Chicago, Illinois

Date: July 20, 2011