PUBLIC LAW BOARD NO. 3241

In the Matter of:	)	
	)	
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,	)	National Mediation Board Administrator
	)	
Organization,	)	
	)	
and	)	
	)	Case No. 25
UNION PACIFIC RAILROAD COMPANY,	)	Award No. 25
	)	
Carrier.	)	

Hearing Date: January 12, 1988
Hearing Location: Sacramento, California
Date of Award: September 28, 1988

MEMBERS OF THE BOARD

Employes' Member: C. F. Foose
Carrier's Member: J. J. Shannon
Neutral Member: John B. LaRocco

STATEMENT OF THE CLAIM

"1. The Carrier's decision of May 1, 1986 to dismiss Track Laborer D. A. Shirley was in violation of the current Agreement, without just and sufficient cause and in abuse of discretion.

"2. The Carrier will now be required to reinstate Claimant to his former position with seniority and all other rights restored unimpaired and compensation for all wage loss suffered."

OPINION OF THE BOARD

This Board, after hearing upon the whole record and all evidence, finds that the parties herein are Carrier and Employe within the meaning of the Railway Labor Act as amended; that this Board has jurisdiction over the parties and the subject matter of the dispute herein; that this Board is duly constituted by an Agreement dated July 23, 1982; and that all parties were given due notice of the hearing held on this matter.

I. BACKGROUND AND SUMMARY OF THE FACTS

The Carrier alleged that Claimant, a Track Laborer on Gang No. 8801, fraudulently filed an on-duty accident report stating that he incurred an on-duty injury on April 8, 1986 when, in fact, Claimant was uninjured. Also, the Carrier charged Claimant with being absent from his assignment without proper authority for the three-day period from April 9, 1986 through April 11, 1986.

The following facts were adduced at a May 1, 1986 investigation.

Claimant testified that as he was walking in front of the auto spiker (in a stooped position) on April 8, 1986, the machine struck his hip. Claimant continued to work the remainder of his tour of duty. Shortly after the alleged mishap, one of Claimant's fellow workers asked Claimant how badly he was hurt. Claimant responded, "...about $60,000 worth." [Transcript at Page 30.] At the end of the day, Claimant completed and signed the appropriate personal injury form but he did not fill in Section 4 which pertained to medical treatment because he had not yet been examined by a physician. Later that evening, Claimant proceeded to the Elko Hospital. According to the hospital report, Claimant was suffering

from lower back pain. The hospital examination disclosed that there were no bruises or other physical symptoms visible on Claimant's body. The report also noted that Claimant should not work for a minimum of five days. Claimant gave the hospital report to the Timekeeper. While the record is vague, the Timekeeper evidently discarded the report after he received a second medical slip from the hospital physician. The doctor, at the behest of the Assistant Gang Foreman, wrote that Claimant was fit to perform light duty, provided he did not do any lifting during the next five days. An unknown person then added to the already signed personal injury report that Claimant was medically released to perform work in the Carrier's light duty program. The Assistant Foreman testified that he disregarded the information and work restriction on the hospital report since a nurse, as opposed to a medical doctor, had signed the report.

At the time that the auto spiker allegedly hit Claimant, a Mechanic was sitting on the spiker next to the Machine Operator. The Mechanic did not testify at the investigation. Over the vigorous objections of Claimant's representative, the Hearing Officer admitted the Mechanic's written statement into the record. In his statement, the Mechanic declared that the auto spiker approached but did not touch Claimant. He emphasized that the machine stopped short of hitting Claimant. A Laborer, who was at the scene, endorsed the Mechanic's statement; however, the Assistant Rail Gang Supervisor conceded that the Laborer could not

read or write English. The Assistant Foreman suspected that Claimant never suffered an injury because, in his opinion, if the automatic spiker had hit Claimant, it would have hit his lower legs rather than his hip.

Both the Assistant Foreman and the Assistant Rail Gang Supervisor asked Claimant to continue working in the Carrier's light duty program. Claimant rejected the offer and told the supervisors he would be off work per the recommendation in the hospital report. Claimant did not report to work on April 9, 10, and 11, 1986. The Assistant Rail Gang Supervisor related that while he did not give Claimant permission to be absent, employees have the right to participate or to refrain from participating in the light duty program. Claimant subsequently received treatment from another physician and a chiropractor, and he was off for more than five days.

On January 25, 1988, the Neutral Member of this Board issued an interim decision ordering the Carrier to reinstate Claimant to service with his seniority unimpaired. The record reflects that the Carrier subsequently complied with the Board's interim decision but Claimant lacked sufficient seniority to hold an assignment (at least as of February 16, 1988).

II. THE POSITIONS OF THE PARTIES

A. <u>The Carrier's Position</u>

The Carrier contends that Claimant's "$60,000" remark demonstrates that Claimant intended to fraudulently extort money from the Carrier for a nonexistent injury. Claimant's motive for misrepresenting that he had suffered an injury was to obtain a

windfall. If Claimant were truly injured he would not express the nature of his injury in monetary terms.

Claimant obviously was unhurt because two eyewitnesses stressed that the auto spiker did not hit Claimant. The Hearing Officer could properly admit the statement of the Mechanic who was absent from the investigation. Hearings are not conducted like trials in a court of law. The Hearing Officer could also place great evidentiary weight to the statement, since the Mechanic was an unbiased observer. Furthermore, the hospital could not find any physical manifestation of the alleged injury. There were no bruises, marks, or pierced skin on Claimant's body. Therefore, Claimant reported a false injury.

Last, the Carrier avers that Claimant lacked permission to be off three days following the purported accident. Neither his Foreman nor a higher level supervisor approved his absence. On the contrary, since the treating physician had cleared him to perform limited duties, Claimant should have reported to work.

B. The Organization's Position

The hospital report excuses Claimant's absence. The report indicated that Claimant should not work for at least five days. The Carrier would have disciplined Claimant if he had aggravated the injury while working. Moreover, under the Carrier's light duty program, employees may voluntarily perform light duty or they can elect to stay away from work.

Claimant did not receive a fair and impartial hearing. The hearing officer improperly relied on statements from absent witnesses. A Laborer signed one of the statements but there is no

showing that he understood the contents of the statement. The Organization was deprived of an opportunity to cross-examine the Mechanic on the accuracy of his written statement.

The Carrier did not prove that Claimant concocted an injury. The hospital report confirmed that Claimant was suffering from lower back pain the evening after the mishap. He received treatment not only from the hospital but he also had to undergo extensive chiropractic therapy.

In summary, the Carrier imposed discipline on Claimant solely because he had suffered an on-duty injury withut any evidence that Claimant was responsible for the injury. Since the Carrier could not blame Claimant for causing the accident, the Carrier accused him of falsifying an injury report.

III. DISCUSSION

The Carrier bears the burden of proving, with substantial evidence, that Claimant committed the two charged offenses. Substantial evidence means more than conjecture, speculation, or a suspicion that Claimant may have been guilty. In this particular case, the Carrier's conclusion that Claimant committed the two charged offenses was premised on speculative, unreliable and inadequate evidence. In addition, most of the record evidence refutes the modicum of evidence which supports the Carrier's guilty finding.

The Carrier correctly points out that the Hearing Officer may, at his discretion, admit written statements into the investigation record. However, the deciding official should discount the probative value of such statements inasmuch as the Organization was

deprived of an opportunity to cross-examine the declarant on the contents of his written statement. The Carrier did not explain why the Mechanic did not attend the investigation especially since he witnessed the incident. Also, this Board notes that the Mechanic had a motive for asserting that the auto spiker did not hit Claimant. If the machinery contacted Claimant, the Mechanic may very well have been subject to discipline for breaching Carrier safety rules. Therefore, the Mechanic's statement, standing alone, does not constitute substantial evidence that Claimant did not suffer an injury.

While Claimant's "$60,000" comment was inappropriate, the hearsay statement does not necessarily mean that he was uninjured. At most, the remark shows that Claimant intended to hold the Carrier fully accountable for whatever damages he suffered.

The Timekeeper and the Assistant Foreman mishandled the medical records. After reading the hospital report, they were aware that Claimant would be off work for at least five days, and yet they pressured the treating physician into releasing Claimant for limited duty. Next, the Timekeeper recklessly discarded the original hospital statement. (The record does not disclose if the Assistant Foreman instructed the Timekeeper to throw away the report.) Moreover, someone added information to the personal injury form after Claimant had signed it. The investigation record strongly suggests that some unknown person was tampering with the evidence to make it appear as if Claimant was falsely reporting an injury.

The Assistant Rail Gang Supervisor frankly conceded that Claimant had a right to turn down an opportunity to perform limited duties while recovering from his injury. Claimant cannot be penalized for exercising this right. Therefore, the Carrier did not prove that Claimant was absent without proper authority during the three days following the accident.

This Board emphasizes that its decision herein is narrow. We are not making an affirmative finding that Claimant actually suffered an on-duty injury on April 8, 1986. This Board simply holds that the Carrier did not come forward with substantial evidence that Claimant deliberately feigned an on-duty injury to extract money from the Carrier.

The third paragraph of Rule 20 sets forth the proper remedy.

AWARD AND ORDER

Claim sustained. The Carrier shall exonerate Claimant in accord with the third paragraph of Rule 20. The Carrier shall comply with this award within thirty days of the date stated below.

Dated: September 28, 1988

C. F. Foose
Employes' Member

J. J. Shannon
Carrier's Member

John B. LaRocco
Neutral Member