PUBLIC LAW BOARD NO. 3241

In the Matter of:	)	National Mediation Board Administrator
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,	)	
Organization,	)	
and	)	
UNION PACIFIC RAILROAD COMPANY,	)	Case No. 41 Award No. 41
Carrier.	)	

Hearing Date: June 4, 1992
Hearing Location: Sacramento, California
Date of Award: April 16, 1993

MEMBERS OF THE BOARD

Employes' Member: C. F. Foose
Carrier Member: D. A. Ring
Neutral Member: John B. LaRocco

ORGANIZATION'S STATEMENT OF THE CLAIM

1. That the Carrier's decision to dismiss track Laborer Mr. J. M. Vasquez based on unproven charges, was in violation of the provisions of the current Agreement. Said action being without just and sufficient cause and in abuse of discretion.

2. The Carrier shall now be required to reinstate Claimant to his former Carrier position with seniority and all other rights restored unimpaired, with compensation for all wage loss suffered, and in addition all charges from his record with no reference made thereto in the future.

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.

On or about April 9, 1986, Claimant stated on an accident report that he had suffered an injury while off-duty, but on Carrier property, on Sunday, April 6, 1986 at about 9:15 p.m. According to the information Claimant placed on the accident report, he lost his balance while carrying a bag of groceries up the stairway to the outfit car.[1] Claimant slipped and fell down the stairs. He suffered a broken right ankle and underwent surgery at a local hospital. There were no witnesses to the accident.

Subsequently, Claimant instituted a lawsuit for one-half million dollars in damages against the Carrier under the Federal Employers' Liability Act (FELA). While the suit was pending, both Claimant's counsel and the Carrier's attorney received an anonymous handwritten note, dated November 3, 1987, stating that Claimant had suffered the injury to his leg at home rather than on Carrier property. Although the Carrier now suspected that Claimant's injury claim was fraudulent, it could not prove fraud without knowing the identity of the author of the anonymous letter. Shortly after the anonymous letter surfaced, Claimant's attorney withdrew from the case because he did not want to be involved in a potentially fraudulent scheme. On March 7, 1989, the Court dismissed Claimant's FELA action with prejudice due to Plaintiff's failure to prosecute.

---

[1] Claimant, who lived Ogden, Utah was reporting to the outfit car in Elko, Nevada so that he would be ready for the work week.

On March 17, 1990, Claimant's ex-wife called the Carrier's attorney and told him that Claimant had suffered the ankle injury at home while he was drinking heavily.[2] She further asserted that Claimant had intended to commit fraud on the Carrier and use the money he gained to open a business in Mexico. In addition, his ex-wife accused Claimant of being involved in smuggling illegal aliens into the United States from Mexico and that Utah Tax Authorities had accused Claimant of failing to pay taxes.

As a result of the information gleaned from Claimant's ex-wife, the Carrier charged Claimant with allegedly falsifying his accident report and defrauding the Carrier. The Carrier withheld Claimant from service pending an investigation which was held on March 31, 1990.

At the investigation, Claimant's ex-wife testified that Claimant was drinking heavily on Saturday evening, April 5, 1986. He arrived home at about 2:00 a.m. on Sunday, April 6, 1986 with some friends. Claimant continued to consume alcoholic beverages. At about 8:30 a.m., Claimant's ex-wife left the house. When she returned at 10:30 a.m., she found Claimant laying on the steps outside the front porch of the house. She did not see Claimant fall down the steps. Later in the day, at about 4:30 p.m., Claimant's wife got Claimant's clothes together because his ride to Elko would arrive at 6:00 p.m. Claimant's ex-wife observed that Claimant was limping. His shoe was only halfway on his right foot and his right ankle was very swollen. Claimant was able to walk to the car and a fellow employee drove him to the gang's work site at Elko.

[2] In 1986, Claimant was still married. Claimant and his spouse did not get divorced until February 2, 1989, after being separated for at least one year. The record does not reflect why Claimant's ex-wife happened to contact the Carrier's attorney on March 17, 1989, shortly after the divorce was finalized.

Claimant's ex-wife further testified that on Monday night, Claimant called her from the hospital and said that he going to have surgery on his ankle. Claimant then recuperated at home for two or three months. At some point during his home convalescence, Claimant told his wife that he hurt his ankle when he fell down the front steps of their house.

At the investigation, Claimant insisted that he broke his ankle when slipped and fell on the outfit car stairway. He conceded, however that he should have noted on the accident form that he had slipped and fallen on his front porch steps earlier in the day. The first fall (at home), Claimant asserted, was not serious because he could still walk. Claimant testified that he had merely twisted his ankle at home. Claimant speculated that the first injury did not contribute to the second injury. Finally, Claimant thought that his lawyer withdrew as his counsel on the FELA matter because the lawyer had concluded that Claimant was at fault for the accident.

Following the investigation, the Carrier dismissed Claimant from service.

As the Organization points out, there is no direct evidence of record demonstrating that Claimant misrepresented the true location of his ankle injury with the wrongful intent to extract monies from the Carrier. It is rare that direct evidence is available to prove an offense such as fraud which is, by definition, committed under a blanket of concealment. Thus, circumstantial evidence has the same probative value as direct evidence to implicate a guilty employee providing, the Carrier weaves a web of circumstantial evidence around Claimant. In this case, the Carrier has produced sufficient circumstantial evidence to prove that Claimant committed the charged offense.

For several reasons, the circumstances show that Claimant attempted to commit fraud on the Carrier. First, Claimant admitted that he intentionally omitted reporting his home accident

property. The ex-wife observed Claimant exhibiting the symptoms of someone who had fractured or broke his ankle.

Fourth, unless Claimant's first ankle injury caused him to fall down the outfit car steps, it is simply too coincidental that Claimant would fall down steps twice in one day and each fall would involve some injury to his right ankle. Claimant presumably fell down the steps at home because he was intoxicated. He was sober by the time he arrived at Elko. The more plausible explanation is that Claimant fell at home and then feigned the accident on the outfit car steps with the goal of bringing a FELA claim against the Carrier.

The cumulative effect of all of these circumstances shows that Claimant falsified the accident report.

Dishonesty is a serious offense warranting severe penalty. The Carrier need not tolerate employees who attempt to perpetrate fraud. Claimant expected the Carrier to be honest with him and he was under the same obligation to be honest to his employer.

AWARD AND ORDER

Claim denied.

Dated: April 16, 1993

C. F. Foose
Employees' Member

D. A. Ring
Carrier Member

John B. LaRocco
Neutral Member