PUBLIC LAW BOARD NO. 4244

Award No. 341
Case No. 347

PARTIES TO DISPUTE: Brotherhood of Maintenance of Way Employes
and
BNSF Railway
(Former ATSF Railway Company)

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement on June 18, 2004, when it withheld and later dismissed the Claimant, H. M. Nevarez, from service for failing to provide factual information about an injury he sustained on March 3, 2004; in violation of Rules 1.2.7, and 1.6 of the Maintenance of Way Operating Rules.

2. As a consequence of the violation referred to in part (1), the Carrier shall immediately return the Claimant to service with seniority, vacation and all other rights restored, remove any mention of this incident from his personal record, and make him whole for all time lost account of this incident. [Carrier File No. 14-04-0127. Organization File No. 190-13I3-042.CLM].

FINDINGS AND OPINION:

Upon the whole record and all the evidence, the Board finds that the Carrier and Employees ("Parties") herein are respectively carrier and employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted by agreement and has jurisdiction of the dispute herein.

The Claimant, Mr. Herman M. Nevarez, first entered the Carrier's service in 1966. He resigned in 1967 and was reemployed in 1973. He was working as a Trackman in the Maintenance of Way Department on March 3, 2004 and thereafter until his dismissal from the Carrier's service on July 19, 2004.

The Claimant was directed to attend a formal investigation on June 28, 2004, in a notice served him by Division Engineer Denver R. Gilliam, and which reads, in part, as follows:

> [T]o determine all facts and place responsibility, if any, in your alleged failure to properly provide factual information regarding your report of an on-duty personal injury of March 3, 2004, in possible violation of Rules 1.1 (Safety); 1.2.7 (Furnishing Information); and 1.6 (Conduct) of the Maintenance of Way Operating Rules . . . BNSF's first knowledge of this was on June 16, 2004.

The investigation was postponed until July 13, 2004, by request of the Organization. A transcript of testimony and evidence submitted in the investigation appears in the record before this Board.

The Claimant testified that he suffered a personal injury on the job on March 3, 2004, and that he reported it to his Foreman, Mr. Esteban R. Gutierrez. The injury consisted of a swollen right hand and wrist. He said that Mr. Gutierrez did nothing at the time, but asked about his condition the following day, March 4, 2004. When he displayed his swollen hand, he was allowed to perform lookout duty for the work crew, which would not require him to use his hand for heavy work.

In a statement which was written on June 29, 2004, Mr. Gutierrez gave his account of events on March 8, 2004. His statement reads:

> On March 8, 2004 I was the Foreman for the Support Gang, we were doing quality behind the Super Surf-Gang. That day I noticed Mr. Nevarez wasn't holding his tool right. I ask Mr. Nevarez if he was ok, he reply by said yes. So I ask him again are you sure your ok, he said, yes don't worry. I call everybody to side of the track to have a job briefing. I ask Mr. Nevarez whats going on. Mr. Nevarez told me he hurt his right wrist at home. I ask him are you sure. He said yes. That day I made a letter saying that Mr. Herman Nevarez got hurt at home, not at work. I told Mr. Nevarez what the letter said in Spanish, he said he understood. Before he sign it I ask him again are sure, he said yes don't worry. After that Mr. Nevarez sign the letter on his own will. [Exhibit No. 7]

Mr. Gutierrez testified that he wrote a statement for the Claimant to sign, and read it to him in Spanish. He gave it to him to be signed and stated that it appeared the Claimant read the letter, which was handwritten in English, and signed it. The letter is dated March 8, 2004, and reads:

> 0620 [hours] I Herman Nevarez take responsibility for my right hand. I got hurt at home, my right wrist. I did not get hurt at work. I reported this to my foreman E. R. Gutierrez. [Exhibit No. 6]

On cross examination, Mr. Gutierrez denied having any discussion with the Claimant about an injury on either March 3 or 4, and said he did not see anything wrong with the Claimant's hand until March 8, 2003. (It appears March 5-6-7 were rest days.)

The Claimant acknowledged that he signed the above statement, but denied that he either read it or it was read to him. He said that Mr. Gutierrez gave him two Advil "pills" to take for swelling and pain.

More than two months later, on May 10, 2004, Roadmaster John J. Palacios testified that it had been brought to his attention that:

> . . . Mr. Nevarez had some problem with his right arm. He had some of his fellow workers and his foreman complaining about him not being able to perform his duties and not being able to pull his fair share of the work. . . . [Transcript page 45]

The Claimant was brought to Mr. Palacios's office, accompanied by Foreman Emilio R. Corchado. Mr. Corchado and Mr. Palacios both testified that when asked about his injury, the Claimant said it happened at home. The Claimant testified that he feared he would be "fired" if he admitted that he'd been injured on the job. [Transcript page 64]. Since the Claimant would begin three rest days after the day of their meeting, followed by his vacation, the Claimant told Mr. Palacios he would get treatment and "he wasn't going to have any problems pulling his weight on the gang." [Transcript page 50]. Mr. Corchado signed a written statement on June 28, 2004, describing the meeting on May 10:

> To whom it may concern, I Emilio M. Corchado witnessed on May 10, 2004 in Fresno, CA. a conversation between Roadmaster John J. Palacios and Herman M. Nevarez concerning an injury to his right hand and wrist.
>
> Roadmaster Palacios asked Herman if he got hurt at work, and Herman said no, that he got hurt at home, so Palacios instructed him to take it easy until he got better. [Exhibit No. 8]

The record shows that the Claimant consulted a physician on May 28 and June 1, 2004, whose written diagnosis was "tendonitis [*sic*] right forearm." [Exhibit No. 9]

Manager of Safety James Portz testified that on or about June 10, 2004, he was asked to assist in arranging medical treatment for the Claimant who "had an obvious swollen arm from an unknown condition." [Transcript page 16]. He made arrangements for the Claimant to be seen by a medical contractor used by the Carrier, but he understood the medical issue was not work related.

Division Engineer Gilliam testified that he saw the Claimant and some other Maintenance of Way employees in Stockton, California, on June 15, 2004, and was told by one of them that the Claimant had injured his wrist. The Claimant, according to Mr. Gilliam's testimony, told him that he had hurt his wrist on the job on March 3, 2004. [Transcript page 31]

On June 16, 2004, Mr. Portz stated that he was called to meet with Roadmaster Wayne Morris, the Claimant, and Mr. Corchado, in Mr. Morris's office. The Claimant spoke in Spanish

and Mr. Corchado interpreted for him. Mr. Portz said the Claimant wanted to report an on-duty personal injury which occurred on March 3, 2004. Mr. Portz was aware of the statement signed by the Claimant on March 8, 2004 — Exhibit No. 6, above — and he expressed concern about the apparently conflicting accounts being offered by the Claimant. He told the Claimant the conflicting accounts might result in an investigation of the circumstances. He nevertheless gave the Claimant a blank personal injury report, and sent him to a hospital for evaluation, accompanied by Mr. Corchado. At the hospital, Mr. Corchado filled in the on-duty injury report as directed by the Claimant, who then signed it. He described the injury as "Swelling of the wrist & hand on the right, and also pain." In the space on the form calling for a description of how the injury occurred, the report states, "Swinging a sledge hammer hitting a tie plate at m.p. 1047.4." [Exhibit No. 5]

In his closing statement in the investigation, the Claimant asserted that when he reported his injury to Foreman Gutierrez on March 3, 2004, he felt he'd fulfilled his duty to report his injury to an immediate supervisor, and that when Mr. Gutierrez prepared a statement for him to sign on March 8, 2004, he was told it was a report of his injury to Roadmaster Palacios.

On July 19, 2004, the Hearing Officer wrote the Claimant, advising his decision on the investigation:

> This letter will confirm that as a result of formal investigation on July 13, 2004, concerning your failure to properly provide factual information regarding your report of on-duty personal injury of March 3, 2004, you are dismissed from employment for violation of Rules 1.2.7 (Furnishing Information) and 1.6(4) (Conduct - Dishonest) of the Maintenance of Way Operating Rules . . .

The Organization promptly appealed the above disciplinary decision to the Carrier's Labor Relations Department. It argues that the Carrier did not afford the Claimant a fair and impartial hearing, because it failed to call all witnesses whose testimony could have thrown light on the matter. It argues that the information which could have been developed was important, whether "for or against anyone," to determine whether there was a valid foundation for the charges against the Claimant.

The Organization further argues that testimony of the two witnesses it had asked the Carrier to make available would have substantiated the Claimant's testimony that he was in fact injured while on duty, that Foreman Gutierrez attempted to "cover up" the injury, and that further efforts were made by other Carrier officers to conceal the fact of the injury. The Organization charges that the Claimant was told by an officer that if he filled out an on-duty injury report, he'd end up in an investigation and be fired. It suggests that the threat unnerved the Claimant so that he became uncertain what to do.

The Organization also argues that when the Claimant signed the statement prepared for him by Foreman Gutierrez on March 8, 2004, he was unable to read English and he did not understand what he was signing. The Organization points to the Claimant's 32 years of service, with no prior injuries reportable to the Federal Railroad Administration, and with no disciplinary entries since 1990.

The Carrier rejoins that the Organization had the opportunity to call witnesses on the Claimant's behalf, but failed to do so. The Carrier asserts that it developed substantial evidence during the course of the investigation to prove that the Claimant submitted two different statements with respect to his injury. After making an initial inquiry into the circumstances of the case, the Carrier called all employees who had pertinent information as witnesses. It suggests that the Organization has failed to show that the witnesses it claims should have been called would have had pertinent knowledge.

The Carrier further argues that the case rests on who is more credible. Although the Claimant alleges that he does not read English and did not know what he was signing on March 8, 2004, the record shows that he had passed many training and testing events which were available only in English. The Carrier rejects the Claimant's assertion that he had help on the tests. The Carrier characterizes the Claimant's defense of his conflicting reports as "a fantastic story," and it denied the Organization's appeal.

The Organization responded to the Carrier, further renewing its argument with respect to the Carrier's decision not to call the two witnesses, whose presence was requested by the Organization. It argues that the investigation is held for the purpose of determining the facts, not just as a prosecution of the employee alleged to have violated the Carrier's rules. The Hearing Officer is charged with responsibility to develop the facts, whether good or bad. He should be impartial, neither interested in proving nor disproving the charges against the employee. The Organization argues that failure to have present those witnesses it requested, and who would have damaged the Carrier's case, amounts to preconceived advance judgment. The Organization believes the Carrier did not comply with the Agreement's Discipline Rule.

The Board has considered the lengthy transcript and correspondence in this case, and the arguments set forth by the Parties.

Much of the Parties' arguments in this rest upon the credibility of those who offered testimony. In large part, the testimony of those witnesses who appeared at the Carrier's direction was consistent, one with another, and there is little in the record to support the Claimant's own testimony. True enough, there was a witness who did not appear, and that issue will be addressed below.

The Claimant signed a statement written out for him by Foreman Gutierrez on March 8, 2004, in which he states, "I got hurt at home." Mr. Gutierrez said he read the statement to him in Spanish, and the Claimant took it and appeared to be reading it before it was signed. The Claimant said it was not read to him and denies that he can read English. The Board cannot resolve these directly conflicting accounts. The Hearing Officer is in a better position to assess the credibility of those who offer testimony before him.

If the Claimant's English language capabilities are so poor that he cannot read, write, nor speak in English, his confusion would be understandable. From the evidence in the record, however, the Board is not persuaded that his language skills are limited to that degree. Two witnesses gave testimony of the multitude of tests and required language skills inherent in the Claimant's work, all of which require command of the English language. Mr. Gilliam named safety certification, rules examinations, hazardous materials handling, safety rules, bridge rescue, Engineering Instructions, track buckling , all requiring proficiency in reading and writing English. Mr. Palacios testified that the Claimant could not have taken all the above courses and tests if he could not read and write English. The Board notices that the Claimant's personal record has almost three single-spaced typewritten pages of training successfully accomplished by the Claimant. His personal record shows that he was qualified as a Section Foreman in 2003, a position of responsibility which would require greater communication skills and the ability to fill out various forms and reports.

It appears that he is more comfortable when using Spanish, and for his convenience, an interpreter was used in the investigation, but some of his answers were given in English, and all the documentation is in English, including the Maintenance of Way Operating Rules he said he was conversant with.

It is clear that the Claimant offered conflicting information as to the cause of his injury. Regardless of which account is the correct one, he is caught on the horns of a dilemma. If he was injured at home, as he contended until June 16, 2004, he filed a false personal injury report on that date, alleging that he was injured on the job. If, on the other hand, he was indeed injured on the job on March 3, 2004, he failed to promptly report the injury as required by the Carrier's rules. He, of course, argues that he did report his injury to Foreman Gutierrez on March 3, who then took it upon himself to "cover up" the injury by preparing a false statement for the Claimant's signature. If that scenario is correct, then we are left to wonder why the Claimant didn't take the statement to another bilingual employee to have it read to him, if Mr. Gutierrez did not read it. We are also left to wonder what would have motivated Mr. Gutierrez to engineer a "cover-up."

In spite of all this alleged mishandling, the Claimant had an opportunity to set the record straight when he met with Roadmaster Palacios on May 10, 2004, but he continued to set forth his original story — it was an off-duty injury.

This Board is unable to resolve the credibility issues in this case, and therefore, cannot find that the Hearing Officer's determinations of credibility are so unreasonable as to warrant reversal of his decision. Two issues remain for consideration.

First, the Organization's complaint that the Carrier failed to have present the witnesses whose testimony was deemed necessary for a fair and impartial hearing. On June 22, 2004, the Organization wrote the Division Engineer, asking that the investigation site be changed from Bakersfield to Stockton, California, and in a separate paragraph made this request:

> We are also requesting the Carrier bring E. R. Gutierrez [employee number] and W. S. Maestas [employee number] as Carrier Witnesses, as they have pertinent information to this Investigation.

The location of the investigation was changed to Stockton, as requested, but the Carrier made no response to the request for the two named witnesses. Mr. Gutierrez was present, however, and when the investigation was convened, the Claimant's representative inquired about the absence of Mr. Maestas. The Hearing Officer rejoined with citation of Agreement Rule 13(k), which does not address how witnesses are to be summoned, but rather, compensation for those employee witnesses who are present at the request of another employee.

Mr. Gutierrez was present and his testimony was not favorable, from the Claimant's point of view. Mr. Maestas was listed as a witness to the Claimant's injury on the on-duty injury report, and for that reason alone, it would appear that his presence might have offered some enlightenment. The Carrier did not acknowledge the request for these witnesses in any way, although it did change the investigation site. Its silence could be construed either of two ways: It would have the witnesses present or it was ignoring the Organization's request. It should have communicated either compliance or refusal — how would the Organization know if its request was not acknowledged?

Nevertheless, in view of the Carrier's silence in response to this request, the Organization should have sought resolution of the matter. If the Carrier refused to call the witnesses and made that refusal known, the Organization could have acted in a positive way to get their testimony in a statement, by telephone, or other means. The Carrier could hardly challenge its inability to cross examine a written statement if it declined the opportunity to have the known witness present.

The findings of the following Boards are instructive:

Award No. 7, Public Law Board No. 5998

> . . . This instant case deals with credibility and evidence. . . . First of all, as the Organization reasonably and properly argues, the credibility issue could have been

> perhaps resolved in a reasonable manner in this case if the Carrier would have called the only other eye-witness, so to speak, to testify at the investigation. This witness was Maintenance of Way Foreman Puckett. It remains unclear why the Carrier did not do so. Obviously, as moving party, the Carrier chose to leave out such corroborating testimony/evidence from the record at its own risk. The Carrier improperly argued that it was the obligation of the Claimant to have called this witness, if she would have wished to do so, in her own defense. In this respect the Board can but observe that the responsibility for establishing a prima facie case in this instance lies with the Carrier. As a matter of due process, the Carrier cannot shift that burden to the Claimant. . . . [Underscoring in Award]

Third Division Award No. 33490

> . . . The record is clear that the Carrier did not make available, despite the Organization's request, the Train Director and other Train Dispatchers who had knowledge of the incident at the Investigation. As is clear from the facts of the incident, the Train Director's conduct, and perhaps his complicity, are critical to the charges against the Claimant and particularly his defense to the charges. Thus, by failing to make this critical witness available upon request, the Carrier failed to give the Claimant the opportunity to confront the evidence of the Carrier that he was guilty of the charges. . . .

Second, the Claimant's disciplinary record shows that he was given a 30-day suspension in 1977, but the nature of the rule infraction is not recorded. In 1990 he is shown as having an accumulation of 30 total demerits, but no loss of time is recorded. His record is clear thereafter, until his dismissal on July 19, 2004.

The Board concludes that the Claimant either misrepresented an on-duty injury as an off-duty injury on March 8, 2004, or he misrepresented an off-duty injury as an on-duty injury on June 16, 2004. Whatever the case, his motives are unclear. Perhaps he suffered an on-duty injury and feared discipline if it were reported as such. When, however, his condition did not improve, but rather became worse with the passage of time, he changed his mind and decided to tell the truth, in order to obtain treatment and perhaps compensation for his injury. This is speculation. We cannot discern the truth. In any event, his depiction of Mr. Gutierrez as a mean-spirited deceiver who duped the Claimant and conspired with Carrier Officers to cover up an on-duty injury lacks both motive and credibility.

The Board is persuaded that the Hearing Officer correctly concluded that the Claimant indeed violated Maintenance of Way Operating Rules 1.2.7 and 1.6(4). Rule 1.2.7 states,

> Employees must not withhold information, or fail to give all the facts to those authorized to receive information regarding unusual events, accidents, personal injuries, or rule violations. [Underscoring added]

Rule 1.6(4) requires that employees must not be dishonest.

The Board believes that permanent dismissal is more severe than warranted, however, because the Carrier failed to forthrightly communicate whether or not it would accede to the Organization's request for the presence of the witnesses, and because of the Claimant's long years of responsible service to the Carrier. He should understand hereafter that complete honesty is required, whether or not it might reflect negatively on himself.

The dismissal is converted to a lengthy suspension. The Claimant shall be returned to service with seniority and other rights restored, but without pay for time lost — when he can pass the usual return-to-service examinations. Procedures to restore him to service shall begin within thirty (30) days from the date of this Award, affixed below.

AWARD

The claim is sustained in accordance with the Opinion. The Carrier is ordered to comply within thirty (30) days from the date of this Award.

Robert J. Irvin, Neutral Member

R. B. Wehrli, Employe Member

William L. Yeck, Carrier Member

4-21-05
Date