PUBLIC LAW BOARD NO 5850

Award No.
Case No. 70

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes

(The Burlington Northern Santa Fe Railroad

STATEMENT OF CLAIM:

1. That the Carrier's decision to remove Eastern, Trackman Terry L. Hogg from service was unjust.

2. That the Carriers now reinstate Claimant Hogg with seniority, vacation, all benefit rights unimpaired and pay for all wage loss as a result of Investigation held thirteen hours, January 28, 1998 continuing forward and/or otherwise made whole, because the Carrier did not introduce substantial, credible evidence that proved that the Claimant violated the rules enumerated in their decision, and even if Claimant violated the rules enumerated in the decision, removal from service is extreme and harsh discipline under the circumstances.

3. That the Carrier violated the Agreement particularly but not limited to Rule 13 and Appendix 11, because the Carrier did not introduce substantial, credible evidence that proved the Claimant violated the rules enumerated in their decision.

FINDINGS

Upon the whole record and all the evidence, the Board finds that the parties herein are carrier and employee within the meaning of the Railway Labor Act, as amended. Further, the Board is duly constituted by Agreement, has jurisdiction of the Parties and of the subject matter, and the Parties to this dispute were given due notice of the hearing thereon.

Claimant, On January 13, 1998, was issued a notice of an Investigation reading, in pertinent part, as follows:

> "Arrange to attend formal investigation to be held on January 28, 1998, at 1:00 PM, Superintendent Operations' Office...concerning your alleged late reporting and possible falsification of on duty injury on September 24, 1997 while assigned as trackman at Newton, Kansas so as to determine the facts and place responsibility, if any, involving possible violation of Rules S-1.2.5, S-1.2.8, S-28.1.3, S-28.2.5, Sec. A and Sec. C, S-28.2.7, S-28.3.1, S-28.6 and S-28.13 of the Safety Rules and General Responsibilities for All Employees effective March 1, 1997, as revised."

The Investigation was held as scheduled, and the Carrier did, in February, advise Claimant that as a result of the Investigation he was dismissed from employment with the Carrier.

The facts as adduced at the Investigation, clearly established that Claimant misled the Carrier (namely two Roadmasters and one Foreman) into believing pain he suffered on September 24, came from an aggravation of an earlier back injury he suffered 12 years prior. Each Supervisor, when talking to Claimant on separate occasions, asked if he wanted to go see a doctor, did the injury occur on the job, and in each instance Claimant stated the injury, i.e., the soreness in the lower back, was an extension of an injury he suffered 12 years before and he thought with a little rest he would be fine. In fact, his Foreman who had worked with Claimant for years thought little of Claimant's ailments as he had, from time to time, taken time off for the same reason. As of the alleged date of occurrence, no Supervisor asked nor completed an injury report, each lulled by Claimant's contention of an aggravation of an old injury.

After the 24th, Claimant was off until the 29th and upon reporting, advised the Relief Roadmaster that he still was not feeling well. On September 30, Claimant furnished a doctor's statement indicating Claimant suffered from chronic back pain and he then placed restrictions upon Claimant's physical activities. With that statement and Claimant's prior history, the Carrier accepted Claimant in its Transition Work Period for a maximum of 30 days. At the conclusion of the 30 days, Claimant was to furnish a statement releasing him for full unrestricted duty or the Carrier would then place him on medical leave until such a time as his health improved sufficiently to return to unrestricted duty.

On October 28, 1997, the Claims Department received a letter from an attorney advising Claimant was their client, and the law office would be representing Claimant for the alleged low back injuries allegedly sustained on September 29, 1997, while nipping and building rail track panels on concrete. The Claims Department told the attorney they had no knowledge of any such injury, and the law firm indicated that perhaps Claimant had not yet filed a report with the Carrier.

On November 11, he furnished a doctor's report regarding his condition, and again on

December 19, 1997, he wrote Carrier complaining that since he had been injured, he supposed he would not get a jacket. This December 19, 1997 letter was the first time Claimant ever advised any of his Supervisors that he had incurred an injury.

The Carrier immediately contacted Claimant to have him come in and complete the injury report. Finally a time was set, January 9, 1998, at 5:30 PM, but Claimant arrived at the Roadmaster's office at lunch time on the 9th and left a completed injury report stating he did not want to talk to the Supervisor. Claimant stated on the report of January 9, 1998, that he injured himself between 10:00 AM and 12:00 Noon on September 24 while "building panels on main line and working on concrete platform."

Finally, three months and two weeks after the alleged incident, Claimant filed the injury report. Prior hereto he had never alluded to a new injury, only referring to the pain as an off-shoot of the old injury. He must have told his lawyer the injury occurred on September 29, and he told the Carrier it happened on September 24.

During Claimant's testimony, he denied ever telling either his Foreman or either of the two Roadmasters that the current disability stemmed from a previous injury. He also denied telling the Relief Roadmaster that when he was off on September 25, 26, 27 and 28, that on the 25th and 26th he started to feel better and that on the 27th he commenced picking up things in his yard, only to re-aggravate the injury.

He also indicated that his lawyer was in error. The injury was on September 24, 1997, not on September 29, 1997.

Why Claimant did not come right out on September 24, 1997, and complete an injury report, only he knows. Why he consistently refused medical assistance when offered and why he misled his Supervisors from September 24, 1997, until January 9, 1998, into believing his injury flowed from an old prior injury, only he knows, but his reluctance to tell it like it is has cost Claimant his job as the Carrier has brought forth substantial evidence that clearly established Claimant's culpability for the

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charges assessed.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

Robert L. Hicks, Chairman & Neutral Member

Rick B. Wehrli, Labor Member

Thomas M. Rohling, Carrier Member

Dated: June 5, 1998