PLB No. 7633
Award No. 215
Case No. 215

PUBLIC LAW BOARD NO. 7633

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES)
DIVISION – IBT RAIL CONFERENCE)
)
and)
)
UNION PACIFIC RAILROAD COMPANY (FORMER)
MISSOURI PACIFIC RAILROAC COMPANY))

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STATEMENT OF CLAIM

"Claim of the System Committee of the Brotherhood that:

1. The Carrier's discipline (dismissal) of Mr. E. Aguilar, by letter dated March 9, 2023, for an alleged violation of Rule 1.6 Conduct – Dishonest; SSI 10-I: Union Pacific Policies (Statement on Ethics and Business Conduct); 'The How Matters' Policy; and Rule 1.6: Conduct which stipulates that any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employes is cause for dismissal and must be reported and indifference to duty or to the performance of duty will not be tolerated, was exceedingly harsh, imposed without the Carrier having met its burden of proof and in violation of the Agreement (System File UP903JC23/1786497 MPR).

2. As a consequence of the violation referred to in Part 1 above, Claimant E. Aguilar shall now '… be returned to work with all vacation and seniority rights unimpaired, that the charge and discipline, issued per letter of March 09, 2023 from AVP Bridge Maintenance & Construction, Jeffrey Mancuso, resultant investigation held February 21, 2023, be removed from his personal record, that he be made whole for all time lost due to discipline issued in connection with these charges, and that he be reimbursed for any additional expenses, including those requested in the February 21, 2023 hearing, incurred that would have normally been covered by Carrier benefits, account the Carrier violated Rule 22, of our Agreement.' (Employes' Exhibit 'A-2')."

FINDINGS

Upon the whole record, after hearing, this Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction of the dispute herein, and that the parties to said dispute were given due notice of hearing in the matter and participated therein.

Eduardo Aguilar (the Claimant) at the time of his dismissal by the Carrier held the job of Bridge Welder Helper with eight years of service and no record of discipline. By letter dated January 31, 2023, he was requested to report for a hearing on February 9, 2023, to develop the facts and determine his responsibility, if any, in connection with the following charge:

> *On 1/13/2023, at the location of Eagle Pass, TX, at approximately 1000 hours, you allegedly provided a written statement dated 1/13/2023 with false information during an incident investigation. This is a possible violation of the following rule(s) and/or policy:*
>
> 1.6: Conduct – Dishonest
> SSI 10-I: Union Pacific Policies (Statement on Ethics and Business Conduct)
> "The How Matters" Policy

The January 31 letter added, "Under the MAPS Policy, this violation is a Dismissal event. Based upon your current status, if you are found to be in violation of this alleged charge, Dismissal may result." After a postponement an investigative hearing was held in this matter on February 21, 2023.

On January 11, 2023, the Claimant and three other employees were assigned to participate in refresher fall training. As part of the training the Claimant acted in the role of someone who is being rescued after a fall. This required him to ascend a ladder while wearing a harness. Attached to a ring on the harness were two sets of ropes. One set enabled the instructors conducting the training exercise to lift the Claimant off the ladder, suspend him in the air, and then lower him to the ground. The second set of ropes, called a belay line, was a safety, or back-up, line that would automatically take over should the first set of ropes snap or break. The belay line was fully capable of holding the Claimant suspended in the air and then lowering him to the ground.

During the training exercise on January 11, the sheathing on the rope that was holding the Claimant suspended in the air became damaged, partially exposing the cords of the rope beneath the sheathing. The instructor conducting the exercise noticed this and asked the person in charge of the belay line to tighten the line so that there would be no shock or danger to the employee being rescued. This was done. The instructor then lowered the Claimant to the ground. The belay line was not used at any time in the process. Later that evening the Claimant complained to his Manager that he free-fell about two feet and was injured during the exercise.

The Claimant's manager, a Sr. Manager of Bridge Construction, provided an undated written statement of his role concerning the events under investigation. He was called as a witness at the investigative hearing, identified his statement, and read it into the record. It stated, in pertinent part, as follows:

> On January 11, 2023, [the Claimant] was doing his fall refresher training in Spring, Tx. . . . [The Claimant] called me at 7:21 pm. The conversation was "Victor you need to write down what I am about to tell you. Today when we were doing fall refresher class we did a rescue and I was the victim, and I did not even know that I had free fall about 2ft. And the guys started

> telling me you're about to fall. I started freaking out, so then they brought me down and I saw the rope was about to brake [sic]. I just wanted to let you know my back feels funny."
>
> Then I called Russel [Director of Bridge Maintenance] to inform him what was the situation. Before that I called Enrique because I asked [the Claimant] if he had said anything to anyone, and he said to Enrique. So I called Enrique and Enrique said he never talked to Eddie about nothing like that. So Enrique tried to call [the Claimant]. And I called the [Claimant] and he didn't answer. At 7:23 pm he then texted me "driving, call you back."

According to the Manager's statement, in the Claimant's last text to the Manager on January 11th, the Claimant wrote, ". . . I just got home and I'm exhausted and tired. Have a goodnight. I will send you the statement or [sic of?] incident. Thank you, I apologize for not returning the call."

According to the Manager's written statement, the events that thereafter occurred were as follows. The next morning, January 12, 2023, the Manager was able to make telephone contact with the Claimant at around 10:30 a.m. He asked him, "Are you injured?" The Claimant said, "Yes." At the Manager's request, the Claimant agreed to talk to a nurse. The Manager arranged for a nurse to call the Claimant, and at 1:15 p.m. on January 12, the Claimant texted the Manager, stating that the nurse told him to call her the next day to see how he was doing; that he should rest for three days and take Tylenol or Aleve, and to keep moving so that his muscles did not get stiff. If his condition did not go away after three days, he was to visit a doctor for a checkup.

The Manager drove to Eagle Pass, Texas, and met the Claimant there the morning of January 13, and gave him the paperwork to fill out for an injury. In response to the Manager's inquiry, the Claimant said that he was "doing better" and moving his muscles "like the nurse said." The Claimant's job had been abolished or was about to be abolished [this information does not appear in the Manager's statement], and the Manager asked him if he was going to exercise his rights to bump somebody. He said that "he did not want to because it was too far. He would make more money doing traffic control." According to the Manager, as of the date of his written statement, the Claimant had not worked since the date of the incident.

The Claimant filled out the paperwork regarding his alleged injury and gave his Manager photos of the rope that was cut. He said that he brought the rope as a souvenir because he fell. The Manager asked him where he got the rope, and he said from the trash. The Claimant handed the harness he wore on the day of the incident to the Manager, and the Manager gave him a new harness. The next day, January 14, the Manager texted the Claimant, asking how he was feeling, and the Claimant replied that he was "a little bit better but still feel sore." The Manager responded, "I will check on you and keep you updated on any job so you can come back."

The Manager [to continue with the summary of his written statement] texted the Claimant again on January 16, inquiring about his condition, and the Claimant replied that he was "doing much better" and gave the Manager a thumbs up. On January 17 the Manager texted the Claimant that he needed the rope of which the Claimant took pictures. The Claimant agreed to provide it, but said that he would

need a receipt. The Manager stated that he also needed the inspection log, and the Claimant replied that that was no problem. On January 19, the Manager met with the Claimant in Eagle Pass, Texas, and received the rope from the Claimant, providing him with a receipt for the item. The Claimant also gave the Manager the inspection log. He asked the Claimant how he was feeling, and the Claimant said that he was feeling much better.

On Monday, January 23, the Claimant texted his Manager, stating that he did not get a bid and "was wondering if I can ride a bulletin in your gang." The Manager replied, "Sorry, Eddie, we cannot let anyone ride bulletins anymore." The Claimant thanked his Manager for trying to help him. On Friday, January 27, at 6:32 p.m. the Claimant texted his Manager, "Good morning [Manager]. I could not stand the pain today so I went to Stats Emergency and doctors prescribed me medication and gave me a copy of my MRI and x-rays." The Manager thanked the Claimant for letting him know. That concluded the Manager's written statement.

In reply to questions from the Organization representative, the Manager testified that the Claimant has worked for him "[o]n and off" and has been a good employee working under him. He gave the Claimant a new harness, he stated, because he was expecting him to come back to work. In response to questions from the hearing officer the Manager testified that prior to the January 11 fall protection training the Claimant's "gang got cut off" or was abolished. "He was still working for me," the Manager explained, he . . . was still entitled to 40 hours of his notice of abolishment."

The Union Pacific Railroad Report of Personal Injury or Occupational Illness filled out by the Claimant dated January 13, 2023, gave the date and time of the injury as 1/11/2023 at 9:00 or 10:00 AM. Other pertinent questions on the form with the Claimant's answers were as follows: Q. "What specifically caused the accident/injury/illness" A. "Fall Retrieval Rescue System equipment." Q. "What medical condition did the accident/injury/illness cause:" A. "Pelvic, shoulder arms, lumbar (lower back area)." Q. "When did you first become aware that this condition may have been caused by your work? How did you learn this?" A. "1/11/2023 after the training, when driving back home. At or about 7:00 p.m." Q. "Did equipment or tools cause or contribute to the cause of the accident/injury/illness?" A. "Yes." Q. "If yes, provide details (including equipment ID number):" A. "Fall retrieval rescue system. Improperly inspected." Q. "Did working conditions cause or contribute to the cause of the accident/injury/illness?" A. "Yes." Q. "Did other persons cause or contribute to the cause of the accident//injury/illness?" A. "No." Q. "Names, occupations and addresses of all crew members and/or other persons who witnessed or have any knowledge of accident/injury/illness:" A. "Danny Luna, Joe Fuentes, Scott, instructors Rodney Neblett, Mike Lowery, Pablo Ruiz." Q. "What are your symptoms?" A. "Pain, sore body." Q. "When were you first treated or diagnosed?" A. "Pending, if pain gets worse, will attend a medical doctor." Q. "Were you examined by a medical professional?" A. "Yes." Q. "If yes, give medical professional's name and address:" A. "By phone. Rosemary UPR nurse – advise[d] by nurse to take over-the-counter Tylenol or Aleve." Q. "If treatment was provided, please provide details including name of treating physician and facility." A. "Pending." Q. "Was prescription written?" A. "No."

Claimant also provided a detailed typewritten statement regarding the incident. He stated that before he climbed up a 12-foot ladder, the instructors attached a safety line to the D-ring of his harness to prevent him from falling to the ground. As he waited at the top of the ladder, he stated, the instructors attached a lower/upper double pulley safety line on his D-ring harness. "As they were pulling down safety device line," he wrote, "I felt a sudden whiplash and notices [sic] I had gone more than 2 feet down. I felt scared due to the whiplash of the rope. The Instructors told me not to make any moves because the safety line pulley had torn and was hanging by the threads." He continued, "I felt pressure on my legs. Everyone was saying not to make any movements."

The Claimant's written statement continued, "The instructors decided to pull me down slowly knowing that my life was endanger [sic]. I consider this inappropriate rescue and negligence of the instructors. I feel that the instructors did follow [sic did not follow?] the proper rescue steps and for not examine the equipment properly and didn't follow the UPRR guidelines. After the Incident we all went back to the seating area and before sitting down, Danny and I told Enrique Rivera that I almost felt [sic fell?] down to the ground. He responded by saying in Spanish (["]Te uviveras Morido"). I felt humiliated and lack of respect. I think this is an inappropriate behavior and unprofessional from the supervisor."

The Claimant testified that someone, perhaps the instructor, threw the rope on the ground, and he (the Claimant) picked it up. He took the rope to the pavilion, he stated, and sat down there. He was going to show the rope to Enrique, the supervisor, he testified, and told him, "I almost fell down." Enrique, according to the Claimant, responded in Spanish, "Te uviveras Morido," which, the Claimant stated, in English means, "You should have died." The reason he was going to explain to Enrique what happened, the Claimant testified, was that he did fall down. He explained that as he was being pulled up, he "just felt some sudden like the fall and the instructor said, don't . . . move because . . . the rope was hanging on the thread. And I looked up and one of the guys, Daniel Luna and Joe Fuentes they approached me be careful, it's tearing up. It's only hanging by the thread." Then, the Claimant testified, instructor Lowery said, "Don't move," and he (the Claimant) was pulled down slowly. "[T]hat's when," the Claimant stated, "we walked to the pavilion."

After the foregoing testimony by the Claimant, the hearing officer asked him, "But you said earlier that you almost fell? Did you actually fall or did you not fall?" He answered, "No sir. I did not fall." Asked whether instructor Lowery cut the rope with a knife, as he testified, the Claimant stated that he did. The inside of the rope did not tear, the Claimant testified. The fall protection system used for his training session on January 11, the Claimant testified, was a double pulley system and not the system testified to by the Carrier witnesses. The hearing officer recited before the Claimant the names of three witnesses who had testified that he did not fall, and then asked the Claimant, "Did you fall that day?" He answered, "I mean fall to the ground you talking about? Or I yanked myself, sudden yank." The hearing officer came back, "I'm asking if you fell, just fell." The Claimant replied, "I mean, I didn't fall to the ground. I can respond to that."

Asked whether his gang was abolished, the Claimant testified that his Manager announced that the gang was going to be abolished early in January, but that he also said that he did not know what

date he was going to abolish it. The Claimant acknowledged that he knew that at some point his gang was going away. He further acknowledged that the Manager was trying to help out the members of the gang by sending them for training so that wherever they placed themselves, they would have the needed training. The hearing officer asked the Claimant if he had an opportunity where he could bump somewhere else and place himself. He answered, yes, but that if he had to go all the way to Dallas for assignment to a headquarters gang, he would be unable to pay his bills and hurting financially. That is why, he explained, he decided not to go. Asked if it was correct that if he went to Dallas, he would no longer get per diem, the Claimant said that it was correct. He was working with the Manager, he testified, to try to find somewhere he could be placed so that he could stay on his gang and claim per diem.

Witness Michael D. Lowery, Senior Instructor – Workforce Resources, and the individual in charge of the January 11, 2023, fall protection exercise, read his written statement of the incident into the record:

> 1-11-23
>
> While the class was performing the last rescue of the day utilizing the Industrial Decender [sic Descender ?], I noticed the outside sheathing starting to tear at the overhead carabiner. I told Ronnie who was working on the belay line to tighten the line so there would be no shock or danger to the employee rescued. The rescue was completed without incident. The damaged part of the rope was removed and a new knot was installed.

In response to questions from the Organization representative he testified as follows. An employee's harness is made with what is called rip stitching that is designed to pop or tear if the harness is subjected to shock or is jolted. This will happen, he stated, with a shock load of about 400 foot pounds. Mass times distance, he stated, equals foot pounds. He explained that a person weighing 250 pounds suspended in the air is exerting 250 foot pounds against the stitching. If that individual fell one foot, that would exert a total of 500 pounds, he testified, and if two feet, 750 pounds. In the Claimant's case, the stitching on his harness did not tear during the incident. The ropes used, the Instructor testified, are extremely strong and durable, capable of holding a load around 9,000 pounds. On the date in question, the rescue system used was the force vector industrial descender system, and not a pulley system. There is no pulley. The apparatus they used works on a vectoring system where the rope runs over the carabiner.

In response to questions from the hearing officer, Mr. Lowery testified as follows. He identified the rope used in the incident involving the Claimant during the training exercise on January 11, 2023. The sheathing on the rope started to tear where it rubbed against the carabiner. He cut the rope two to three feet back from the defect and reinstalled the rope onto the bridge with a figure eight knot. After he cut the rope, he pulled the sheathing off to expose the entire core fibers of the rope. He then took apart the strands of the rope he had cut and explained to the employees at the class how rope of that type gets its strength. Had the Claimant fallen two or more feet as described in his statement the horizontal stitches on his harness would have popped instead of remaining intact as they did. Every

day prior to the use of their fall protection equipment each individual should give it an individual inspection. The Claimant's inspection log shows that he inspected his fall protection equipment on January 11. After the Claimant documented his inspection on his inspection log, he (Senior Instructor Lowery) reinspected the equipment and signed the inspection log, indicating that everything was in good order. Mr. Lowery testified that during the exercise the person being rescued would normally be lifted up from the third rung of a ladder, although the outcome would be the same if a different rung of the ladder was used. The person who mans the belay line, he testified, is equipped with a device called gri-gri that is designed to lock up the instant that there is any kind of load pull against the belay line. The moment that there is a resistance against the belay line, he explained, "that GriGri locks up and then it must be unlocked manually." This did not happen with the Claimant, Mr. Lowery testified. According to Mr. Lowery, once the gri-gri device locks up, it is not possible for the person being rescued to descend from whatever height the individual is suspended.

The entire time that a rescue is taking place [Mr. Lowery's testimony continued], the employee's safety is his number one priority. At no time does anything go on that he is not aware of. He (Lowery)was the person that noticed the sheathing tearing. He is the one that told the person handling the belay line to tighten up on the line so that nothing could happen. Then they lowered the employee down. He absolutely did not see any type of incident. At the end of the day the Claimant did not tell him that he felt any pain or that he had fallen. Nor did he report any type of incident to him or to Mr. Neblett. He made no report of an incident to anybody there. After rescue he and the others sat there and ate barbecue. They were there for another couple of hours before everybody was released to go home, and he never heard anything from the employee or anyone else.

Mr. Lowery testified that even if the double pulley system had been used in the rescue of the Claimant (which Lowery insisted was not not the case) instead of the Industrial Descender, the belay line would have been part of the protection system. "[B]efore you get on the ladder," he stated, "you are hooked into the belay line every single time." The instructor manning the belay line, he testified, would, under the double pulley system, also have been equipped with the gri-gri device, which would have locked automatically with any movement of the person being rescued and would then have to be manually unlocked. In addition, according to Mr. Lowery, the stitches on the Claimant's harness would have popped had he experienced a free-fall that was suddenly arrested as he claimed.

Another member of his gang, besides the Claimant, who took part in the fall protection training on January 11, 2023, was H. S. Wicke. He was in the first group to receive the training, designated group 1. The Claimant's group was designated group 2. According to Mr. Lowery's testimony, the first group was given the choice of whether the Rescue Utility System (RUS) , which is a pulley system, or the Industrial Descender (ID) system would be used for the rescue. Group 1, he stated, chose the R.U.S. system, which left the Industrial Descender system to be used by group 2. Mr. Wicke was not called as a witness, but his written statement was introduced into evidence:

> group 1 was observing group 2 doing a simulated fall Retrievel [sic] Rescue. ID Equipment was used for that scenario, Victim was in place group 2 had their plan and Rigged their Ropes up when two Employee's [sic] walked down the Rope and pulled down to Raise the Victim up

> thats [sic] when the outside sheathing separated. Showing the inter cords of the Rope, Instructor tighten the safety Line and group 2 lowered the victim a little slower in my opinion. Victim did not ever free fall
>
> I was in group 1. /*s*/ H. S. Wicke

Ronnie A. Neblett, Bridge Instructor, was called as a witness to testify by telephone. The following statement that he wrote regarding the incident was read into the record by the hearing officer, and he acknowledged that it was his:

> Mike and I was leading the scenario. We ask for a volunteer to get on the ladder, During the scenario Mike said, tighten up on the rope. I was operating the back-up line. At no time did I see the guy fall.
>
> R. A. Neblett

In answer to questions from the Organization representative, Mr. Neblett testified as follows. He was on the belay line. He was asked to tighten the rope because the outer sheathing on the rope seemed to be peeling off. He and Mr. Lowery inspected the line once they lowered the Claimant. The sheathing was not completely disconnected from the remainder of the rope.

In response to questions from the hearing officer, Mr. Neblett gave the following testimony. Part of the belay line protection includes a device called gri-gri which causes the belay line to tighten up if the person being rescued begins to fall. He would have felt this in his hand if the Claimant had begun to fall. It did not happen during the training exercise with the Claimant on January 11. In addition, he was watching the Claimant during the exercise, and he did not see him fall.

It is the position of the Carrier that the evidence clearly shows that the Claimant was dishonest by stating that he fell two feet. The seriousness of his violation, the Carrier contends, fully supports the discipline imposed. Claimant was accorded all due process rights he was entitled to under the collective bargaining agreement, the Carrier maintains, and there were no procedural defects serious enough to void the assessed discipline. The Carrier argues that multiple statements and testimony show that the belay line equipped with the GriGri device would have stopped any movement of an individual being rescued and prevented any shock to the individual's body. The Claimant, the Carrier contends, was therefore dishonest in claiming that he fell two feet.

Honesty, the Carrier asserts, is the cornerstone of the employment relationship. The reasonableness of a rule prohibiting dishonesty, the Carrier argues, is self-evident. It has shown by substantial evidence, the Carrier contends, that Claimant violated Rule 1.6 : Conduct - Dishonest, an offense subject to dismissal under the Carrier's MAPS policy. Claimant's conduct, the Carrier contends, was an extreme breach of trust. Not only did Claimant's dishonesty permanently damage the employment relationship, the Carrier argues, but it also harmed any bond Claimant had with his

coworkers, who honestly reported the events of the day. The serious nature of the Claimant's offense, the Carrier maintains, fully supports the discipline assessed.

The Organization raises several procedural arguments. It argues that Claimant did not receive a fair hearing because the Carrier prejudged the case before the hearing when it reached conclusions in the case during its own internal investigation prior to the investigative hearing. In addition, the Organization asserts, both the hearing officer and the charging officer work together in the same building, creating an inherent conflict and raising serious concerns about impartiality. A further denial of due process, the Organization contends, occurred when the Carrier failed to call all relevant witnesses. Instead, the Organization asserts, the Carrier relied upon only two witnesses and failed to call the three other employees besides the Claimant who participated in the training exercise. Claimant was further denied a fair hearing, the Organization argues, when the Carrier called R. Neblett to testify by telephone instead of in person, thereby denying the Claimant his contractual right to face and cross-examine his accuser. The Organization further argues that the Carrier improperly relied on a lay witness, M. Lowery, to provide expert testimony despite his lack of the necessary credentials to do so. These procedural violations, the Organization contends, require that Claimant's discipline be vacated and he be made whole.

On the merits the Organization contends that the Carrier failed to meet its burden of proof to show that Claimant allegedly acted dishonestly by falsifying an injury report on January 13, 2023, concerning the January 11, 2023, incident. It has not shown, the Organization argues, that the Claimant did not suffer an injury during the fall retrieval exercise on January 11. "[I]n essence," the Organization asserts, "the Carrier endeavored to create a fictitious storyline where the Claimant was facing abolishment of his job and was somehow motivated by this to fabricate an injury, thusly filling out an injury report later under false pretenses." The record, the Organization contends, fails to support this "false narrative in the slightest." The simple facts, according to the Organization, "are that the Claimant went to training, incurred an incident whereby he slipped in the pulley system having suddenly fall[en] and only later came to find out he had sustained an injury."

In support of its position that the record lacks substantial evidence to prove that the Claimant was dishonest, the Organization points to the testimony of instructor Lowery that it would have taken approximately 400 pounds of force to pop the stitches on the Claimant's harness during the fall retrieval exercise and the Organization's expert rebuttal documentation from the 3M fall protection manual that the correct figure for that to happen is 450-650 pounds. The record lacks evidence, the Organization argues, that a person of the Claimant's actual weight (and not the hypothetical weight of 250 pounds used in Mr. Lowery's hypothetical example) would have caused the stitches on his harness to pop as the result of a free fall of two feet. Therefore, the Organization argues, the fact that the stitches on the Claimant's harness did not pop is not evidence that he did not fall during the training exercise. In addition, the Organization asserts, the rope used during the exercise shows damage, and this "is wholly consistent with the Claimant's version of events."

The Organization contends that there is no credible evidence that effectively rebuts the Claimant's account of the day's events, "only unsupported speculation by the manager." It argues that

he "gave a clear accounting of his activities that day, his reasonable delayed discovery of his injury and the steps he took in good faith moving forward to report said injury." It asserts in underlining, "At no point did the Claimant attempt to conceal or misrepresent any information." Because of the very harmful economic and social consequences of being found guilty of dishonesty, the Association argues, arbitration boards have required clear and convincing evidence to sustain such a charge. That level of proof has not been met in this case, the Organization contends. In addition, the Organization maintains, to sustain a charge of dishonesty requires proof of an intent to defraud or to game the system. Here, the Organization argues, "the Carrier has presented no evidence to indicate there was an intent by the Claimant to be dishonest or deceive the Carrier."

The Organization argues that the penalty of dismissal for the Claimant's alleged conduct was arbitrary and unwarranted. It notes an arbitration board's ability to overturn or reduce discipline and argues that the Claimant, as an eight-year employee of the Carrier who did not attempt to conceal or misrepresent any information, should, at a minimum, have his discipline reduced from the ultimate penalty of dismissal. The Organization concludes that as a consequence of the Carrier's violation of the Agreement, its requested remedy should be awarded to the Claimant.

On the factual issue of whether the Rescue Utility System (RUS) pulley apparatus or the Industrial Descender (ID) system was used for the Claimant's fall retrieval training session on January 11, 2023, this Board is convinced that the ID system was used. Senior instructor Lowery, who was in charge of the training exercise and the one who lowered the Claimant to the ground when he discovered that part of the sheathing on the rope had come off, testified unequivocally that the ID system was used for the Claimant's exercise. He explained that the first group of trainees used the RUS apparatus and the second group, of which the Claimant was a part, the ID system. He explained that the two systems do not at all look alike. Mr. Lowery had no motive to lie about which system was used and as the person in charge of the training was the person in the best position to know what equipment was used.

That Mr. Lowery was not mistaken on the question is supported by the written statement dated January 13, 2023, of H.S. Wicke, a member of the same work gang as Claimant and who himself participated in the same fall retrieval training as the Claimant on January 11, 2023. In his statement Mr. Wicke noted that he was in group 1 but that he observed the group 2 training. "ID Equipment was used for that scenario," Mr. Wicke wrote. It is not disputed that Claimant was part of group 2. Not only did Mr. Wicke have no motive to give a false statement, but his statement was given at a time when nobody knew that a factual issue would later come up as to whether the RUS or ID system was used for the Claimant's fall retrieval exercise. His statement therefore provides strong corroboration for instructor Lowery's testimony that the ID system was used.

In addition when three people give evidence about an incident in good faith, it is not likely that the two accounts that agree with each other will be wrong and the third one, which gives a directly opposite account, right. For all of these reasons this Board is satisfied that the evidence strongly establishes that the Industrial Descender system was used for the Claimant's fall retrieval training session on January 11, 2023.

The Board is not persuaded that the Organization's procedural arguments provide a basis for altering the discipline in this case. The argument that the case was prejudged because the Carrier reached conclusions based on its internal investigation prior to the formal hearing in this matter cannot prevail. The parties' agreed-upon dispute resolution system in disciplinary cases assumes that there will be a preliminary determination on the part of management that there is sufficient evidence warranting discipline in order for a hearing to be held. This is also true of private arbitration procedures under collective bargaining agreements in many other industries.

Once a hearing is held, to then claim that it is procedurally unfair because management reached conclusions based on its internal investigation is to attack the very legitimacy of the parties' own dispute resolution mechanism. The arbitration board cannot accept such an argument. In so concluding, the Board notes that even in this country's criminal justice system, with its many procedural safeguards provided to defendants accused of criminal conduct, in many cases there will first have been an indictment based on a finding by a grand jury of probable cause before the case ever goes to trial. Inherent in any private or public formal system in which a tribunal judges whether a rule or statute has been violated by a particular individual is the necessity to have some mechanism to determine whether there is a sufficient basis to charge that individual with a violation of the applicable rule or statute. There is no evidence that the procedures followed by the Carrier in the present case deviated in any manner from the parties' agreed dispute resolution procedure for deciding disciplinary cases.

The fact that the hearing officer and the charging officer work in the same building is not a basis for finding a lack of an impartial hearing. By analogy, for example, it is not unusual for the judge and the prosecuting attorney in a criminal trial to work in the same building. There is nothing in the parties' collective bargaining agreement or in any cited arbitration cases that would prohibit such an arrangement. The fact that Carrier witness Bridge Instructor R. Neblett was permitted to testify by telephone instead of being required to do so in person did not deprive the Claimant of a fair hearing. The Organization and the Claimant had a full opportunity to cross-examine him. In addition, he was merely a corroborative witness. The Carrier's chief witness, who was in charge of the training exercise during which the incident occurred, testified in person.

The Organization faults the Carrier for not calling all of the four employees who took part in the fall retrieval exercise as witnesses. First, there is no requirement in American law that every witness to an event that is the subject of a trial be called to testify as a witness. Second, in the Board's opinion sufficient witnesses and documentary evidence were presented to satisfy the Board that a fair representation of all of the relevant facts in the incident were disclosed at the hearing. Third the Organization had equal opportunity to call the individuals in question, all of whom are bargaining unit employees, as its own witnesses, but failed to do so or to ask the Carrier to require them to attend as witnesses. The Board concludes that there is no evidence that the Claimant was deprived of a fair hearing based on the failure to call the individuals in question as witnesses.

The Board does not not agree that Carrier witness Senior Instructor Lowery was asked any questions beyond his competence. The Organization did present evidence that raised a legitimate

question of fact regarding the amount of force necessary to pop the stitches on the harness of an individual who is arrested in mid-air during the course of a free-fall. However, as shown in the discussion that follows, the guilt or innocence of the Claimant in this case does not turn on that factual issue.

Turning to the merits of the dispute, contrary to the Organization's assertion, at no time has the Carrier argued that because his job was abolished, or about to be abolished, Claimant was motivated to fill out a false injury report. No Carrier witness so testified, and no such argument appears in its submission to this Board in this case in support of its position. Its position is simply that the Claimant's injury report and accompanying statement were dishonest because he did not free-fall two feet during his fall-retrieval training exercise as claimed by him, and that nothing occurred during the exercise that would have caused him an injury. It is true that the Carrier has provided testimony and documentation that could cause one to surmise that the abolishment of his job and his inability to find another job that paid per diem could provide an explanation for why the Claimant might want to falsely claim an injury and thereby delay the time that he would have to bid on a new job. Carrier, however, has never articulated this argument, or otherwise adopted it, in support of its position in this case, and it has no obligation to prove its validity.

The weight of the evidence clearly establishes that Claimant did not free-fall at least two feet as he wrote in his statement incorporated as part of his injury report submitted to the Carrier in support of his injury claim. To the contrary the evidence shows that the Claimant did not free fall at all during the exercise. Senior instructor Lowery, who was in charge of the training exercise, and his assistant, Bridge Instructor Neblett, so testified. Their testimonies are supported by the undisputed fact that during the training exercise the Claimant was hooked up to an auxiliary safety line, called a belay line, equipped with a GreGre device, that would have immediately locked up and arrested any fall should the Claimant have begun to free-fall even a very short distance. That the device did not lock up is clear from the Claimant's own testimony in which he describes how he was lowered to the ground without any mention of the necessity to first unlock the GreGre device. In addition, Bridge Instructor Neblett testified that he operated the belay line with the GreGre device during the Claimant's test exercise, and that the device was never activated. Both instructors' accounts were corroborated by the written statement of bargaining unit employee Scott Wicke, a member of Claimant's work gang, who wrote that he observed the fall retrieval rescue and that in his opinion, referring to the Claimant, "Victim <u>did not</u> ever free fall." (emphasis Mr. Wicke's). Mr. Wicke had no motive to lie or falsely accuse the Claimant. The evidence in the case strongly strongly supports the Carrier's position that Claimant did not experience a free-fall during the fall retrieval training exercise in question and that his representation in his written statement to the Carrier that was incorporated as part of his injury report was untrue.

The Organization correctly argues, however, that to prove dishonesty it is not sufficient to show that a claimant gave an inaccurate or untrue account of an incident in dispute; that there must also be a showing that there was an intent to deceive or falsify. The Board is satisfied that the requirement of proof of intent has been met in this case. According to Claimant's Manager's written statement, not denied by the Claimant, on January 11, 2023, the Claimant called him at 7:21 pm and told him to write

down what Claimant was about to tell him. The Claimant then told the Manager that during the fall rescue exercise he participated in that day "I was the victim, and I did not even know that I had free fall about 2 ft. And the guys started telling me you're about to fall. . . . ." In his first report to his Manager about the alleged free fall, the Claimant thus represented to his Manager that he did not even know it, but based on what others told him, he had free-fallen about two feet. Since the evidence is strong, however, that Claimant did not free-fall at all on January 11, nobody could have told the Claimant that such an event happened on that date. His claim to the contrary must be considered an intentional falsification. Nor did the Organization or Claimant produce any of the three other members of his gang that were present at the fall retrieval training session to testify at his hearing, or request the Carrier to produce them as witnesses, to corroborate his account of his incident.

There is also no basis in the evidence to support the Claimant's representation that he was injured during the training exercise. Since the Claimant did not free-fall, there is no evidence in the record to support his claim that his body was subjected to whiplash or to any other event serious enough to injure him to the extent that he was unable to report for work with the Carrier. In this connection no doctor's report or other medical evidence was offered into evidence to support the claim that Claimant was injured during the training exercise he participated in on January 11. There is also evidence of a possible motive for the Claimant to feign an injury, namely, to delay the time when the Claimant would have to bid on another job with the hope that in the meantime a job that paid per diem would open up either with his current manager or another one. This Board concludes that the evidence strongly supports the Carrier's determination that the Claimant provided a false statement to it on January 13, 2023, in support of a claim of injury allegedly incurred by him during a fall retrieval training exercise on January 11, 2023, and that he thereby violated rule 1.6: Conduct – Dishonest.

Under the Carrier's MAPS Policy, a violation of rule 1.6: Conduct – Dishonesty is an offense subject to dismissal. Dishonesty is a very serious offense because it violates the fundamental qualities of trustworthiness and loyalty that an employer has the right to expect from its employees. Absent strong mitigating circumstances, such conduct ordinarily justifies severing the employment relationship. The Organization argues that the facts that the Claimant is an eight-year employee who did not conceal or misrepresent any information should, at a minimum, justify the reduction of his discipline from dismissal to some lesser penalty. It escapes this Board, however, how the Organization can contend that he did not conceal or misrepresent any information when he intentionally provided his employer a false statement regarding having suffered a free-fall during his training exercise and, in the same document, falsely accused the instructors who conducted the exercise of negligence.

There is mitigating evidence in the record in the testimony of the Claimant's Manager that he was a good employee. (Tr. 112). The hearing officer objected to the testimony on the basis that it was opinion evidence. The Board, however, disagrees with the hearing officer. See, for example, the case cited in *McCormick's Handbook of the Law of Evidence* (Second Edition, 1972) by Edward W. Cleary, General Editor, p. 24, n. 29, which the author describes as "the 'orthodox' view of many courts." In summarizing the "current of authority on the subject of the admissibility of the opinions of witnesses as evidence," the court stated;

> . . . (4) In matter more within the common observation and experience of men, non-experts may, in cases where it is not practicable to place before the jury all the primary facts upon which they are founded, state their opinions from such facts, where such opinions involve conclusions material to the subject of inquiry. (5) In such cases the witnesses are required, so far as may be, to state the primary facts which support their opinions.

In a dismissal case, where a claimant and the Organization argue that the employee involved is deserving of another chance, it is certainly material for the tribunal deciding the case to know whether the individual in question is a good employee or not. The foregoing summary of the law by the court teaches us that in such a situation it is permissible for a witness, knowledgeable of the facts, to give a conclusionary opinion as to whether or not the claimant is a good employee. Surely, in the present case, the Claimant's Manager over a period of years had intimate knowledge of what kind of an employee the Claimant was while working under him. It was therefore permissible to ask him to give his opinion on the question. However, it would also have been appropriate to require the Manager to state the basis of his opinion, such as the quality and quantity of Claimant's work, his absence and tardiness record, his disciplinary history, and how he interacted with supervision, management, and co-employees.

Although the hearing officer expressed disapproval of the question, the Manager's answer is in the record, and this Board accepts as a fact that the Claimant was a good employee. Nevertheless the Claimant's dishonesty in this case was of a very serious nature. It was of a prolonged duration that continued over a period of weeks in which the Claimant continued to claim that he was injured from a free-fall that never occurred and that other employees or agents of the company were responsible for his injury. Under these circumstances, despite the Claimant's past good employment record, the Carrier was entitled to conclude that its loss of trust in the Claimant was irretrievable and that it could no longer retain him as an employee. The claim will be denied.

A W A R D

Claim denied.

/s/ Sinclair Kossoff 12/19/2025
Sinclair Kossoff, Neutral Member Date

Chris Bogenreif 1/5/2026
Chris Bogenreif, Carrier Member Date

1/5/2026
John Schlismann, Organization Member Date