NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6402

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	)
	) Case No. 139
and	)
	) Award No. 115
UNION PACIFIC RAILROAD COMPANY	)
	)

Martin H. Malin, Chairman & Neutral Member
T. W. Kreke, Employee Member
B. W. Hanquist, Carrier Member

Hearing Date: December 17, 2008

STATEMENT OF CLAIM:

1. The dismissal of Trackman James E. Brown, Jr. for violation of Rule 1.6(4) (Conduct - Dishonest) in connection with the allegation that he allegedly falsified an injury on September 7, 2007, is unjust, unwarranted, based on unproven charges and in violation of the Agreement (System File MW-T07-31/1493809 MPR).

2. As a consequence of the violation outlined in Part (1) above, it is requested that Mr. Brown be returned to service with all his seniority rights and vacation rights restored unimpaired, and that the level against him be dismissed in its entirety. Mr. Brown was displaced at the time he was suspended from service; therefore the Organization requests that he be given a sufficient number of days to successfully place himself in a position for which he is qualified. The Organization also requests that Mr. Brown be compensated for all lost wages from the date he was pulled from service until the date he is returned.

FINDINGS:

Public Law Board No. 6402 upon the whole record and all of the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

On September 13, 2007, Claimant was notified to report for a formal investigation on October 2, 2007, concerning his alleged dishonesty when, on September 7, 2007, he claimed to have suffered a personal injury. Following several postponements, the hearing was held on

October 25, 2007. On November 8, 2007, Claimant was advised that he had been found guilty of the charge and had been dismissed from service.

The Organization has raised several procedural objections. These objections are controlled by our ruling in Case No. 127, Award No. 109. As in Case No. 127, the Organization contends that Carrier violated Rule 21 of the Agreement by postponing the hearing without the concurrence of Claimant's representative and by holding the hearing outside the Rule 21 time limits. Rule 21(a)(1) provides that "Carrier will make every effort to schedule and hold a formal investigation under this rule within thirty (30) calendar days from date of the occurrence to be investigated except as herein provided or from the date the Carrier has knowledge of the occurrence to be investigated." Rule 21(i) provides that if an employee is suspended pending investigation, "the Carrier will make every effort to schedule and hold a formal investigation within twenty (20) calendar days of the date the employee is suspended, and render a transcript and decision within twenty (20) calendar days following the date the hearing is concluded."

As we observed in Award No. 109, the Agreement does not mandate that the hearing be held within the specified time frame. It requires that Carrier "make every effort" to schedule the hearing within the specified time frame. In the instant case, the hearing initially was scheduled for October 2, 2007, which was within the time frame specified in the Agreement, i.e. within thirty days of the alleged incident and within twenty days of the date Claimant was withheld from service. The investigation was postponed to October 16, postponed again to October 23 and postponed again to October 25. The final postponement is not at issue as it occurred at the request of Claimant and his representative. The postponement to October 16 occurred because the investigating officer was not available and the postponement to October 23 occurred because a key witness, the Engineering Supervisor, was not available. There is no evidence that the postponements were made for any reason other than necessity and no evidence of any further effort that Carrier could have undertaken to conduct the hearing within the thirty and twenty day time frames. There is also no evidence that the delay prejudiced Claimant's ability to present a defense. Accordingly, we conclude, as in Award No. 109, that there was no violation of Rules 21(a)(1) or 21(i).

Rule 21(b) provides for postponements upon "mutual agreement between the Carrier and the employee or his representative." In the instant case, no such agreement was obtained for the postponements to October 16 and 23. However, as we held in Award No. 109, the effect of Carrier's failure to obtain agreement for a postponement is to deprive Carrier of the ability to rely on the postponement to fulfill its contractual obligation of conducting the hearing in a timely manner. It does not provide a basis for disturbing the discipline if, independently of a mutually agreed to postponement, Carrier has complied with Rule 21's provisions for timely scheduling. In the instant case, as we held above, Carrier did make every effort to schedule the hearing within the Rule's time lines. Consequently, as in Award No. 109, the failure to obtain agreement for the postponements does not invalidate the discipline.

On September 7, 2007, Claimant and the claimant in Case No. 127 were passengers in a Carrier van driven by the Switch Gang Foreman. The van was waiting to make a left turn into a

store parking lot when another vehicle came out of the parking lot and tried to go around the van but struck it in what witnesses described as a minor accident. The other vehicle scraped the rear of the van.

Claimant claimed to have been injured in the accident and completed a personal injury report. At issue is whether Carrier proved by substantial evidence that Claimant falsified the report.

Supporting the Organization's position that Claimant was in fact injured, was the report from the physician who examined Claimant after the accident and diagnosed, "sprain lumbar region, spasm of muscle, contusion of knee." On the other hand, the Foreman testified that immediately after the accident he asked if anyone in the van was hurt and Claimant indicated that he was not hurt. About ten minutes later, the Engineering Supervisor arrived on the scene and Claimant again indicated that he was not hurt. Claimant denied telling them that he was not hurt, but maintained that he only said that he was not "busted up" or bleeding. Of course, as an appellate body that does not observe the witnesses testify, we defer to the credibility determinations made on the property as long as they are reasonable. In the instant case, we defer to the decision made on the property to credit the testimony of the Foreman and Engineering Supervisor over the testimony of the Claimant.

Additionally, a Trackman testified that he was in the van after the accident and overheard the claimant from Case No. 127 on the phone with his union representative and then with his lawyer. The Trackman testified that he observed Claimant and the claimant from Case No. 127 periodically laughing about the situation and that they did not appear to be hurt or to be taking the accident seriously.

An expert in accident reconstruction retained by Carrier testified that the impact generated insufficient force to transfer any energy to the occupants of the van. In the expert's opinion, it was not possible for any of the van's occupants to have been injured as a result of the collision.

As we observed in Award No. 109, "Our review is limited to a determination of whether the factual findings made on the property are supported by substantial evidence, that is whether a reasonable person could have come to the same factual conclusions." As in Award No. 109, the medical report supports a finding that Claimant acted honestly in claiming an on-duty injury. However, the testimony from the Foreman, the Engineering Supervisor and the Trackman, together with the expert witness's report all support the finding made on the property that Claimant was not injured and falsified his report. In Award No. 109, we analyzed a similar record as follows, "We cannot say that Carrier was unreasonable in concluding that the evidence supporting a finding of guilt outweighed the contrary evidence. We conclude that Carrier proved the charge by substantial evidence." The analysis applies equally to the instant case.

Having concluded that Carrier proved by substantial evidence that Claimant falsified his injury report, we turn to the penalty imposed. Dishonesty generally is a dismissible offense. We

cannot say that the penalty imposed was arbitrary, capricious or excessive.

AWARD

Claim denied.

Martin H. Malin, Chairman

B. W. Hanquist
Carrier Member

T. W. Kreke
Employee Member 2-18-09

Dated at Chicago, Illinois, January 31, 2009