NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6402

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	)
	) Case No. 84
and	)
	) Award No. 96
UNION PACIFIC RAILROAD COMPANY	)
	)

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

Hearing Date: April 22, 2008

STATEMENT OF CLAIM:

1. The dismissal of B & B Assistant Foreman D. R. Ruark for alleged violation of Rule 1.6 Conduct, Part 1, Careless of the safety of themselves and others and 1.6 Conduct, Part 4, Dishonest in connection with a personal injury sustained by him on August 7, 2005 is unjust, unwarranted based on unproven charges and in violation of the Agreement (System File MW-06-04/1436566 MPR).

2. As a consequence of the violation outlined in Part (1) above, Mr. Ruark be reinstated immediately will all vacation rights, seniority rights, all pay for lost time starting on August 5, 2005, on a continuing basis, and days to be used as qualifying days for vacation purposes and all other rights due him under our collective bargaining agreement.

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 August 11, 2005, Claimant was notified to report for a formal investigation on August 24, 2005, concerning his alleged carelessness of his own safety and that of others and alleged dishonesty on August 7, 2005. Following two postponements, the hearing was held on September 30, 2005. On October 27, 2005, Claimant was advised that he had been found guilty of the charges and had been dismissed from service.

We have carefully reviewed the more than 320 pages of hearing transcript along with the numerous exhibits that were introduced in the investigation. We fail to find any evidence that supports the finding of guilt of either charge.

Initially, we observe that the two charges were inconsistent and that a finding of guilt on one charge cannot possibly coexist with a finding of guilt on the other. On August 7, 2005, Claimant was working as Assistant Foreman on Gang 9301. Claimant was sliding ties and maintained that he hurt his back doing so. The charges were that Claimant failed to work safely, resulting in the injury to his back, and that he faked the back injury and filed a fraudulent report of personal injury. While it was certainly proper for Carrier to include such inconsistent charges in the notice of investigation because at the time the notice was issued, Carrier did not have all of the facts and the purpose of the hearing was to ascertain the facts, the finding of guilt on both charges makes absolutely no sense. If Claimant was in fact guilty of not working safely, then his injury was not faked and his report of personal injury was not fraudulent. In other words, he could not have been guilty of dishonesty. On the other hand, if Claimant faked the injury and filed a fraudulent report, then he was not injured and the basis for the charge of failing to work safely was not proven.

In any event, as indicated above, neither charge was proven. There is absolutely no evidence that Claimant was careless of his safety or of the safety of others. The Manager of Building Construction testified, "For being carelessness (sic) of safety, if there (sic) something - - he did accidentally hurt his back for some reason, he was in a poor posture to try to do that he was doing if he did." Apparently, the finding that Claimant failed to work safely was inferred from the fact that Claimant suffered a personal injury. However, the fact of a personal injury alone does not establish a failure to work safely. *See, e.g.,* Third Division Awards 31952, 26594. There is absolutely no evidence of what Claimant did that he should not have done or what he failed to do that he should have done. Indeed, Claimant's Supervisor, when asked if the way Claimant slid the ties was the Gang's standard procedure, replied, "We have done it that way."

With respect to the charge of dishonesty, we similarly find that there is no competent evidence to support it. The Manager of Building Construction testified that he interviewed the other employees on the Gang and none of them was aware that Claimant had been injured and some referred to it as a "bullshit injury." However, the Manager took no written statements from the employees and only one employee was called as a witness. That employee testified that as Claimant was sliding a tie, Claimant asked him if he had heard a pop and stated that he believed he had just injured his back. The employee told Claimant to report the injury to supervision. A written statement from a second employee, introduced by the Organization, corroborated the first employee's testimony concerning Claimant's inquiry whether his coworkers heard a pop. Claimant did report the injury to his Foreman who referred him to the Supervisor. The Supervisor and Manager asked Claimant if he wanted to complete a personal injury report but Claimant replied that he wanted to see if he could walk it off. Between 30 and 60 minutes later, Claimant notified the Supervisor that there was numbness running down his back and leg and they went to the emergency room, where Claimant was treated with an injection and prescribed medication. Claimant received follow-up medical treatment over the course of the next several

weeks.

The Manager of Building Construction questioned how, if Claimant was truly injured, he was able to drive himself home, a distance of 460 miles. Claimant, however, testified without contradiction that he did experience pain during the drive and had to make stops because of the pain. There is simply no question that Claimant did sustain an injury on August 7, 2005, and that his report of personal injury was not fraudulent.

Much of the "evidence" on which Carrier relied consisted of allegations by the Manager of Building Construction of other alleged incidents which took place years before August 7, 2005, and for which Claimant was never noticed for investigation and never disciplined. Such "evidence" was completely irrelevant to the charges that were under investigation. Carrier also called the Director of Bridge Maintenance, Central Region who last supervised Claimant in 2000. The Director testified at length to an alleged incident that occurred in 1999 for which Claimant was never noticed for investigation and never disciplined. The Director's testimony was completely irrelevant to the charges that were the subject on the investigation and we find it appalling that Carrier chose to waste so much time on his testimony. The calling of the Director as a witness raises very serious questions concerning whether the hearing officer was fair and impartial, but we need not reach those questions because we find that Carrier offered absolutely no competent evidence in support of the charge of dishonesty.

Because of the total lack of evidence to support the charges of carelessness of safety and dishonesty, the claim must be sustained. Of course, Claimant's entitlement to back pay does not extend to the period that he was disabled from working but runs from the date he would have returned to service had he not been dismissed until the date that he is returned to service.

AWARD

Claim sustained.

ORDER

The Board having determined that an award favorable to Claimant be issued, Carrier is ordered to implement the award within thirty days from the date two members affix their signatures hereto

Martin H. Malin, Chairman

B. W. Hanquist
Carrier Member

T. W. Kreke
Employee Member

Sept 17, 2008

Dated at Chicago, Illinois, August 31, 2008