

PUBLIC LAW BOARD NO. 7194

AWARD NO. 1

CASE NO. 1

PARTIES TO THE DISPUTE:

Brotherhood of Maintenance of Way Employees Division – IBT Rail Conference

vs.

Union Pacific Railroad Company

ARBITRATOR: Janice K. Frankman

DECISION: Claim sustained

STATEMENT OF CLAIM:

1. The dismissal of Trackman Glen H. Deininger for violation of Union Pacific General Code of Operating Rules 1.6 (Conduct), 1.27 (Divulging Information), 1.2.5 (Reporting) and 1.1.3 (Accidents, Injuries and Defects) in connection with alleged dishonesty in reporting an alleged injury on July 5, 2006, is based on unproven charges, unjust, unwarranted, excessive and in violation of the Agreement. (Carrier's File 146451).
2. As a consequence of the unjust dismissal, we respectfully request that Mr. Deininger be reinstated to the service of the Carrier on his respective assigned position, his seniority and all other contractual rights be restored unimpaired, that he be compensated for net wage loss and benefit loss suffered, and the alleged charge(s) be expunged from his record.

FINDINGS:

The Board, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties; that the Board has jurisdiction over the dispute herein; and that the parties were given due notice of the hearing.

Claimant commenced service with Carrier on May 15, 2002, and holds seniority rights as a Trackman, Utah Service Unit, Wells, Nevada. He held a Track Laborer position on July 5, 2006, the date of the incident which gave rise to this case. Claimant was dismissed from his position for UPGRADE Level 5 violation of GCOR Rules 1.6, 1.27, 1.2.5 and 1.1.3 on September 13, 2006. He had no earlier discipline.

Under Carrier's Operating Rules employees must not be dishonest; must report personal injury sustained while on duty or on Company property, immediately to a proper manager; and, must report by first means of communication, any personal injury that may affect the safe and efficient operation of the Railroad and, where required, promptly provide a written report.

Claimant submitted a FORM 52032 dated April 6, 2006, to his MTM reporting neck, shoulder and arm pain which required surgery to remove a disc and fuse vertebrae on April 4, 2006. Mr. Tuttle, Claims Department Staff, had advised him in completing the FORM. He

returned to work without restriction on June 19, 2006, as reported on a Form from his surgeon dated June 15, 2006. MTM thought he was returning too early and admitted at investigation that they should have gone to Carrier Health Service.

On July 5, 2006, Claimant felt pain in his neck, shoulders and arms when riding in a Company vehicle on his regular shift. He scheduled an appointment with his treating physician for July 17, the first date he could be seen. Claimant had continued working and felt pain every time he road in the Company truck traveling over poorly maintained roads. The doctor found that the fusion had fractured, and he restricted Claimant from working for eight weeks which he noted on a form Claimant gave his MTM on July 25, 2006.

Claimant met with MTM on July 19, to tell him about the work restriction. They spoke that day together with Mr. Tuttle in Claims on MTM's cell phone in his truck. Mr. Tuttle inquired whether the case had gone through medical review. Claimant testified that both he and MTM were mystified by the question because neither was familiar with the process. Both testified to conversations with Mr. Tuttle after July 19. Claimant testified that Mr. Tuttle again questioned why there had been no medical review. MTM testified that Mr. Tuttle directed him to get a FORM 52032 from Claimant.

Organization representative assisted Claimant by telephone in completing FORM 52032, which Claimant gave to MTM on July 25, 2006, along with his doctor's work restriction form. Claimant wrote on the FORM 52032 that the cause for the fracture of the fusion was his return to work, without restriction, following his April surgery. He noted contributing factors were his doctor returning him too early and UPRR allowing his early return to work.

Organization argues Claimant's dismissal is unwarranted, unjust, excessive and in violation of the parties' CBA. It argues Carrier did not provide evidence of violation of any of the GCOR Rules cited in its NOI. Organization objected at investigation to the vagueness of the Rule citation and that Carrier had improperly cited Rule 1.27. Conducting Officer agreed with the objection to citation of Rule 1.27, noting a typographical error when Rule 1.2.7 was apparently intended, and agreeing that it was not properly a part of the case.

Organization argues the investigation was not fair and impartial and that it appeared the investigation transcript had not been read before assessing discipline. It argues if the transcript had been read, there would have been no discipline.

Carrier argues the investigation hearing was fair and impartial and that there was no evidence that Claimant's dismissal was arbitrary or capricious. It asserts there was no violation of the parties' Agreement. It argues that Claimant was late in reporting the July 5, injury and was dishonest in doing so. It argues if Claimant had been injured, he would have reported his injury immediately as required. It refers to Claimant's April 6, 2006, FORM 52032 reporting pain which began in 2004, suggesting a pre-existing injury, unrelated to work, support for a conclusion that Claimant falsified the July 5, 2006, injury, a serious offense which supports the dismissal.

Carrier has not provided substantial evidence in support of its case. It appears that, in its analysis, Carrier confused and inappropriately intertwined the April and July injuries. The July injury, verified by medical documentation, followed the April surgery which was properly reported and acknowledged by Carrier. Organization has effectively refuted Carrier's case with testimony and documentary evidence that reflects Claimant properly reported the July injury two days after seeing his treating physician. He was unaware of his injury until he saw the doctor, and continued working until he was restricted. There is no evidence of dishonesty in reporting

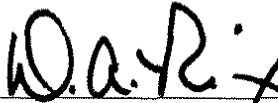
his condition or that Claimant violated Rules which require prompt and accurate reporting of illnesses and injuries whether incurred on or off-duty.

AWARD

Claim sustained. Claimant shall be reinstated to the service with pay for net time lost and shall be made whole consistent with Organization's Statement of Claim, paragraph 2.

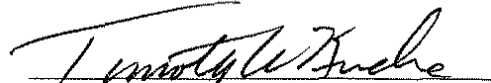


Janice K. Frankman, Chairperson
Neutral Member



Dominic A. Ring
Carrier Member

Carrier Desants



Timothy W. Kreke
Organization Member

Sept. 16, 2008