PUBLIC LAW BOARD NO. 7194

AWARD NO. 10
CASE NO. 10

PARTIES TO THE DISPUTE:

Brotherhood of Maintenance of Way Employes Division – IBT Rail Conference

vs.

Union Pacific Railroad Company

ARBITRATOR: Janice K. Frankman

DECISION: Claim sustained

STATEMENT OF CLAIM:

1. The dismissal of Machine Operator Michael E. Fisher for violation of Union Pacific General Code of Operating Rule 1.6 Conduct (#4-Dishonest) and Rule 1.1.3 Accidents, Injuries and Defects in connection with submitting a late and dishonest injury report on April 3, 2007 is based on unproven charges, unjust, unwarranted, excessive and in violation of the Agreement (Carrier's File 1475492 SPW).
2. As a consequence of the unjust dismissal, we respectfully request that Mr. Fisher be reinstated to the service of the Carrier on his former position with seniority and all other rights restored unimpaired, compensated for all wage and health benefit loss suffered by him since his removal from service 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 Employes 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; that the parties were given due notice of the hearing; and that Claimant appeared at this hearing on July 15, 2008, in St. Paul, Minnesota.

Claimant commenced service with Carrier on May 12, 1998. He held a position in the Bridge and Building Steelman classification when he was dismissed from his position on May 11, 2007.

Claimant held a Machine Operator position on Gang No. 7515 headquartered at Stockton California on September 11, 2006, when the incident which gave rise to this Claim arose. Under Carrier's Operating Rules employees must not be dishonest and must report accidents and personal injuries by "the first means of communication" and, "where required, furnish a written report promptly after reporting the incident." See, GCOR Rules 1.6 and 1.1.3

Claimant was authorized to drive his own vehicle to a Peer Support Meeting on September 11, 2006, when his car was hit by a car that ran a red light, causing the driver to be taken from the scene by ambulance and requiring Claimant's car to be towed for repairs. He reported the accident immediately by cell phone to Manager Young and Foreman Ruiz. He advised them he did not believe that he was hurt. Manager Young was out of the State on bereavement. He directed Claimant to report the accident to Manager in Charge Strickland. Claimant met with Manager Strickland and provided a hand-written report of the accident the same day.

On September 13, 2006, Claimant felt pain in his back and neck. He had the first of several appointments with K. Peter Huber, D.C., a Qualified Medical Evaluator for the State of California, on September 15, 2006, who reported "both objective and subjective symptomalogy of great significance". In a letter anticipating the investigation dated April 25, 2007, Dr. Huber wrote, "It is common for whiplash symptoms to be mild in (sic) initially but then intensify within 48 to 72 hours which could explain why initially there was not a great deal of symptomatology occurring." Investigation Exhibits 16 and 17, TR pages 215 and 216

Claimant told Foreman Ruiz, after visiting Dr. Huber, that he had been placed on light duty. The "Employee's Work Limitation Slip" dated 9-19-2006, which he gave Foreman Ruiz noted a "non-occupational" injury and provided temporary limitations for movement and lifting for two weeks based on diagnosis of "cervical sprain/strain, abnormal involuntary muscle spasms, thoracic Sp/St." Investigation Exhibit 13, TR page 212. Claimant's phone records reflect that he called Supervisor Young on September 19, 2006, which he testified was to discuss the light duty requirement. Foreman Ruiz testified that he consulted with Supervisor Young about the light duty request while Supervisor Young testified he was unaware Claimant had been placed on light duty but was aware of the return to work documentation in October. Both men testified Claimant told them several times that he was not injured in the car accident. Claimant worked in a carpenter position in the Stockton Shop for about one month. He was returned to work without restrictions on October 16, 2006.

Claimant had a second accident on the job on February 8, 2007. He held a Machine Operator position on Gang 8565 in San Luis Obispo CA when his machine was hit from behind causing a second injury which he immediately reported to his Supervisor George Nelson. He completed FORM 52032, noting a sore neck, headache and stiffness. The following day, he provided a handwritten report concerning the car accident in September, 2006, and his continuing treatment, noting that he had given Supervisor Strickland a written statement and that Supervisor Young was out of town on September 11, 2006.

Claimant had seen Dr. Huber on February 6, for a flare up of the first injury. When he saw him on February 15, the Doctor saw increased symptomalogy and told Claimant the second injury would need to be treated to recover to the level he had been before the second accident. Dr. Huber spoke with Claimant's Supervisor George Nelson who advised he knew Claimant had been treating for injury from the car accident, that he believed there had been no new injury and that Claimant would need to receive treatment by his own insurance. Claimant then began treating with another chiropractor on his personal insurance list. In his April 25, 2007, letter, Dr. Huber reported Claimant's ongoing treatment and condition as reflected on a March 21, 2007, MRI report, also included in the investigation record.

Claimant submitted a Form 52032 on April 3, 2007, reporting his injury on September 11, 2006. He and Supervisor Young signed it. He reported that he was sore and stiff a few days after the accident, and that he was treated and released to light duty which he had reported to Supervisor Young. The investigation record does not address why the FORM 53032 was completed at that time.

Claimant testified that he, and he believed others, were confused at the time of the first accident whether his injury was considered work related. He did not pay close attention to how forms were being completed in his doctor's office. Carrier did not ask him to complete a FORM 52032, required when an injury is sustained. He is certain that his supervisors and co-workers knew that he had been injured in the September car accident. Supervisors Young and Strickland and Foreman Ruiz testified that they did not know whether there is coverage for an injury when driving your own car.

Organization has challenged the discipline procedurally and on its merits. It contends Carrier violated its UPGRADE Discipline Policy when it exacted onerous and excessive discipline. It argues Claimant was denied a fair and impartial hearing by failure to give proper consideration to the evidence and testimony presented at the investigation hearing. It argues that Carrier has not provided substantial evidence in support of the dismissal and that it has failed to prove Claimant was dishonest or late in the filing of the Form injury report. It points to Claimant's immediate reports of the accidents in September, 2006 and February, 2007, and that he followed all other requirements of which he was aware. It argues he was directed to use his own vehicle to travel to a Peer Support Meeting and was unclear along with his supervisors as to how to deal with an injury sustained while driving his own vehicle which is a rarity. It points to his advising his supervisors immediately upon visiting his doctor and the need for light duty in September, all supported by documentation in the investigation record.

Carrier argues Claimant was provided a fair and impartial hearing and that it has provided substantial evidence in support of its action. It argues Claimant was late in filing a required injury report and was dishonest in doing so. It argues that Claimant had filed injury reports earlier and understood the requirement. It argues that dismissal is appropriate and consistent with UPGRADE and that there is no evidence that an arbitrary and capricious decision was made. It argues there was no evidence that Claimant sustained an injury in the September 11, 2006, accident, that witness testimony is overwhelming in that regard and that Claimant never indicated to anyone between September 11, 2006, and April 3, 2007, that he had been injured.

Carrier has not provided substantial evidence that Claimant was dishonest when he submitted FORM 52032 on April 3, 2007. It appears that crucial evidence received at the investigation hearing was either overlooked or ignored. Medical evidence detailing the sequence of events beginning on September 11, 2006, is unrefuted. It includes a report of a conversation with Claimant's supervisor in February, 2007, who denied coverage for the second injury sustained in February, 2007, based upon the September, 2006, car accident injury. Carrier's testimony at investigation was inconsistent and was effectively refuted by Organization's documentary evidence and testimony.

There is substantial evidence that Claimant should have completed FORM 52032 on or about September 15, 2006, when he first sought medical treatment for his injuries. Violation of GCOR Rule 1.1.3 is an UPGRADE Level 1 offense which calls for counseling.

AWARD

Claim sustained. Claimant shall be reinstated to the service 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 Dissents
September 4, 2008

Timothy W. Kreke
Organization Member
Sept. 4, 2008