

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 7258

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES)
and) Case No. 4
UNION PACIFIC RAILROAD COMPANY) Award No. 4
_____)

Richard K. Hanft, Chairman & Neutral Member
T. W. Kreke, Employee Member
D. A. Ring, Carrier Member

Hearing Date: November 12, 2008

STATEMENT OF CLAIM:

1. The dismissal of Machine Operator Kelvin Dean Rodgers for violation of GCOR Rule 1.6 (4) [Conduct (Dishonest)] and 1.2.5 (Reporting) in connection with false and late reporting of a personal injury is unjust, unwarranted, based on unproven charges and in violation of the Agreement (Carrier's File 1484555 SPW).
2. As a consequence of Part (1) above, we respectfully request that Claimant's Level 5 be expunged from his personal record. We also respectfully request that Claimant be immediately reinstated to the service of the Carrier, to his former position with seniority and all other rights restored unimpaired and that the letter of dismissal also be expunged from his personal record. In addition, Claimant Rodgers shall also be compensated for net wage loss, both straight time and overtime and benefit loss suffered by him since Claimant's wrongful and unwarranted removal from service and subsequent dismissal.

FINDINGS:

Public Law Board No. 7258 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.

Claimant was notified by letter dated May 18, 2007 that he should report for an investigation and hearing in connection with an allegation that he was dishonest in reporting a personal injury in violation of GCOR 1.6 and 1.2.5 on May 29, 2007. After a postponement and hearing location change, an investigation and hearing was conducted on June 21, 2007. Claimant

was notified by letter dated July 10, 2007 that the charges that he violated GCOR Rule 1.6 (4) and 1.2.5 had been sustained and that he was being assessed a Level 5 discipline and dismissed. A claim was initially filed on Claimant's behalf on August 23, 2007. The claim was denied by letter dated October 17, 2007. An appeal was presented on November 13, 2007 and denied on January 8, 2008. The claim was discussed in conference on March 5, 2008.

After a thorough review of the record, it seems that the Claimant got off of his machine on May 9, 2007 and stepped into an indentation on the ballast along the track, twisting his back and slightly injuring his lower back and hip. Claimant testified that the safety captain was present at the time and witnessed the event. Safety captain did not testify at the investigation. Claimant, at that time did not report the incident to any management officials as is required under Rule 1.2.5. Claimant testified that the twisted back was a minor injury and that at the time he thought that he could work through it. Claimant testified that later that evening, the safety captain stopped by to check on him and gave him some over-the-counter pain reliever to ease Claimant's pain. On the following day, the record reflects, Claimant worked a full day without incident. Toward the end of that day's shift, Claimant and his foreman had a dispute. The Supervisor of Ties North was summoned to the work site around 6:00 p. m. and he met with Claimant and his foreman. An equipment supervisor was also asked by the Supervisor of Ties to come along and witness the conversation. According to testimony adduced at the investigation, the immediate dispute was resolved at that time. All three supervisors testified that at that meeting on May 10, 2007, no mention was made of the fact that Claimant was injured.

It is undisputed that Claimant was off work, May 11, 2007. On the following day, Claimant testified, he came to work, attended the morning job briefing, did exercises and then proceeded to the work site. Upon arriving at the work site, Claimant was informed that he had been bumped from his job as a machine operator but was not released to leave. There was a mistake made here on the part of the Carrier because if an employee is to be bumped from his position, pursuant to Rule 21 G, that bump is to take place at the start of the shift; here, that didn't happen. In any event, Claimant, he related, was told by his foreman to work on the ground rather than operating his machine for the remainder of the day. Claimant took umbrage with foreman's refusal to release him from duty and eventually told foreman that his hip hurt and that he wanted to visit the doctor to have it looked at. The gang's assistant foreman transported Claimant to a doctor where they were met by the Supervisor of Ties. Claimant, at his examination, filled out Carrier's Report of Personal Injury or Occupational Illness Report as well as Carrier's Authorization to Use or Disclose Health Information form. On the Report of Personal Injury form Claimant listed the date of injury as May 10, 2007. Moreover, the record reveals, he dated both forms as having been filled out on May 10, 2007 when in fact it was May 12, 2007.

Claimant was charged with violation of Rules 1.6 (4) (dishonesty) and 1.2.5 (Reporting). Supervisor of Ties stated that Claimant was charged with dishonesty because he stated a claim of injury on the property when it appeared to the supervisor that Claimant had not been injured on the property. Claimant was further charged with failing to timely report, in accordance with the rule, the injury that his supervisor contends never happen. Carrier cannot have it both ways.

The Organization first argues that the investigation into this matter was less than fair and impartial because Carrier failed to call the safety captain of Claimant's crew as a witness. While the Organization cites several previous awards for the proposition that it is Carrier's duty to produce all witnesses known to have knowledge of the circumstances being investigated, the Organization also has the right to call any witnesses it thinks may put its claim in the best light, and while this witness may have been helpful in proving that an injury did occur, he may have also provided testimony proving that Claimant failed to follow proper procedure in reporting the injury. Whether to call this witness or not was a decision for the Organization to make and they had adequate time to make that decision, but it is disingenuous to assert that the investigation was less than fair and impartial when it had the right to call the safety captain as a witness and chose not to.

Moreover, the Organization asserts that the Claimant was not dishonest in reporting his injury and contends that, although there was some confusion as to the date the initial injury occurred, that it is obvious from the Report of Injury or Occupational Illness that it occurred on May 9, 2007 and was immediately reported to the safety captain and the foreman. The safety captain, as is indicated above, did not testify during the investigation and the foreman denied any knowledge of the injury prior to May 12. In fact, all Carrier witnesses denied having any knowledge of Claimant's injury prior to 10:00 a.m. on May 12, 2007.

We find that Carrier failed to provide substantial evidence that Claimant was dishonest in reporting that he incurred an injury on the property. An objective review of the medical reports entered into the record as Exhibits M & N show clearly that Claimant was suffering from lumbar and sacral sprain and strain, was prescribed medicine and a regimen of heat treatment and instructed to have a follow-up visit with his primary care doctor the following Monday. Hence, we cannot say that an injury did not occur nor has Carrier proven that it did not happen just as Claimant described.

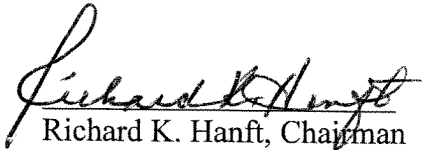
That finding, however, requires us to find that where Claimant did sustain an injury on the property, he failed to immediately report it in accordance with Rule No. 1.2.5. Claimant testified that the safety captain "...came to my hotel on the 10th and gave me medicine. He said that, 'you know I'm going to be in trouble if you report that you got injured?' I said 'Well, I'm not going to report it man, just - you know, I'm just going to get well.' He said 'all right, because you know I should have reported it on the 9th - is what he said.'" Where, as here, there is an admission of guilt, we have no choice but to find that Claimant violated the Carrier's rule requiring timely reporting of injuries sustained on the property. Moreover, failure to report an injury incurred on the property is a dismissible offense. We cannot say that the penalty imposed was arbitrary, capricious or excessive.

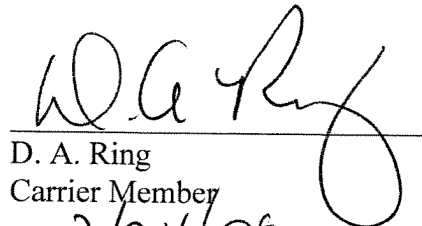
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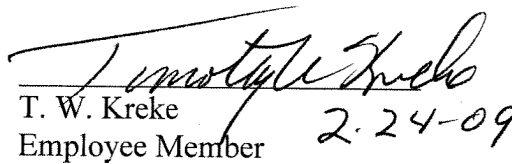
Claim sustained in part.

ORDER

The Board, having determined that an award favorable to the Claimant hereby orders the Carrier to remove from Claimant's files any reference to his violation of Rule 1.6 (4) within thirty (30) days following the date two members of the Board affix their signatures hereto.


Richard K. Hanft, Chairman


D. A. Ring
Carrier Member


T. W. Kreke
Employee Member 2.24-09

2/24/09
Dated at Chicago, Illinois, January 19, 2009