

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 1048

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES)	
DIVISION - IBT RAIL CONFERENCE)	Case No. 185
and)	
)	Award No. 185
NORFOLK SOUTHERN RAILWAY COMPANY)	
_____)	

Richard K. Hanft, Chairman & Neutral Member
T. W. Kreke, Employee Member
D. L. Kerby, Carrier Member

Hearing Date: February 25, 2010

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

1. The dismissal of Trackman Steven S. Kawa for making false statements regarding an alleged incident and claim of injury to his back, neck and head on July 6, 2009 is based on unproven charges, unjust, unwarranted and in violation of the Agreement (Carrier's File MW-FTW-09-36-LM-344).
2. As a consequence of the violation referred to in Part 1 above, Mr. Kawa shall be reinstated immediately with all rights and privileges including any pay for time lost. We further request that his record be cleared of all charges, discipline and actions by the Carrier that are linked to this injury."

Upon the whole record and all of the evidence, after hearing, the Board finds that the parties herein are carrier and employee within the meaning of the Railway Labor Act, as amended and this Board is duly constituted by agreement under Public Law 89-456 and has jurisdiction of the parties and subject matter.

AWARD:

After thoroughly reviewing and considering the record and the parties' presentations, the Board finds that the claim should be disposed of as follows:

Claimant was notified to report for a formal investigation on July 31, 2009 in connection with a charge that he made false statements concerning an alleged incident and claim of injury to his back, neck and head on July 6, 2009. The hearing was held as scheduled and Claimant was notified by letter dated August 12, 2009 that he had been found guilty of the charge and as a result was dismissed from service.

The record reveals that on the morning of July 6, 2009 Claimant, his foreman and two co-workers were traveling from Melvindale, Michigan to Raisin Center, Michigan in Carrier's work truck. Claimant and his foreman were in the front seats of the truck, which were air-ride seats, and Claimant was driving. The two other members of the gang were riding in the back seat of the crew cab on a standard bench seat. As the truck transitioned from the highway to a bridge over the Ford River on the interstate, the difference in surface elevations caused the occupants of the truck to be jostled within the cab. Claimant continued driving for another twenty (20) miles and then pulled the truck over and asked his foreman to drive the remaining distance complaining of a sore back and neck. Upon arriving at their destination, the assistant supervisor was summoned and Claimant was taken to a medical facility where he was x-rayed, diagnosed with a cervical sprain, excused from work for seven days and advised to consult his personal physician. At the medical center, Claimant dictated to the Assistant Supervisor information for completion of a Personal Injury Report. Claimant reported that "While driving West on I-94 we hit a large bump/hump. I was thrown forward, back and up at the same time. My head jammed against the ceiling of the truck." Claimant was released from the medical center and was transported to the Adrian, Michigan Headquarters where he was interviewed by the Division Engineer. Claimant went home and the rest of the crew was interviewed by the Division Engineer and the Assistant Division Engineer that afternoon. The Assistant Division Engineer testified that when questioned, none of the other occupants of the truck remembered seeing Claimant hit his head on the ceiling of the truck.

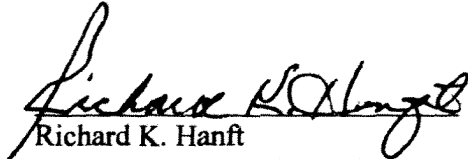
Because the other members of the crew did not recall Claimant striking his head on the truck's ceiling as he reported, the Division Engineer and the Assistant Division Engineer became suspicious and on the following day enlisted another employee to drive the crew's truck to the location where the alleged injury occurred. The Division Engineer and the Assistant Division Engineer observed the other employee in the driver's seat of the crew truck driving over the bump in the road at Ford River Bridge first at 50 miles per hour and then again at 55 mph, the speed Claimant was reportedly driving when the incident occurred. Observing that employee drive over the bump and watching how much vertical travel was experienced by the driver convinced the supervisors that Claimant was not injured by impacting the ceiling. To corroborate their opinion, Carrier retained an independent professional engineer on July 7, 2009 to perform anthropometric testing. That engineer concluded, with a high degree of engineering certainty, that based on the physical evidence of the vehicle, the testing of the incident site and the development of calculations and research on previous top of head impact testing that, *inter alia*, "The injuries alleged by" Claimant "would place in extremely remote chance of occurring as described by him." Based on their own investigation and the report of the independent engineer, the District Engineer testified, he and his assistant determined that the incident allegedly causing Claimant's injury could not have happened the way Claimant reported.


The seven (7) days that Claimant was excused from work transpired and the Claimant did not return to work. Claimant testified at the investigation that he visited his personal physician on July 9th and that she told him to take at least three months off work. No additional tests had

been performed by Claimant's personal physician at the time of the investigation. No documentation concerning his visit to his personal physician or to the extended period he was to be excused from work pursuant to his personal physician's orders were produced at the investigation. At the time of the investigation, Claimant had still not returned to work and the Division Engineer testified that although he had expected Claimant to return to work at the end of the seven day period, he had received no medical documentation or anything to follow up and that Claimant had not contacted his office concerning his status as of the date of the investigation.

The Organization asserts that the Carrier bears the burden to prove that Claimant made a false statement concerning his injury, but has failed to submit one shred of evidence that proves Claimant was not injured in the manner reported. We disagree. The Hearing Officer weighed the credibility of the testimony of various witnesses and weighed the conflicting evidence and concluded that Claimant did not impact with the truck ceiling as reported. As an appellate body, we are in a very poor position to assess the relative credibility of the witnesses. Generally, we defer to the credibility determinations made on the property. In this case, the Division Engineer and the Assistant Division Engineer's testimony was credited over the Claimant's. We see no reason to disturb that credibility determination. We conclude that the finding on the property that Claimant made a false statement concerning an on-duty injury is supported by substantial evidence.

We realize that Claimant had more than thirty-one (31) years service and a positive disciplinary record. However, falsifying a claim of an on-duty injury is a very serious offense that generally warrants dismissal. On the record presented, we cannot say that the penalty assessed was arbitrary, capricious or excessive. Thus, the claim is denied.


Richard K. Hanft
Chairman & Neutral Member
Dated at Chicago, IL May 10, 2010


D. L. Kerby
Carrier Member

Dated: 6/10/10


T. W. Kreke
Employee Member

Dated: June 18, 2010

EMPLOYEE MEMBER'S DISSENT
TO
AWARD 185 OF SPECIAL BOARD OF ADJUSTMENT NO. 1048
Referee Hanft

INTRODUCTION

Claimant Steven Kawa did not receive even the semblance of the fair and impartial investigation to which he was contractually entitled pursuant to Rule 30. Instead of conducting a hearing to develop the truth, regardless of the effect on either party, the Carrier clearly prejudged the Claimant's guilt and set about amassing a record disproportionately in favor of finding the Claimant guilty. That record was based on a so-called reenactment of the incident in question without the participation of the Union, the Claimant or anyone else who actually witnessed the incident. To add insult to injury, the reenactment was conducted by a purported expert who was no expert at all and he employed a transparently invalid methodology to analyze the incident. Finally, to gild the lily, the hearing officer allowed the written opinion of the so-called expert to be entered in the record without having the expert present for cross-examination. Of course, all of this was done over the vigorous objection of the union. The fact that this Board ignored all of the direct evidence and upheld the dismissal of the Claimant based on this record was a travesty of both procedural and substantive due process.

THE EVIDENCE

The uncontroverted testimony of all direct witnesses established that on July 6, 2009, the claimant was driving a crew cab truck on Interstate 94 to transport himself and three fellow employees to a job site. Road work at the Ford Lake Bridge had created an uneven transition from the road surface to the bridge surface. When the truck hit that bump in the road at 55 mph it caused the truck to buck violently. The three passengers in the truck provided the following written testimony:

Mr. Waluzak - "On the day Mr. Kawa received his injury I was riding behind him in the gang [truck] that he was driving. I had my helmet on we were in heavy traffic, we hit a bad piece of road. **I received a significant buck from my seat, hitting my head on the ceiling of the gang truck. I heard Steve say something, thinking to myself that maybe he hit his head too.** I do know that the air seats in the front of the truck travel much more than the seats in the rear."

Mr. Barnard - "We proceeded to 94 freeway with Steve driving. He was driving in the right lane. **When he drove over the bridge at Ford Lake there was a rough transition in the road that shook us up in the truck.** He continued driving almost to Button. Steve stopped and asked if I could drive. He said his neck and back was hurting." (In addition to his written testimony, Mr. Barnard testified at the hearing that, **"Well, when we went over it, it kind of threw us off every which way, up, down, forward pretty bad."** (Tr.P.140).

Mr. Ransom - "On I-94 their (sic) is a bump at Huron in the westbound lane. The right lane is worst. I was looking out the window in the back seat and didn't notice we were at that spot. **When we hit it we all went up and down.** The first time Steve said anything was after we hit the bump." (In addition to his written testimony,

"Mr. Ransom testified at the hearing that, "Well, uh, when we were going down 94 and we hit that bump there, everybody just kind of went flying around...." (Tr.P.154).

It was simply uncontroverted that the gang truck hit a rough transition at Ford Lake Bridge causing a "significant buck" that "... threw us off every which way, up, down, forward pretty bad." and that within minutes Mr. Kawa complained of back and neck pain and requested that Mr. Barnard take over driving duties. It was similarly uncontroverted that upon arrival at their destination, Mr. Kawa immediately reported his injury to the Carrier and a supervisor transported him to a medical center for treatment. Documentary evidence from the medical center records established that Mr. Kawa was initially diagnosed with a cervical sprain and was given an injection of a muscle relaxer, prescription for 500mg Vicodin and a neck collar.

Mr. Kawa subsequently completed a personal injury report dated July 6, 2009 where he stated, "While driving west on I-94 we hit a large bump/hump, I was thrown forward, back and up at the same time. My head jammed against the ceiling of the truck." Notwithstanding the fact that Mr. Kawa's description of the incident was consistent with the statements of all direct witnesses and medical documentation, in a letter dated July 20, 2009 Mr. Kawa was charged with, "making false statements regarding your alleged incident and claim of injury to your back, neck and head on July 6, 2009."

THE REENACTMENT

It was transparently clear that none of the direct witness accounts or documentary evidence supported the charges against the Claimant. To the contrary, all of that evidence served to exonerate the Claimant. Consequently, the Carrier set about amassing a record to convict the Claimant by employing a purported expert to conduct a reenactment. But that reenactment was suspect from start to finish and ultimately fatally flawed for at least four reasons. First, the reenactment was suspect from the outset because it was conducted without the knowledge or participation of the Union or any of the four (4) employees who were actual participants in and eyewitnesses to the incident purportedly being reenacted.

Second, the purported expert who conducted the reenactment and submitted a written opinion on which the Carrier relied was no expert at all. To the contrary, he was a civil engineer and there was no evidence that he had any training, education or professional experience in the relevant field of biomechanical engineering or accident investigation.

Third, there was no evidence that the methodology employed by the so-called expert was generally accepted in the biomechanical engineering field or subject to peer review. To the contrary, that methodology was transparently invalid on its face. For example, while the expert purported to have based his opinion on "anthropometric testing", he never performed any measurements of the Claimant, much less the obviously critical measurement of the Claimant's seated height. Indeed, the entire reenactment reminds one as nothing so much as the Keystone Kops off on one of their comic capers. The test driver was substantially shorter than Mr. Kawa and testified that, "I was ready for

"it knowing that I was going over it and I still went for a pretty good ride." (Tr.P.165). In other words, the whole reenactment was at best a parody of real science because the test driver was able to consciously or subconsciously brace himself for the jolt. And, while the so-called expert purported to have taken precise measurements at the moment of impact, those measurements were taken with..... *a hand held tape measure*. It is simply ludicrous to think that measurements involving microseconds and fractions of inches could be taken with a tape measure at precisely the moment everyone in the truck would have been thrown "... every which way, up, down, forward pretty bad." In short, the reenactment was junk science at best and should have been afforded no weight whatsoever.

Finally, the junk science opinion paper submitted by the so-called expert was presented at the hearing as naked hearsay. That is, over the vociferous objection of the Union, the hearing officer allowed the Carrier to enter the opinion paper into the record even though its author was not present for cross-examination as to his credentials or methodology. And, to make matters worse, the Carrier failed to even inform the Union of the existence of the opinion paper, much less provide a copy, in advance of the hearing. This was a blatant case of prosecution by ambush and any fair reading of the transcript establishes that the Claimant did not receive a fair and impartial investigation.

THE CLAIMANT WAS DENIED DUE PROCESS

While due process is a flexible concept, it is transparently clear that Mr. Kawa was denied both procedural and substantive due process by any definition of those terms. In a paper delivered at the 2009 Annual Meeting of the National Academy of Arbitrators, Professor John B. LaRocco, a veteran rail industry arbitrator, provided this simple definition of due process:

**** Due process means fundamental fairness. We will only have confidence in and defend a procedure that guarantees fairness to the parties who have a stake in the outcome of the dispute. Thus, I will analyze railroad hearings according to universal notions of fundamental fairness, starting with disciplinary hearings."¹

Professor LaRocco also pointed out that the ultimate guarantors of due process protections in the railroad industry are Section 3 tribunals such as this SBA No. 1048:

"The intent of the hearing is to develop the truth 'regardless of the result to either party....' *Lazar* at 229. The check on a hearing officer amassing a record disproportionately in favor of the carrier's disciplinary sanction is the appeal. The Adjustment Board or a Public Law Board can reverse the discipline on the basis that the collective bargaining agreement was violated because the carrier deprived the employee of a fair and impartial hearing without addressing the merits of the discipline. The carrier can accumulate overwhelming proof that the employee committed the charged offense, but if the carrier denies the employee contractual due process, the discipline is expunged. *Lazar* at 19." (LaRocco at P.5)

¹ John B. LaRocco, "Due Process in Railway Hearings and Appeals" (2009), at P.1.

In this case, the claimant was denied both procedural and substantive due process by the Carrier and this Board failed miserably in its duty to protect those fundamental rights. Indeed, the Board failed to even address any of the multiple procedural and substantive due process deprivations that were vigorously raised by the Union and instead swept them all aside with a truly incredible deferral to the right of the hearing officer to make credibility determinations even though there was no valid evidence, much less substantial evidence, to support those determinations.

To adopt the notion that Carrier hearing officers have an unfettered right to make credibility determinations that are not subject to stringent review by Section 3 tribunals is to adopt the notion that all railroad industry discipline hearings are a cruel sham, just as the hearing in this case was a sham. But the better reasoned awards have recognized that Carrier officers do not have such unfettered rights. This principle was clearly enunciated by Arbitrator Gilbert Vernon in NRAB Third Division Award 23864:

“*** We agree that the Carrier has a right to rely on the hearing officer's assessment of credibility and the resolution of conflicts in evidence **when such decisions are supported by substantial evidence.** In this case, however, the above mentioned portion of the charge was not supported by substantial evidence. In regard to the petition and profane language, the supervisor's testimony differed sharply with that of three witnesses and the Claimant. The supervisor's testimony is not entitled to more weight per se. **In resolving conflicts, the Carrier must rely on more than the hearing officer's right to resolve those conflicts. There must be evidence of a rational deliberation, weighing of evidence and a reasonable conclusion. The Carrier must clearly show reliance on factors such as credibility, demeanor, corroborative evidence and other such facets of evidence.**” (Emphasis in bold added)

Arbitrator Vernon, who previously served as a Carrier Member of the National Railroad Adjustment Board and currently has the distinction of serving as the President of the National Academy of Arbitrators, clearly recognized that the hearing officer's assessment of credibility must be supported by substantial evidence and must show evidence of rational deliberation, weighing of evidence and a reasonable conclusion. None of those factors were present in the instant case and, therefore, I must vigorously and emphatically dissent to Award 185 of SBA No. 1048.

Respectfully submitted,


Timothy W. Kreke
Employee Member

CARRIER MEMBER'S REPONSE TO THE
EMPLOYEE MEMBER'S DISSENT
TO
AWARD 185 OF SPECIAL BOARD OF ADJUSTMENT NO. 1048

The Organization's Dissent wrongly asserts that the Board ignored all of the direct evidence in upholding the dismissal, thereby constituting "a travesty of both procedural and substantive due process." To the contrary, the Board carefully and correctly weighed all of the evidence presented, including any relevant testimony which the Organization deems favorable to the Claimant. In giving proper consideration to all of the direct and circumstantial evidence, including assessing credibility where necessary, the Board correctly determined, consistent with the arbitral standards for burden of proof and rules of evidence, that the recorded substantiated the Claimant's guilt of the precise charge.

The Organization's recognition that the direct evidence as a whole supports the Claimant's guilt is evident in that the Dissent only points to selective passages in the testimony of the witnesses, with respect to confirming that the Gang Truck did hit a rough transition on the bridge, and to the Claimant's testimony only to the extent that he ultimately complained of pain, sought medical attention and was initially diagnosed with a cervical sprain. The Dissent conveniently omitted that although the Claimant reported that "his head jammed against the ceiling of the truck," none of these same witnesses saw the Claimant's head hit the ceiling of the vehicle – or that co-worker R. Ransom, who was seated in the truck directly behind the Claimant, actually stated that the Claimant's head did not hit the ceiling of the truck. Similarly, the assertion in the Dissent that "within minutes" of hitting the bump, "Mr. Kawa complained of back and neck pain" is just plain wrong. There is no direct evidence that the Claimant gave any immediate indication of an injury. In fact, the direct evidence established quite the opposite - as the Board pointed out, "the Claimant continued driving for another twenty (20) miles and then pulled over...complaining of a sore back and neck." Accordingly, the Board did not "ignore" the statements cited in his Dissent; it simply weighed the substantial evidence elsewhere in the record, which supported the charges against the Claimant.

The Dissent's discouraging remarks regarding the allowing into the record or giving any consideration to the testimony of the reenactment or the expert witness submission is contrary to the accepted standards. Hearing Officers typically allow all reasonable efforts to establish the facts – such material is accepted into the record and afforded whatever weight is appropriate based on the character and reliability of the information. The reenactment, while not necessarily definitive standing on its own, was of some relevance with respect to the possibility of the incident occurring as alleged, just as were details regarding the type of seat in the Gang Truck, whether it had been properly installed, its position and whether the Claimant wore his seatbelt. The expert witness submission was merely a documentation of all these details. The Board did not accept that information in a vacuum; rather it weighed that evidence along with all of the other, including the eye-witness statement that the Claimant's head did not hit the ceiling of the truck versus the Claimant's report that he "jammed" his head against the ceiling.

The Dissent's attempt to portray the decision as an adoption of "the notion that Carrier hearing officers have an unfettered right to make credibility determinations that are not subject to stringent review by Section 3 tribunals" further severely misconstrues the conduct of the Board in this case. As evident in the plain language of this Award, the Board took particular note of the Claimant's dubious explanation for his allegation that more than two weeks after the incident he was medically unfit to return to service despite the initial exam at the clinic excusing him for a

seven day period, yet he did not provide any subsequent information from a follow-up exam or contact the Carrier in any way until after being cited to the hearing. The Claimant testified that he did see his physician in a follow-up exam within the seven days and was told to stay off from work for three months; however, the Claimant did not at any point in the handling provide documentation of such exam or state his diagnosis, and went so far as to testify that this recommendation to remain off from work for three months was determined without performing any tests. The Board's determination that it could "see no reason to disturb" the Hearing Officer's determination that this explanation for remaining off from work lacked credibility is certainly not inconsistent with any arbitral precedent. To the contrary, consistent with the principles of Award 23864 (Vernon), as cited in the Dissent, the Board recognized that the Hearing Officer's determination was based on "rational deliberation, weighing of evidence and a reasonable conclusion." The Claimant's misrepresentation of why he failed to return to service after seven days, not only supported part of the falsification charge, but also, certainly further tainted the credibility of the Claimant's report that he "jammed" his head against the ceiling, which complemented all of the evidence in support that he did not do so.

Any reasonable reading of the record and the resulting Award can only lead to one valid conclusion. Here, the Board painstakingly digested each iota of relevant evidence, carefully assessed its probative value, and properly determined that the Claimant had not been forthright in his dealings with the Carrier. Accordingly, the slipshod review expressed in the Dissent is disturbing, and hopefully stems more from understandable disappointment and resultant venting over this regrettable circumstance of a thirty-one year employee, rather than a genuine view of the quality of the Board's determination in this case. Given the record before it, the Board had only one valid and correct determination to make, and it properly rendered that decision. I heartily concur with Award 185 of SBA No. 1048.

Respectfully submitted,


D. L. Kerby
Carrier Member