

PARTIES TO DISPUTE:

UNION PACIFIC RAILROAD COMPANY
AND
BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN

STATEMENT OF CLAIM:

“Request the removal of the level 3 discipline from the record of engineer J. A. Flores with him being made whole, which includes but not limited to lost earnings, all vacations rights, cobra payments and any other penalties associated with this discipline.”

FINDINGS:

On August 1, 2004, at approximately 11:00 p.m., Engineer Flores was assigned to the LAQ02-1 Switcher. While taking instructions from the Conductor during a switch move, the Conductor’s radio malfunctioned; loss of communication resulted in a hard coupling, and an injury to Engineer Flores’ back. Engineer Flores advised MYO Mr. G. Garces of personal injury and requested personal injury report form. Engineer Flores, later, sought medical attention and was advised by Carrier that he would be held out of service until he obtained a medical release.

Carrier initiated its own investigation into the events that occurred on the night of August 1, 2004. Part of that investigation included a study by a Biomechanical Engineer Consultant, and his expert opinion as to whether Engineer Flores’ injury was consistent with the physical facts of the hard coupling. Based on the evidence provided the Consultant, he concluded the injury was inconsistent with the physical evidence.

On December 29, 2004, Carrier mailed Engineer Flores a certified letter directing him to:

“Please report to the Conference Room, 6105 Old Alice Rd, Olmito, Texas, at 9:00 a.m., Friday, January 07, 2005, for a formal investigation to develop facts and place your responsibility, if any, in connection with you allegedly being dishonest by misrepresenting facts and circumstances relative to injury reported on Form 52032, alleged to have occurred on August 01, 2004, while working job LAQ02-01, as evidenced by Biodynamic Research Report received on December 22, 2004.”

Engineer only – This is a Level 5 violation under the Upgrade Policy. You may contact MOP Don Pruett at 361 – 885 – 3211 for conference purposes.”

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After mutually agreed upon postponement, investigation was convened on January 26, 2005. After reading transcript of formal investigation, Carrier found Engineer Flores responsible for violating rule, as charged. Upon a finding of responsibility, he was assessed Level 5, discipline – permanent dismissal.

Discipline was appealed and denied in accordance with labor agreement. Partisan parties have been unable to resolve this dispute on property, and it comes, now, before this Board for final and binding adjudication.

During investigation, Carrier introduced into evidence results of test conducted by its Consultant, as well as Consultant's expert opinion. He offered two principal reasons to support his opinion that Engineer Flores' back injury was not the result of the hard coupling:

First, he opined that Engineer Flores' diagnosis - disc desiccations (a reduction in the water content of the disc) - is a degenerative condition that occurs over many years as the spine ages; it was not the result of a traumatic injury to the spine.

Secondly, based on the known speed at the time of hard coupling, a frontal crash would have been minor, with a very low potential for injury; and if injury occurred, it would, likely, have involved the knees, arms, and chest. Engineer Flores made no complaints about injury to those parts of his body.

Organization maintained that when Engineer Flores completed the personal injury form, he did not claim to be permanently injured. It introduced evidence, in the form of Engineer Flores' doctor's report, confirming Engineer Flores did, in fact, sustain a soft tissue, twisting injury to his lower back – the type of injury Carrier's expert witness acknowledged - depending upon Engineer Flores' sitting position - was consistent with the physical facts of the hard coupling, but was not provided him before hand. Carrier's expert witness, further, acknowledged medical report from Engineer Flores' doctor was not factored into his expert opinion as to whether or not Engineer Flores sustained an injury resulting from the hard coupling.

OPINION OF THE BOARD:

We have read the evidence and weighed the arguments made by both parties. We noted, with some interest, Organization's procedural argument that Carrier denied access to 31 pages of documentation, then, surprised Organization with material evidence after convening formal investigation. The record did not establish that Carrier had gathered

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those documents at the time Organization made its request for access. Had that been established in the record, fairness would have demanded access (not to be confused with discovery) prior to formal investigation.

But, moving to the merits of this dispute, evidence presented by Carrier fell substantially short of supporting allegations of rule violation. We saw nothing in the record to suggest Engineer Flores was dishonest, or that he misrepresented the facts in reporting his injury. His complaint of back pain was consistent with the physical facts of the accident, medical report of his personal physician, and expressed opinion of Carrier's expert Consultant.

This Board has, recently, received advice that Carrier reduced discipline to Level 3 and returned Engineer Flores to work on a leniency basis after receipt of doctor's release to return to work.

We agree with Carrier's action as far as it goes; but it does not go far enough. Since there was no evidence of wrong doing, Level 3 discipline must fall, and must be removed from Engineer Flores' personal record.

AWARD:

Claim is sustained per findings above.

J. E. (Jim) Nash – Arbitrator, Chairman and Neutral Member

Employee Member, Mr. Lee Pruitt
Brotherhood of Locomotive Engineers &
Trainmen

Carrier Member, Mr. Randy Weiss
Union Pacific Railroad Company