BEFORE PUBLIC LAW BOARD 5600

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

and

ELGIN, JOLIET & EASTERN RAILWAY COMPANY

Case No. 4

STATEMENT OF CLAIM: Claim of the Brotherhood that:

1. The dismissal of Garage Serviceman R. J. Delgado for allegedly making '...false and fraudulent claims for RUIA unemployment benefits during the claim period ending December 3 and the claim period ending December 17, 1993.' was arbitrary, capricious, without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement (System File SAC-1A-94/UM-6-94).

2. As a consequence of the violation referred to in Part (1) above, the claimant shall be reinstated to service with seniority, all benefits and rights unimpaired and he shall be compensated for all wage loss suffered.

FINDINGS:

The Claimant who was employed by the Carrier since July, 1973, was on furlough status completing the terms of a leniency reinstatement from a previous dismissal after testing positive for THC when the incident in this case arose.

The Claimant was charged with allegedly filing fraudulent claims for unemployment benefits after he was observed on November 24, 29, 30 and December 14 and 15, 1993, entering the facility of Lindsay Company and "performing tasks one would reasonably associate with an employment relationship". A hearing was held on January

5, 1994, and the Carrier found the Claimant guilty as charged and dismissed him from service.

The Organization filed a claim on behalf of the Claimant contending that the Carrier had "failed to substantiate the charge".

The parties being unable to resolve the issue, this matter now comes before this Board.

This Board has reviewed the evidence and testimony in this case and we find that the Carrier has not met its burden of proof that the Claimant filed false and fraudulent claims for unemployment benefits during the period December 3 through December 17, 1993. Therefore, the claim must be sustained.

The Carrier presented evidence of a surveillance of the Claimant which demonstrated that the Claimant was observed arriving at the Lindsay Company on five separate dates between November 24, 1993 and December 15, 1993. He was also observed wearing a uniform bearing the company logo when he arrived at the company. The Claimant never denied that he reported to the Lindsay Company in uniform. The Claimant denied receiving any pay and states that he was merely trying to learn a new profession. The Carrier has not presented any evidence that the Claimant actually received any funds for the services performed. That is a necessary element of the proof that is required of the Carrier in this case.

It is fundamental that the Carrier bears the burden of proof in all discharge matters.

In this case, the Carrier must prove that the Claimant, while receiving unemployment compensation benefits, was also being paid by another employer. The Carrier has not proven that assertion with sufficient evidence. It did prove that he reported to and performed services for the Lindsay Company. However, the Carrier did not prove that the Claimant had received any compensation. The Claimant stated that he had not been compensated for his work. Although he did not provide a notarized statement for the employer, it was not the Claimant's obligation in this case to prove the negative. The Carrier had an obligation to prove its charge that the Claimant had been paid while he was receiving unemployment compensation benefits.

Since the Carrier has not met its burden of proof in this case, the claim must be sustained.

AWARD

Claim sustained.

PETER R. MEYERS
Neutral Member

Carrier Member DISSENT

DATED: 8/28/95

Organization Member

DATED: 9-5-95

CARRIER MEMBER'S DISSENT

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REFEREE PETER MEYERS

The carrier presented substantial evidence that the claimant was working at the same time he was also filing for unemployment benefits. He was observed on five separate occasions over a two-week period, in uniform bearing a company logo, performing various tasks one would reasonably associate with an employment relationship.

The claimant's statement that he was not being compensated was totally self-serving and without foundation. Claimant was aware of the nature of the charge and could have easily presented evidence that he was receiving no compensation by presenting a letter from his "friend" stating such was the case. In fact, the hearing officer generously held the hearing open to entertain such a letter. Claimant produced nothing, however. The carrier was perfectly justified in drawing a negative inference from claimant's failure to produce a corroborating statement.

It simply comes down to a test of reasonableness. And the carrier submits that it is more reasonable to conclude that a person repeatedly observed wearing a uniform with company logo, loading and unloading trucks and performing other warehouse inventory tasks, was "working", in the usual sense.

Because the majority chose not to apply a test of reasonableness in this case, the carrier must dissent.

In a fitting postscript to this award, however, the carrier believes the claimant demonstrated his true character when he took his physical to return to work pursuant to this award. He tested positive for THC and was again dismissed.

J. F. Ingham, Carrier Member
Public Law Board No. 5600

LABOR MEMBER'S RESPONSE
TO
CARRIER MEMBER'S DISSENT
TO
PUBLIC LAW BOARD NO. 5600, CASE 4
(Referee Peter Meyers)

One school of thought among railroad industry arbitration practitioners is that dissents are not worth the paper they are printed on because they rarely consist of anything but a regurgitation of the arguments which were considered by a board and rejected. Without endorsing this school of thought in general, it is foursquare on point with respect to the dissent in this case.

The burden of proof in discipline cases rests with the Carrier and what it considers a "test of reasonableness" is not the issue before this or any other board. Unless the Carrier meets that burden, the charged employe does not have to come forth with evidence to disprove the charge leveled against him. The Carrier did not meet that burden in this case and the Board properly so ruled.

The information provided in the last paragraph of the dissent is indeed tragic. The tragedy is that the rehabilitation program did not work for this individual and that that failure will surely haunt this individual for a life time.

Respectfully submitted,

D. D. Bartholomay
Labor Member
Public Law Board No. 5600