

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6089

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES)	
)	Case No. 9
and)	
)	Award No. 1
UNION PACIFIC RAILROAD COMPANY)	

Martin H. Malin, Chairman & Neutral Member
R. B. Wehrli, Employee Member
D. A. Ring, Carrier Member

Hearing Date: April 6, 1998

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The dismissal of Track Patrol Foreman R. D. Busch for alleged violation of Union Pacific Rule 1.6, effective April 10, 1994, was without just and sufficient cause, based on unproven charges and in violation of the Agreement (System File D-271/106382BD).
2. As a consequence of the violation referred to in Part (1) above, the Claimant shall "*** be returned to service with all rights restored unimpaired and compensated for all time withheld from service from December 27, 1996 until his return to service with the Union Pacific Railroad."

FINDINGS:

Public Law Board No. 6089, upon the whole record and all 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.

On December 26, 1996, Carrier notified Claimant to report for an investigation on January 6, 1997. The notice charged Claimant with theft and dishonesty in violation of Rule 1.6 and alleged that he claimed time for November 6, 8, and 11, 1996, and December 2, 5, and 6, 1996, when he was absent from his assignment. Carrier also withheld Claimant from service,

effective December 27, 1996.

Following postponement, the hearing was held on January 22, 1997. On February 5, 1997, Carrier advised Claimant that he had been found guilty of the charge and had been dismissed from service. On May 10, 1997, Carrier offered to reinstate Claimant on a leniency basis. The offer was rejected unless Carrier would agree that Claimant could continue to progress his claim for time held out of service. Carrier would not agree to this condition.

The Organization has launched a multi-faceted attack on Claimant's dismissal. First, the Organization contends that the hearing was not held within thirty days of the alleged incidents as required by Rule 48(a) of the Agreement. Second, the Organization maintains that Carrier violated the Agreement by withholding Claimant from service. Third, the Organization argues that the hearing officer was biased against Claimant and actually testified against Claimant.

On the merits, the Organization contends that Carrier failed to prove that Claimant intentionally stole time. The Organization maintains that Claimant legitimately believed that he was performing services for Carrier on the dates in question, that he was charging time worked on other days, that he had permission to compensate himself for psychiatric visits on some of the days in question, and that he made up the discrepancies by not claiming time for December 10, 11, 12, and 13, even though he worked those days. Finally, the Organization urges that the penalty of dismissal is excessive and that Carrier admitted that it is excessive in its offer of leniency reinstatement.

Carrier maintains that the hearing was timely because it was held within thirty days of the date Carrier knew of the alleged violations. Carrier urges that it acted in accordance with the Agreement when it withheld Claimant from service and that the hearing officer acted fairly and impartially and did not offer testimony against Claimant. On the merits, Carrier contends that it proved Claimant's guilt by substantial evidence and that dismissal was an appropriate penalty for such an offense and in accordance with Carrier's UPGRADE (Union Pacific General Rules for Administering Discipline Effectively) policy, which Carrier points out has been upheld in numerous awards. Carrier objects strenuously to the Organization's reliance on Carrier's prior offer of a leniency reinstatement, contending that prior offers of settlement should not be considered by this Board.

We consider the Organization's procedural arguments first. We find no basis for overturning the discipline on procedural grounds. First, we observe that Rule 48(a) requires that the hearing be held "within thirty (30) calendar days from the date of the occurrence to be investigated or from the date the Company has knowledge of the occurrence to be investigated" The

Manager Track Maintenance testified that he first gained knowledge of the matter on December 16, 1996, when he was discussing with his section foreman the dates on which the section foreman had flagged for the Claimant.

Second, we do not agree that Carrier violated the Agreement by withholding Claimant from service. Rule 48(o) authorizes Carrier to withhold an employee from service pending a hearing where the charges involve flagrant or serious violations. Third, we have reviewed the transcript carefully and we are unable to agree with the Organization's contention that the hearing officer became a witness against the Claimant. We find that the hearing officer afforded Claimant a fair and impartial hearing.

Accordingly, we turn to the merits of the claim. As an appellate body, we do not find the facts de novo. Rather, we defer to the findings made on the property if they are supported by substantial evidence. Such deference is particularly appropriate where witness credibility is at issue because the hearing officer was the person who observed the demeanor of the witnesses.

There was no dispute that Claimant did not work his assignment on the dates in question and that he claimed time on each of those dates. Claimant provided a wide variety of explanations. For two of the days, Claimant maintained that he was performing services for Carrier's benefit by having his truck repaired and by having a radio installed in his truck. He also justified overtime that he put in for, contending that the Manager Track Maintenance approved his charging for time worked on other occasions responding to calls. According to Claimant, he spent the other days receiving counselling from his doctor and was authorized to compensate himself for it. Claimant testified that he had permission from his prior supervisor and that, when he explained this to the Manager Track Maintenance, the Manager advised that it was okay to continue compensating himself.

The Manager Track Maintenance denied ever advising Claimant that he could compensate himself for doctor visits. The Manager Track Maintenance also testified that he did not trade time routinely and that he expected employees to report their time as of the date they actually worked it.

Claimant's explanations were not credited on the property and we see no reason to disturb that finding on appeal. Indeed, the variety of out of the ordinary explanations that Claimant offered to justify his reporting time on days he did not work his assigned duties is particularly incredible. We find it absolutely incredible that Claimant believed he was performing compensable services by having his personal vehicle repaired. Claimant offered no supporting documentation for his contention that he had been authorized to charge Carrier for his time in

counselling. Claimant's own theory, that he was receiving counselling for anger management to the betterment of Carrier, was inconsistent with the facts which showed that all but one of the counselling sessions were in connection with his son and wife, with whom he was in divorce proceedings. Claimant's efforts to connect such personal counselling sessions to providing service to Carrier are beyond belief. We hold that Carrier proved the charges against Claimant.

Accordingly, we turn to the penalty imposed. We agree with Carrier, that Carrier's offer of leniency reinstatement is irrelevant to this issue. Offers of settlement are simply not proper evidence because consideration of them as evidence would deter parties from engaging in settlement discussions. Therefore, we will not consider the leniency reinstatement offer at all.

We also agree with some general propositions presented by Carrier. First, it is not our role to substitute our judgment for Carrier's concerning the appropriate discipline to be imposed. Our review is limited to determining whether the discipline imposed was arbitrary, capricious or excessive.

Second, Carrier's UPGRADE Policy, as a general matter, provides for fair, consistent and progressive discipline and is entitled to considerable arbitral deference. Finally, dishonesty of the type established is generally a dismissable offense and reinstatement is to be considered only in extremely rare circumstances.

Nevertheless, our review of the record convinces us that the instant case is one of those extremely rare circumstances in which upholding dismissal would be excessive. Our decision is based on the particular facts presented in the instant case and should not be interpreted as setting a precedent for any other case. Claimant had twenty-five years of service and there is no evidence of any prior discipline. At the time of the incidents, Claimant, in his own words, had many problems going on in his life and was receiving professional medical assistance for his problems. Furthermore, Claimant did not put in for four days that all agree he worked, in an apparent effort to make restitution to Carrier.

The Board strongly condemns Claimant's actions and his apparent belief that he could atone for them completely by not claiming four days' pay. Claimant should not have wrongfully claimed the time that he did and, upon realizing this, Claimant should have come forward to the Manager Track Maintenance, admitted his guilt, and offered to make a complete adjustment. Nevertheless, the Board finds, considering all of the unique circumstances of this case, that Claimant should be given one last chance to demonstrate that he can be a productive, honest

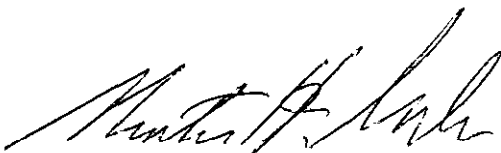
employee. Claimant is to be reinstated, purely on a last chance basis. Any further disciplinary infraction will provide cause for his dismissal. Claimant is to receive no backpay or other compensation, but his reinstatement is with seniority unimpaired.

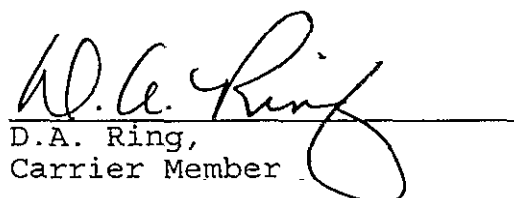
AWARD

Claim sustained in accordance with the Findings.

ORDER

The Board, having determined that an award favorable to Claimant be made, hereby orders the Carrier to make the award effective within thirty (30) days following the date two members of the Board affix their signatures hereto.


Martin H. Malin, Chairman


D.A. Ring,
Carrier Member


R.B. Wehrli
Employee Member

Dated at Chicago, Illinois, April 27, 1998.