

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6089

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

and

UNION PACIFIC RAILROAD COMPANY

)
) Case No. 11
)
) Award No. 15
)

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

Hearing Date: August 26, 1999

STATEMENT OF CLAIM:

1. The discipline (suspension from service pending hearing and subsequent dismissal) imposed upon Track Machine Operator T. Daye was arbitrary, capricious, without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement (System File D-242/1017243).
2. As a consequence of the violation referred to in Part (1) above, the claimant shall be reinstated to service with seniority and all other rights unimpaired; his record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered.

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 21, 1995, Claimant was absent from work. The following day, he was withheld from service. On January 5, 1996, Carrier notified Claimant to report for an investigation on January 15, 1996, in connection with his allegedly being absent without authority on December 21. The hearing was postponed and held on March 28, 1996. On April 12, 1996, Carrier informed Claimant that he had been found guilty of the charge and was dismissed from service.

The Organization contends that Carrier prejudged Claimant's guilt by withholding him from service prior to the hearing. The Organization further argues that Carrier failed to afford Claimant a fair hearing because it did not compel two witnesses to testify. On the merits, the Organization maintains that Carrier failed to prove the charge. The Organization observes that Claimant paged his supervisors and that such pages had been accepted as providing proper authority for absences in the past. Finally, the Organization argues that the penalty of dismissal was excessive.

Carrier contends that it afforded Claimant a fair and impartial hearing. Carrier argues that it proved the charge by substantial evidence. Finally, Carrier maintains that the instant incident was Claimant's third violation of the same rule within thirty-six months and that, pursuant to Carrier's UPGRADE policy, dismissal was appropriate.

We shall consider the Organization's procedural arguments first. We find that Carrier did not prejudice Claimant's guilt when it withheld him from service. Rule 48(o) allows Carrier to withhold an employee from service pending a hearing where the charges involve flagrant or serious rules violations. In Award No. 3 we followed awards of other boards in holding that repeated absences without authority are flagrant violations which justify Carrier in withholding an employee from service under Rule 48(o). We see no reason to deviate from this consistent line of authority.

We also are not persuaded that Carrier's failure to compel the attendance of two witnesses denied Claimant a fair hearing. The record reflects that Carrier contacted the two witnesses and they declined to appear. Rule 48(c) requires that the charged employee be given "reasonable opportunity to secure . . . the presence of necessary witnesses." As the Board stated in N.R.A.B. Third Division Award No. 26435, "Pursuant to the foregoing Rule, it was Claimant's responsibility to arrange for the presence of witnesses on his behalf at the Hearing and his failure to do so does not render the Hearing unfair or arbitrary."

Accordingly, we turn to the merits of the claim. Claimant was absent on December 21, 1995. Claimant maintained that he had paged the Rail Gang Supervisor and the Track Supervisor. He further maintained that he was ill on December 21, that neither supervisor returned his page, and that in the past the supervisors have accepted pages for absences due to illness.

The Rail Gang Supervisor testified that he never received a page from Claimant. The Rail Gang Supervisor further testified that if he receives a page before the start of the shift and the employee subsequently documents the reason for his absence, he gives the employee authority to be absent. He also has authorized absences where the employee did not have documentation but had a reasonable explanation, such as being sick with the flu but not needing to see a doctor.

The Track Supervisor testified that he received a page from Claimant at 8:45 a.m., i.e., after the start of Claimant's shift. However, Claimant did not leave a telephone number where he

could be reached.

Claimant admitted that he did not leave a telephone number to which the page could be returned. He also admitted that he did not have documentation of his alleged illness. Although Claimant testified that he paged both supervisors, Carrier could reasonably credit the supervisors' testimony that Claimant did not page the Rail Gang Supervisor and that his page to the Track Supervisor came after the start of Claimant's shift. Furthermore, although Claimant claimed that he was sick because he was under the influence of alcohol, a co-worker who had shared a motel room with Claimant testified that Claimant was not under the influence of alcohol the morning of December 21. Under these circumstances, Carrier could reasonably discount the credibility of Claimant's claim of illness. Viewing the record as a whole, we find that Carrier proved the charge of being absent without authority by substantial evidence.


There remains the propriety of the penalty of dismissal. The record reveals that this was Claimant's fifth incident of being absent without authority within a fifteen month period. Claimant was counseled on two prior occasions and disciplined on two other occasions. Claimant, who was a relatively short term employee, failed to correct his conduct despite having had the benefit of progressive discipline. Dismissal was in accordance with Carrier's UPGRADE policy and we see no reason to overturn the penalty.

AWARD

Claim denied.



Martin H. Malin, Chairman



D. A. Ring,
Carrier Member



R. B. Wehrli
Employee Member

Dated at Chicago, Illinois, February 14, 2000.