NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6089

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	)	
	)	Case No. 8
and	)	
	)	Award No. 4
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:

(1) The dismissal of Mr. D. A. Wullschleger for alleged violation of Union Pacific Rule 1.6 was without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement (System File D-263/1048987D).

(2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be reinstated to the Carrier's 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 until he is reinstated to service.

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 April 11, 1996, Claimant allegedly voluntarily left the job prior to completing his shift. Carrier dismissed him and Claimant requested a hearing. Prior to the scheduled date of the hearing, at the Organization's request, a conference was held and it was agreed that Claimant would be reinstated to service and

that he would report to Carrier's Employee Assistance Program and comply with all instructions of the EAP. The agreement further provided that in the event Claimant withdrew from the EAP prior to completion or failed to follow the instructions of the EAP counselor, Claimant would revert to the status of a dismissed employee. Upon Complainant's completion of the EAP and release from the program, Claimant's record was to be cleared.

On November 26, 1996, Carrier instructed Claimant to report for an investigation on December 16, 1996. The notice referred to the prior agreement and charged Claimant with violating Rule 1.6. Carrier also withheld Claimant from service.

The hearing was postponed to and held on December 17, 1996. On January 4, 1997, Carrier advised Claimant that he had been found guilty of the charge and dismissed from service.

The Organization contends that Carrier prejudged Claimant, as evidenced by its withholding him from service. The Organization maintains that Claimant's foreman testified that Claimant had performed his duties and carried out all instructions since his return to duty. The Organization argues that Claimant posed no threat to safety or to Carrier's operation and therefore should not have been withheld pending the outcome of the investigation.

The Organization argues that the hearing officer engaged in an improper pre-hearing investigation, thereby prejudicing Claimant's due process rights. The Organization contends that Claimant's due process rights were prejudiced further because the notice of charges was not precise, because Carrier failed to call the EAP counselors as witnesses, and because Carrier refused to make Claimant's foreman available as a witness. The Organization further argues that Claimant's alleged refusal to comply with the EAP counselor's instructions occurred on July 16, August 2 and October 3, but Carrier delayed bringing charges until November 26 and did not schedule the hearing until December 16, in excess of the Agreement's thirty day time limitation.

On the merits, the Organization argues that Claimant complied with all instructions. Claimant reported to the EAP but was not given an assessment because he rightly refused to pay the $15.00 co-payment. When Carrier clarified that it would pay the co-payment, Claimant again reported to the EAP. The Organization relies on Claimant's testimony that he met with the counselor who agreed with Claimant that Carrier was treating him unfairly and advised him to get a lawyer. Thereafter, Claimant heard nothing further from the counselor and, in the Organization's view, properly assumed that he had complied with all that the EAP wanted of him and had been released from the program.

Carrier contends that it properly withheld Claimant from

service in accordance with Rule 48(o). Carrier denies that any improper pre-hearing investigation occurred. Carrier argues that the charges were sufficiently precise to allow Claimant to prepare his defense. Carrier maintains that it could not be required to have the EAP counselors testify because they were not Carrier employees and were beyond its authority to require them to appear. Carrier argues that the charges and hearing were timely because it, in good faith, was making every effort to get Claimant to comply with the EAP. Carrier brought the charges only after Claimant met with the peer support employees who advised Claimant that he had to comply by November 23. The hearing was held within thirty days of November 23.

On the merits, Carrier contends that it proved that Claimant violated the instructions of the EAP to submit to an assessment. Carrier relies on written reports from the counselor and on Claimant's refusal to answer questions about efforts by the Organization and others to get him to comply with the EAP's instructions.

We consider the procedural arguments first. We find that Carrier did not violate the Agreement by withholding Claimant from service. Rule 48(o) authorizes Carrier to withhold an employee from service for alleged serious and/or flagrant violations. Insubordination, in violation of Rule 1.6, is a serious violation.

We have reviewed the charges and find that they were sufficiently precise to enable Claimant to prepare a defense. We also have reviewed the transcript and conclude that the hearing officer conducted the hearing fairly and impartially. The hearing officer did meet with a Manager Track Maintenance before the hearing, but it does not appear that this brief contact prejudiced him in anyway or resulted in his receiving improper prejudicial material.

The record does reflect allegations that Claimant refused to submit to the assessment on July 16, August 2 and October 3. However, we cannot say that Carrier acted improperly when it decided to make further efforts to induce Claimant to comply. Carrier acted reasonably in awaiting the result of peer counseling before initiating formal disciplinary proceedings. The hearing was held within thirty days of these final efforts and Claimant's final refusal to comply.

Finally, we find no due process violation resulting from Carrier's failure to produce certain witnesses. The foreman provided no evidence relevant to the charge. The Organization maintained that his testimony was relevant to whether Carrier acted properly in withholding Claimant from service, but we already have held that the seriousness of the charge justified Carrier's actions. Furthermore, because the EAP counselors were

not Carrier employees, Carrier was not obliged to produce them as witnesses. However, Carrier assumed the risk that by relying on their written statements, it might not have sufficient evidence to prove the charge.

Accordingly, we turn to the merits of the charge. The parties present conflicting views of what occurred. The Organization, relying on Claimant's testimony, contends that Claimant complied with all instructions, that he met with Counselor Mayo, that the counselor did not know why he was there and agreed with him that Carrier was treating him unfairly, and that Claimant never heard from the counselor again and properly assumed that he was released from the EAP. Carrier, relying on Counselor Souther's written statement and testimony from its managers, maintains that when Claimant met with Counselor Mayo, she spent an hour calming him down, he did not submit to the assessment and he refused all subsequent efforts to persuade him to return to the EAP for the assessment.

Counselor Souther's written statement and the Claimant's testimony are in direct conflict. This case would be troubling if the only evidence against Claimant was Counselor Souther's statement, although we note that if Claimant's story is believed, Counselor Mayo acted in a highly unprofessional manner. However, there is considerably more evidence that contradicts Claimant's testimony. Carrier's witnesses testified that the Vice General Chairman also tried to persuade Claimant to submit to the EAP assessment and that he gave the manager track maintenance a letter to give to Claimant. When asked about his dealings with the Vice General Chairman, Claimant refused to answer the questions. Furthermore, Carrier's witnesses testified that peer support employees met with Claimant and conveyed to him Carrier's final ultimatum that he submit to the EAP assessment by November 23. Claimant did not deny the meeting with the peer support employees. Claimant's evasiveness and the negative inferences to be drawn therefrom, coupled with Counselor Souther's written statement and the low probability that a counselor would act as unprofessionally as Claimant maintained Counselor Mayo acted, provide substantial evidence in support of the charge that Claimant was insubordinate in violation of Rule 1.6

Insubordination is a very serious offense. Under Carrier's UPGRADE policy, an insubordinate employee is subject to dismissal. Moreover, Claimant already had been dismissed and reinstated based on his agreement to submit to the EAP and comply with the EAP counselor's instructions. Under these circumstances, we cannot say that dismissal was arbitrary, capricious or excessive.

AWARD

Claim denied.

Martin H. Malin, Chairman

D.A. Ring,
Carrier Member

R.B. Wehrli (Dissent Attached)
Employee Member

Dated at Chicago, Illinois, September 23, 1998.

ORGANIZATION MEMBER'S DISSENT

TO

AWARD NO. 4 OF PUBLIC LAW BOARD 6089
(Referee M. H. Malin)

It has been said more than once that 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 the Board and rejected. Without endorsing this school of thought in general, it is equally recognized that a dissent is required when the award is not based on the widely accepted precedent. Such is the case here.

Like it or not, the Carrier and this Organization agreed to time limit restrictions in their discipline rule and consequences for the party that fails to comply with these time limits. The National Railroad Adjustment Board has *normally* followed the well established principle of law and precedence that a statute of limitations begins when the cause of action arises. In this case the Board's majority recognized that the record reflected allegations *"that Claimant refused to submit to the assessment on July 16, August 2 and October 3."* That same record indicates that by scheduling an investigation for December 16, 1996, a hearing was NOT scheduled and held "*within thirty (30) calendar days from date of the occurrence to be investigated or from the date the company has knowledge of the occurrence to be investigated*" (direct quote of Rule 48 - DISCIPLINE AND GRIEVANCES).

When time limitations, for the performance of an act, are embodied in an agreement, with precision, the parties are contractually obligated to comply with them. Whether the limitations are found in practice to be harsh, not equitable, or unreasonable, should be no concern of this Board. Instead it is allowed no other discretion but to apply the rule as written.

Here, the majority ignored these well established and appropriate principles. In effect, the majority's action constitutes a different interpretation of the time limit provisions as contemplated and/or represents a rewriting of the provisions which it was never empowered to do.

To justify ignoring the alleged incidents of July 16, August 2 and October 3, the majority asserts *"[t]he hearing was held within thirty days of these final efforts and claimant's final refusal to comply."* However, in a quick review of Rule 48, one can easily determine that the time limit provision does NOT indicate or even suggest that the thirty-day time limit commences to toll immediately following the fourth occurrence of the same alleged offense to be investigated. In effect, this Board and its majority decision have established a precedent based on Carrier arguments that will send an inappropriate message to the employees. That message, of course, is that an employee may ignore an instruction given him on three (3) occasions and he will only be subjected to the disciplinary

process if he fails to comply with that instruction on the fourth or "final" occasion. This is of significant concern when it involves instructions dealing with safety. Another conclusion that can be derived form this award is that the employees must comply with the terms and conditions of their employment but Carrier officials need not be concerned with such compliance.

In either case, the conclusion of the Board's majority on this point is seriously flawed, contradicts the well established principles connected thereto and is, therefore, devoid of any precedential value.

Another obvious flaw in this award is the fact that it allowed, if not condoned, the Carrier's decision to dismiss the Claimant without providing adequate evidence in support of its charges. The Carrier is obligated to produce and submit direct, positive, substantial, material and relevant evidence to sustain its charges and actions. The Carrier failed miserably in this regard, yet, the Board's majority inappropriately supports its sustaining of the charges and issuance of discipline.

The record reflects that the only individuals who witnessed what took place between the Claimant and Counselor Mayo, was the Claimant and Counselor Mayo. The only evidence obtained from Counselor Mayo was a written statement (Exhibit G-2) which merely indicated she missed the Claimant at a scheduled intake appointment on May 23, 1996. First, that date, May 23, 1996, had absolutely nothing to do with the charges preferred against the Claimant as it was not *"July 16, August 2 and October 3"* or the *"Claimant's final refusel to comply."* (Quotes from the award) Secondly, the record reflects that the reason why counselor Mayo missed the appointment with the Claimant was not because the Claimant did not report for the session as scheduled, but, instead, it stemmed from a mistake the Carrier made. That is, the Carrier failed to take care of the $15.00 co-pay associated with Claimant's insurance coverage for an Employee Assistance assessment as it origanally agreed to do. This issue was cleared up during the investigation by Supervisor Pensick as shown on page 50 of the hearing transcript, and I quote:

> *"So, at this time, I called Mr. Goodman and told him that, basically, Mr. Wullschleger was right. We agreed to pay the money for his assessment. That we would go ahead and pay the assessment money."*

In light of this fact, there was absolutely no evidence or testimony provided by Counselor Mayo presented by the Carrier to support its version of what purportedly took place between Counselor Mayo and Claimant Wullschleger. The only evidence presented from the two was that provided in direct testimony from Claimant Wullschleger. Absent any evidence from Counselor Mayo which would refute the Claimant's testimony, the Carrier and the Board are without basis to ignore or reject that testimony. Carrier witnesses and managers, Messrs. Kohake and Pensick, recognized this fact during the investigation as shown by the following testimony:

Manager Kohake
(Page 36-37)

Q: Did you ever - - were you present with Mr. Wullschleger when he met

with this counselor?

A: No.

Q: Have you discussed it with the counselor?

A: No.

Q: So, you have no first hand knowledge whether or not he met or did not meet with the counselor, other than a written statement that's been provided?

A: That is correct.

Manager Pensick
(Page 59)

Q: Did he comply - - did Mr. Wullschleger comply with the instruction and programs of the Employee Assistance Counselor, Ms. Patty Mayo immediately following your meeting?

A: Well, I don't have any idea on that myself, as far as - - it's basically out of my hands when he goes to employee Assistance.

The Carrier provided no other witnesses to testify at the investigation concerning the charges. The only "*evidence*" presented by the Carrier in support of its version was a written statement from an associate counselor or "Laison", Ms. Souther, which at the very most could only be categorized as heresay or second hand information. Initially, while this Board member does not agree with the majority that the Carrier was unable or not obliged to produce either counselor as a witness, it makes absolutely no sense that the Carrier could obtain a written statement from Ms. Souther but was unable or chose not to produce one from Counselor Mayo. In any event, the written statement from Ms. Souther was completely unsubstantiated by testimony of Ms. Souther, or testimony and/or a written statement of Counselor Mayo. As such, the hearsay testimony had no probative value.

In light of the fact that this award ignores the well established principles concerning Carrier obligations toward basic procedural and burden of proof requirements, this Board member believes this award is palpably erroneous, of no precedential value and I, therefore, dissent.

Respectfully submitted,

R. B. Wehrli
Organization Member

CARRIER MEMBER RESPONSE
TO
ORGANIZATION MEMBER'S DISSENT
TO
AWARD NO. 4 OF PUBLIC LAW BOARD 6089
(Referee Martin H. Malin)

First and foremost, the Referee in this case did not err in his decision to deny the claim. Contrary to the assertion of the Organization Member the Award is based on ample precedent and therefore is not palpably erroneous. The Carrier considers the Award to have precedential value and will cite the findings in similar disputes.

Second, this is not a "Dissent" but rather a re-hash of the "ex parte" Submission of the Organization Member. Other than conjecture and opinion, at no point is there any substantiation of any of his personal theories.

What is obvious is that the Organization Member only wants to take excerpts of the entire record, put those excerpts under microscopic evaluation, and criticize from there. It has been said the best critic is the best arm chair quarterback. Disturbingly, the Organization Member fails to mention the involvement of the Brotherhood in those other events he contends should have been the triggering date for any discipline.

To read the Dissent of the Organization Member, one would be left with the impression that he is the only person who understands the time limit provisions contained in the Discipline Rule of the Agreement. Nothing is further from the truth. Rather, the Carrier Member points out the Board did not err in its decision and has correctly applied the time limit provisions of the Agreement. Here, the Organization Member continues to dismiss the entire record and only concentrate on those portions of the transcript he individually elects to recognize. The incident, for which the Carrier elected to base discipline, was the date the employee refused to adhere to explicit instructions.

The action or inaction of the Claimant which triggered the discipline was fully and adequately covered in the Notice of Investigation, the Hearing Transcript, the Notice of Discipline and the on-property handling. Both parties adequately and fully explained their respective positions to the Referee in both an "ex parte" submission and oral argument before the Referee. It is therefore time to move on.

In sensationalizing his Dissent, the Organization Member engages in sophistry in its barest form by leaving the impression there will be all kinds of egregious events occurring. To wit, the Organization Member stated, "*That message, of course, is that an*

employee may ignore an instruction given him on three (3) occasions and he will only be subjected to the disciplinary process if he fails to comply with that instruction on the fourth or "final occasion. This is of significant concern when it involves instructions dealing with safety. Another conclusion that can be derived form this award is that the employees must comply with the terms and conditions of their employment but Carrier officials need not be concerned with such compliance." Not only is this statement one of opinion, but not factual. Again, the Organization Member elects to decline to discuss the entire record. The Carrier Member reminds the Organization Member that he is the only one suggesting or condoning employees to ignore instructions, especailly when he reduces such an opinion to written form.

In any event, while the Organization Member went on to reargue the remainder of his submission, to avoid writing a rebuttal submission to the Dissent the Carrier Member affirms the Carrier's position that the Award is correct and has precedential value and will be applied.

Respectfully submitted,

D. A. Ring
Carrier Member