

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6089

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	)
	) Case No. 7
and	)
	) Award No. 5
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 Carrier's actions of withholding Laborer B. S. Bigelow from service pending hearing and imposing Level 2 and Level 5 discipline (dismissal) from service for alleged violations of Rule 1.15 in connection with his being absent without proper authority on:
  - (a) August 11, 1994 was arbitrary, capricious, without just and sufficient cause and in violation of the Agreement (Organization file D-220; Carrier File 95 0172)
  - (b) August 25, 1994 was arbitrary, capricious, without just and sufficient cause and in violation of the Agreement.
  - (c) September 12, 1994 was arbitrary, capricious, without just and sufficient cause and in violation of the Agreement.
- (2) As a consequence of the violations referred to in Parts (1)(a), (b) and/or (c) above, the Claimant's personal record shall be expunged of the charges leveled against him, he shall be reinstated to service, he shall be compensated for all lost wages beginning September 13, 1994 and continuing, he shall be compensated twenty-eight (28) cents for each of the one thousand four hundred twenty-one (1,421) miles he was required to travel plus one hundred fifty-two dollars and thirty-four cents (\$152.34) for miscellaneous expenses incurred while attending the hearing and all benefit provisions including vacation credits, railroad retirement credits and entitlements, insurance benefits should be allowed as if he had worked.

**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 September 7, 1994, Carrier notified Claimant to report for an investigation on September 13, 1994. The notice charged Claimant with being absent without authority on August 11, 1994, in violation of Rule 1.15. On September 7, 1994, Carrier also notified Claimant to report for an investigation on September 13, 1994, charging him with being absent without authority on August 25, 1994, in violation of Rule 1.15. On September 14, 1994, Carrier notified Claimant to report for an investigation on September 20, 1994. The notice charged Claimant with being absent without authority on September 12, 1994, in violation of Rule 1.15. Carrier also withheld Claimant from service, effective September 13, 1994.

The hearing on the September 12 absence was held as scheduled. The hearings on the August 11 and 25 absences were postponed to and held on September 20, 1994. On October 3, 1994, by separate notices, Carrier advised Claimant that he had been found guilty of the charge relating to the August 11 absence and assessed discipline at UPGRADE level 2, that he had been found guilty of the charge relating to the August 25 absence and assessed discipline at UPGRADE level 2 (one day off with pay to develop a corrective action plan), and that he had been found guilty of the charge relating to the September 12 absence and been assessed discipline at UPGRADE level 5 (dismissal).

The Organization has launched a multi-faceted attack on the discipline and dismissal. The Organization contends that Carrier prejudged Claimant, as evidenced by its withholding him from service. The Organization maintains that attendance violations are not the type of serious violation for which the Agreement authorizes Carrier to withhold an employee from service.

The Organization argues that the hearing with respect to the August 11 absence was not scheduled to be held within thirty days of the alleged incident as required by Rule 48(a) of the Agreement. The Organization maintains that Carrier violated Claimant's due process rights by holding all three hearings in Pocatello, Idaho, instead of LaGrande, Oregon, which would have been more convenient to Claimant's home. The Organization contends that Carrier violated Claimant's due process rights with respect to the hearing on the August 25 absence by refusing to provide a witness and with respect to the September 12 absence by refusing to recess the hearing for one day to enable the

Organization to present a witness.

On the merits, the Organization contends that Carrier failed to prove that Claimant violated Rule 1.15. The Organization argues that Claimant had proper authority for his absence on August 11. The Organization urges that Claimant's absence on August 25 was not his fault because another employee, with whom Claimant had shared a motel room, had inadvertently turned off the alarm clock, causing Claimant to oversleep. The Organization maintains that Claimant's absence on September 12 was due to the break down of his car, stranding him where he did not have access to a telephone.

Carrier argues that it properly withheld Claimant from service for serious and flagrant violations. Carrier observes that prior awards have upheld its right under the Agreement to withhold an employee from service for repeated attendance violations.

Carrier contends that it scheduled each hearing in a timely manner. With respect to the hearing regarding the August 11 alleged violation, Carrier argues that Claimant did not return the form advising whether he would elect to waive a hearing until August 31, 1994. Carrier maintains that under Rule 48(a), it had fifteen days from receipt of the waiver to schedule and conduct the hearing, even if such date was more than thirty days after the incident giving rise to the charge. Carrier scheduled the hearing for September 13, which was within fifteen days of its receipt of Claimant's election not to waive the hearing.

Carrier maintains that the Agreement did not require it to hold the hearing in LaGrande, Oregon. Carrier contends that it acted reasonably in holding the hearing in Pocatello, Idaho, because that was where the witnesses were located.

Carrier argues that it did not deny Claimant's due process rights with respect to the denial of witnesses in the hearings related to the August 25 and September 13 absences. Carrier contends that the Agreement places the responsibility on Claimant and the Organization to secure their own witnesses.

On the merits, Carrier contends that Claimant admitted his responsibility for being absent without proper authority on August 11 and August 25. Claimant's absence on August 11 was authorized to enable him to keep an appointment with a lawyer and Claimant was advised to document the visit. Claimant admitted that he did not have an appointment and that the lawyer was not available on August 11. Furthermore, Carrier urges, Claimant produced no documentation until the hearing. With respect to August 25, Carrier argues, Claimant agreed that it was his responsibility to wake up and get to work on time.

With respect to the September 12 absence, Carrier argues that although Claimant testified he had broken down and was stranded while returning to the motel where he and other members of the gang were staying, the gang foreman testified that when he arrived at the motel at 1:10 a.m., he saw Claimant's car in the parking lot and that Claimant later asked him to lie and say he did not see his car. Carrier urges the Board to defer to the decision made on the property and the foreman's testimony was more credible than the Claimant's.

Carrier contends that it properly dismissed Claimant. Carrier urges that under its UPGRADE policy, an employee is subject to dismissal for committing three offenses of the same rule in thirty-six months. Carrier notes that Claimant already had received a letter of reprimand (UPGRADE level 1) for being absent without authority on August 8, 1994. Consequently, in Carrier's view, even if only two of the charges are upheld, Claimant would have violated Rule 1.15 three times in a very short period of time, thereby justifying dismissal.

Two of the Organization's arguments apply to all three charges. We will consider them first. Then, we will address the arguments that pertain to each specific charge.

First, we find no provision in the Agreement that required Carrier to hold the hearings in LaGrande, Oregon. Carrier acted reasonably in scheduling the hearing for Pocatello, Idaho, as that is where most of the witnesses were located. These charges involved a system gang which travelled considerably. Absent specific language in the Agreement requiring Carrier to schedule the hearing at the location most convenient for the charged employee, Carrier was free to schedule the hearing at the location most convenient to the other participants. Therefore, Claimant is not entitled to be reimbursed for his travel and miscellaneous expenses.

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. As we recognized in Case No. 5, Award No. 3, and as other boards deciding cases on this property have recognized previously, repeated attendance violations within a relatively short period of time present flagrant violations within the meaning of Rule 48(o).

Accordingly, we turn to the arguments specific to each claim. With respect to the August 11 absence, we find that Carrier scheduled the hearing in a timely manner. Rule 48(a) permits Carrier to offer a charged employee the option of waiving the hearing. Under such circumstances, the Rule provides, "When discipline is rejected, Carrier shall have no more than fifteen

(15) calendar days from the date of receipt of rejection in which to schedule and conduct the hearing, and hearings held outside the thirty (30) calendar day period referred to above shall not be a violation of this rule." Carrier scheduled the hearing to be held within fifteen days of its receipt of Claimant's rejection of discipline and, therefore, acted in accordance with Rule 48 (a).

Having reviewed the record carefully, we find that Carrier proved the charge with respect to the August 11 absence. There is no dispute that Claimant was given authority to be absent on August 10 to go to the dentist and that he produced the required documentation of the dentist visit. With respect to August 11, Claimant testified that he needed to see his attorney to obtain a power of attorney to proceed with repairs on a building he was in the process of purchasing. Claimant testified that he did not learn he needed the power of attorney until August 10 and that he paged his supervisor who did not return the call. Claimant testified that he left a message for the supervisor stating that he could not work on August 11 because he had an appointment to see the lawyer and that he would bring documentation to that effect.

The supervisor, however, testified that Claimant asked him for authority to be absent on August 11 at the same time that he requested authority for August 10. According to the supervisor, Claimant represented that he had an appointment with the attorney on August 11 and the supervisor granted him authority provided he provide documentation. Regardless of whose story is believed, it is clear that Claimant either sought or obtained authority for his August 11 absence by representing that he had an appointment with the lawyer and that he would provide documentation. The representation was not accurate. He did not have an appointment and was unable to see the lawyer that day. He did not provide any documentation relative to his visit to the lawyer's office until the hearing. Therefore, we find that Carrier's finding that Claimant violated Rule 1.15 is supported by substantial evidence.

Carrier assessed Claimant level 2 discipline for the August 11 transgression. As noted above, Claimant previously had been assessed level 1 discipline for being absent without authority on August 8, 1994. The discipline imposed for Claimant's absence on August 11 was in accordance with the UPGRADE policy and was not arbitrary, capricious or excessive.

We next turn to the August 25 absence. The parties dispute who had the responsibility to arrange for the attendance at the hearing of the employee with whom Claimant shared a motel room the night of August 24. The dispute is beside the point. If the employee had been available, he would have testified that he turned off the alarm the morning of August 25. Claimant,

however, admitted that it was his responsibility to wake up on time and arrive at work in a timely manner. We agree. The other employee's testimony could not have exonerated Claimant. Indeed, who turned off the alarm was irrelevant to whether Claimant violated Rule 1.15. Therefore, we find no violation of Claimant's due process rights.

Claimant admitted that he overslept, that he did not arrive for work on time and that it was his responsibility to wake up and get to work on time. Accordingly, there is no question that Claimant violated Rule 1.15. Carrier assessed discipline at UPGRADE level 2. We cannot say that such discipline was arbitrary, capricious or excessive.

The record concerning the alleged violation on September 12 is much more troubling. Claimant testified that he was returning from his home in Walla Walla, Washington, to the motel in Mountain Home, Idaho, when his car overheated. Claimant testified that he pulled off the expressway at an exit in the middle of nowhere, in the middle of the night, where a telephone was not accessible. He had to wait for the radiator to cool down and took a nap while waiting. Consequently, he arrived at Mountain Home after the start of the shift, paged his supervisor but the supervisor did not return the call right away. Therefore he called the Carrier's GMS Center and left a message with the assignment clerk explaining his situation. Claimant related that he was sharing a room at the motel with another employee and that he did not get to motel until after 8 a.m.

The gang foreman testified that when he arrived at the motel around 1:10 a.m. he saw Claimant's car in the parking lot and that Claimant's car was still there when he left to go to work at 5:15 a.m. He further testified that after work on September 12, when he had returned to the motel, Claimant asked him, as a friend, to go along with Claimant's story and say that he did not see Claimant's car in the motel parking lot. The gang foreman testified that the employee with whom Claimant was sharing a room witnessed this conversation. Claimant denied asking the foreman to lie on his behalf.

Resolution of the conflicting testimony is critical to this charge because the supervisor testified that he liberally granted authority to be absent when employees requested it prior to the start of the shift. The supervisor further testified that he would authorize absence for an employee whose car broke down and who was stranded in the middle of nowhere without access to a phone and was therefore unable to call in and request authority. However, he indicated that the reason he did not authorize Claimant's absence was because Claimant called after the start of the shift and because, based on advice from the foreman that he had seen Claimant's car in the motel parking lot, he believed Claimant had access to a phone to be able to call before the

start of the shift.

After the foreman's testimony, the Organization requested that the hearing be continued to the following morning when the employee with whom Claimant had shared a motel room would be available to testify. The hearing officer denied the request. The only reason offered for the denial was that it was the Organization's responsibility to secure its witnesses for hearing on the date indicated in the notice.

The hearing officer's reason for denying the request to continue the hearing is not persuasive. There is nothing in the record to indicate that the Organization should have anticipated the need for the roommate's testimony prior to the hearing. The need arose when the foreman testified that Claimant's car was at the motel between 1:10 a.m. and 5:15 a.m., that Claimant had asked him to lie on Claimant's behalf, and that the roommate had witnessed the conversation. There is no indication that continuing the hearing until the following morning so that the roommate could testify would have prejudiced the hearing in any manner.

As an appellate body, we cannot find the facts de novo. Generally, because the hearing officer has the opportunity to observe the witnesses' demeanor and we defer to the credibility determinations made on the property. However, such credibility determinations must be based on a fully developed record. In this case, the employee with whom the Claimant had shared a motel room and who allegedly had witnessed the conversation between Claimant and the foreman was a very material witness. Carrier could not make a fully informed credibility determination without hearing his testimony. Therefore, the denial of the continuance was a material violation of Claimant's due process rights. It denied him a fair hearing, in violation of the Agreement, and the discharge resulting from Carrier's finding that Claimant violated Rule 1.15 cannot stand.

Nevertheless, Carrier urges that we uphold Claimant's dismissal because the August 11 and 25 violations, combined with the earlier August 8 violation amounted to three violations of Rule 1.15 within thirty-six months. Carrier's argument misconceives our role. As an appellate body, we do not assess discipline de novo. Our role is limited to reviewing the discipline that Carrier assessed to determine whether it is arbitrary, capricious or excessive. Carrier assessed a level 2 discipline for the August 11 violation and a level 2 discipline for the August 25 violation. We already have found that those penalties were not arbitrary, capricious or excessive. In essence, Carrier has asked us to increase the penalty that it imposed for the August 25 violation from level 2 to dismissal. We have no authority to do so.

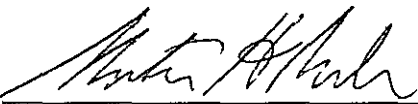
To recap, Carrier did not violate the Agreement by holding the hearings in Pocatello, Idaho. Therefore, the claim for reimbursement of travel and miscellaneous expenses must be denied. Carrier afforded Claimant a fair hearing with respect to the alleged violations on August 11 and 25, 1994. Carrier proved the August 11 and 25 violations by substantial evidence and the penalties imposed were not arbitrary, capricious or excessive. Therefore, the claims based on the level 2 discipline assessed for August 11, 1994, and the level 2 discipline assessed for August 25, 1994, are denied. However, Carrier failed to afford Claimant a fair hearing with respect to the September 12 alleged violation. Therefore, the claim to set aside Claimant's dismissal must be sustained. Claimant must be restored to service with seniority and benefits unimpaired and, in accordance with Rule 48(h) "compensated for net wage loss, if any, which may have been incurred by the employee."

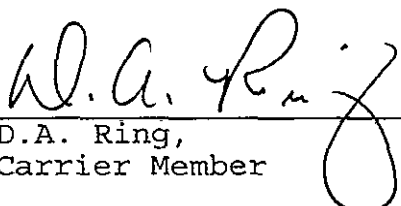
#### AWARD

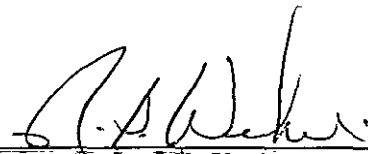
Claim sustained in accordance with the Findings.

#### 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, September 9, 1998.