

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6302

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES)
and) Case No. 119
UNION PACIFIC RAILROAD COMPANY) Award No. 109
_____)

Martin H. Malin, Chairman & Neutral Member
D. D. Bartholomay, Employee Member
D. A. Ring, Carrier Member

Hearing Date: June 4, 2007

STATEMENT OF CLAIM:

The Organization requested that the Claimant, Sharon A. Purcell, be immediately reinstated to service with all seniority, vacation and Agreement rights unimpaired. They requested that Claimant be compensated for all time lost from the date of her removal from service. In their correspondence, it was alleged the Carrier violated Rules 1, 14, 25, 26, 35, 48 and 48(a) of the Agreement.

FINDINGS:

Public Law Board No. 6302 upon the whole record and all of 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 August 21, 2006, Claimant was notified to report for a formal investigation on August 31, 2006, alleging that on August 8, 2006, Claimant was indifferent to duty, dishonest and negligent when she informed her supervisor that she was going to have an injury and provided photographs documenting where or how it would occur. Following two postponements, the hearing was held on October 9, 2006. On October 26, 2006, Claimant was advised that she had been found guilty of the charges and had been dismissed from service.

The Organization raised several procedural objections. We have considered these objections carefully. We find none of the procedural objections, individually or together with the others, warrants setting aside the discipline.

The record reflects that precision that Claimant operated a foam plugger machine. The

operator of the spiker who Claimant followed smoked and, according to Claimant, frequently dropped lit cigarette butts on the track. Claimant testified that she was concerned because of the dry conditions and regarded this as a fire hazard. Claimant related that on August 7, 2006, she engaged in a heated confrontation with her coworker over his dropping lit cigarette butts on the track.

The Track Supervisor testified that during the evening of August 7, he received a phone call from Claimant's coworker complaining that Claimant had been using her cell phone to take pictures of him in connection with their dispute over the cigarette butts. According to the Track Supervisor, he met with Claimant the following morning and read her Rule 1.10 concerning the use of electronic devices. The Track Supervisor further testified that Claimant denied taking pictures with her cell phone.

The Track Supervisor testified that later that morning, Claimant produced photographs which she showed to him and declared that she had taken the pictures so that she would have proof when *she* got hurt. The Truck Driver Foreman and the Gang Foreman testified and corroborated the Track Supervisor's testimony with respect to this later conversation. Claimant denied taking the pictures in question and denied making the statements attributed to her. As an appellate body that does not observe the witnesses testify, we are in a comparatively poor position to evaluate witness credibility and resolve conflicts in the testimony. Consequently, we defer to the credibility determinations made by the hearing officer who did observe witness demeanor. In the instant case, the hearing officer found the evidence of the Track Supervisor, the Truck Driver Foreman and the Gang Foreman to be more credible than the testimony of the Claimant. We see no reason to deny that finding the deference usually accorded hearing officer evaluations of witness credibility. We conclude that Carrier proved that the conversation occurred as alleged.

The instant case differs from the typical case of alleged dishonesty in connection with a personal injury claim. In the typical case, the employee has filed an on-duty personal injury claim which Carrier contends was falsified. There is rarely direct proof of falsification and the typical case turns on whether reasonable inferences of falsification may be drawn from the circumstantial evidence presented. The instant case, however, does not involve a submitted claim of on-duty injury. Rather, the alleged dishonesty is Claimant's intent to falsify an injury claim in the future, using the pictures to support her claim.

The record contains no evidence that Claimant harbored such an intent. Although the Track Supervisor testified that he interpreted Claimant's statement as a threat to file a future injury claim, the other two witnesses did not regard the statement in that way. The Truck Driver Foreman testified, "I suppose she was making a -- a point that it was an unsafe condition." The Gang Foreman testified, "I don't know if she was threatening. I don't know what her intentions, and I can't say one way or the other what her intentions are."

Thus, the record contains only the Track Supervisor's supposition or speculation that Claimant intended a dishonest use of the pictures in the future, but even that supposition or

speculation was not shared by the other two Carrier officers present who testified. Speculation about dishonest intent is not proof of dishonest intent.

Claimant's actions on August 8 were certainly inappropriate and warranted discipline. However, in light of the absence of proof of dishonest intent, we are compelled to find that the penalty of dismissal was excessive. Accordingly, Carrier shall reinstate Claimant to service with seniority unimpaired but without compensation for time held out of service.

AWARD

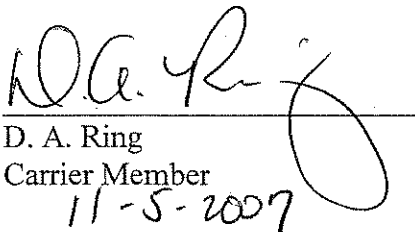
Claim sustained in accordance with the Findings.

ORDER

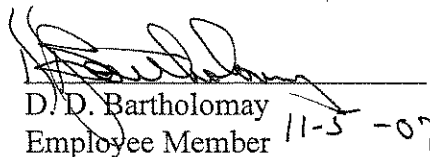
The Board having determined that an award favorable to Claimant be issued, Carrier is ordered to implement the award within thirty days from the date two members affix their signatures hereto



Martin H. Malin, Chairman



D. A. Ring
Carrier Member
11-5-2007



D. D. Bartholomay
Employee Member 11-5-07

Dated at Chicago, Illinois, October 25, 2007