

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD 6302

NMB NO. 172

AWARD NO. 166

PARTIES TO DISPUTE

CARRIER

Union Pacific Railroad

AND

ORGANIZATION

Brotherhood of Maintenance of Way Employees
Division of International Brotherhood of Teamsters

Carrier's File

1506996

System File

J-0848U-262

STATEMENT OF CLAIM

1. The Carrier violated Rule 48 of the Collective Bargaining Agreement effective July 1, 2001 when it imposed a Level 5 discipline and wrongfully dismissed Claimant Stephen L. Medinger from service for the alleged violation of General Code of Operating Rules (GCOR), Rule 1.6 (Conduct), specifically, falsifying a claim for travel allowance for the weekend of May 9, 2008.
2. As a consequence of Carrier's violation as set forth in Point 1 above, the Organization requests as a remedy in accord with Rule 48 (h) of the Agreement that, all charges against Claimant be dropped, the discipline of removal be expunged from his personal record, he be reinstated to service and, be compensated for all time he was withheld from service.

STATEMENT OF BACKGROUND

At the time the subject incident occurred in May of 2008, Claimant, with over eleven (11) years of service and an unblemished work record, was assigned and working as a system tie and rail inspector on Gang No. 8504 headquartered near Indio, California, near Mile Post 610.90. Although Claimant worked in Indio, California, he lived in Grand Island, Nebraska. However, Claimant was assigned to a position for which he could claim weekend travel allowances pursuant to Rule 36, Section 7(a) whenever he made

weekend trips home. The undisputed record evidence reflects that for the weekend of May 9, 2008, a Friday and May 10, 2008, a Saturday, Claimant entered into the timekeeping system a claim for travel home of 2,904 miles round-trip which amounted to a claim for payment of \$725.00. According to the Organization, a review of Claimant's payroll information reflects that the amount of mileage claimed for this weekend travel home was not out of the ordinary and represented the typical monetary amount Claimant would charge when he traveled home on his rest days. As such, Claimant's supervisor did not question his mileage claim and claim for payment, and just routinely approved the claimed mileage and monetary amount.

In and around this same time period of May, 2008, Carrier's Corporate Audit Staff commenced auditing employees who, on a continuous basis, were claiming high mileage trips and where the amount of time allegedly spent at home was suspect. Claimant was identified by the Audit Staff as one such employee who fell within this suspect group of employees. The record evidence reflects that Corporate Audit Senior Ben Hamilton observed both Claimant and his vehicle in Indio, California on the two (2) weekend days of May 9 and 10, 2008 and documented this observation by taking photographs of the Claimant and his vehicle. As a result of Hamilton's audit of Claimant, Carrier notified Claimant by letter dated June 9, 2008 to report for an investigation and hearing to be held June 12, 2008 for the purpose of developing the facts and placing responsibility, if any, in connection with the charge that at the end of the work day (4:30pm) on May 9, 2008, he allegedly did not travel home for the weekend to Grand Island, Nebraska, but that nevertheless, he, in fact, charged 2,904 round-trip miles home for that weekend in clear violation of the Carrier's Weekend Travel Policy. In addition to summoning Claimant to attend the formal investigation on June 12, 2008, Carrier also acted to withhold Claimant from service on June 9, 2008.

By letter dated June 20, 2008, Carrier notified Claimant that upon consideration of all the testimony adduced at the investigation and review of the hearing transcript, it found more than a substantial degree of evidence presented to warrant sustaining the charges brought against him for his violation of Rule 1.6 (Conduct) as set forth in the General Code of Operating Rules (GCOR), effective April 3, 2005. This Rule, as it pertains to an act of dishonesty reads in pertinent part as follows:

Employees must not be:

* * * *

4. Dishonest

* * * *

Any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employees is cause for

dismissal and must be reported. . . .

As a result of such finding, Carrier apprised Claimant he was being assessed a Level 5 discipline resulting in his dismissal from service. In response to this disciplinary action, the Organization filed the subject claim here under consideration by the Board.

The Organization acknowledges there is no dispute that Claimant submitted the claim for the mileage and monetary amount in question but attributes his making said claim to simply making an honest mistake which he readily admitted in his testimony at the investigation. The Organization submits that due to a substantial amount of work assigned Claimant during the month of May, 2008 which required his working overtime throughout the work week preceding the weekend in question, as well as working overtime on his rest days, this very busy workload distracted Claimant resulting in his accidentally and inaccurately inputting his payroll information for the weekend of May 9, 2008. The Organization, in citing GCOR Rule 1.6 (4) asserts that Carrier has the burden to support the charge Claimant committed an act of dishonesty as that term is defined by the rule with clear and convincing evidence, as the offense charged implies an element of moral turpitude if not criminal intent to deceive the Company. On this latter point, the Organization references NRAB Fourth Division Award 3552 which cited the definition of the term, "falsify" as set forth in Black's Law Dictionary (Fourth Edition), to wit:

The word "falsify" may be used to convey two distinct meanings either that of being intentionally or knowingly untrue, made with intent to defraud, or mistakenly and accidentally untrue.

The Organization argues that since Claimant readily admitted in his testimony at the investigation that he erred in submitting the travel claim for the weekend of May 9, 2008, that it is clear that the latter half of the definition of the act involving falsification cited above applies to the instant case, that is, Claimant mistakenly and accidentally submitted an untrue claim for pay related to weekend travel home, travel which he never performed on the weekend in question. The Organization asserts that in dismissing Claimant from service for a first time violation of Rule 1.6 (Conduct), Carrier disregarded Claimant's length of service of eleven (11) years and the fact that over those eleven (11) years, Claimant had a pristine work record. But even more importantly, the Organization submits, is the fact that in assessing Claimant the discipline of dismissal, Carrier completely overlooked the purpose of administering discipline which is meant to rehabilitate, correct, and guide employees so that they never again engage in acts of misconduct as opposed to the imposition of discipline that accomplishes nothing more and serves no purpose other than to punish an employee. The Organization asserts that dismissing Claimant under all the prevailing circumstances was harsh and constituted a punishment rather than serving the true purpose of imposing discipline.

In its handling of the instant claim on the property, the Organization raised the procedural objection of removing Claimant from service prior to convening the

investigation in violation of Rule 48 (c) asserting that, in so doing, Carrier prejudged Claimant's guilt and prejudged his due process right to a fair and objective hearing. Rule 48 (c) reads as follows:

Prior to the hearing, the employee alleged to be at fault will be apprised in writing of the precise nature of the charge(s) sufficiently in advance of the time set for the hearing to allow reasonable opportunity to secure a representative of his choice and the presence of necessary witnesses. The General Chairman will be furnished a copy of the charges preferred against the employee.

Thus, the Organization asserts that holding the investigation just three (3) days after Claimant was removed from service pending convening of the hearing was simply pro forma on the part of Carrier and therefore a sham.

In response to the procedural objection raised by the Organization, Carrier cites Rule 48 (o) as support for its action of suspending Claimant from service pending the convening of the hearing. Rule 48 (o) reads as follows:

It is understood that nothing contained in this rule will prevent the supervisory officer from suspending an employee from service pending hearing where serious and/or flagrant violations of Company rules or instructions are apparent, provided, however, that such hearing will be conducted within thirty (30) calendar days from the date the employee is suspended and a decision rendered within twenty (20) calendar days following the date the investigation is concluded.

Carrier submits that Claimant's act of charging for mileage traveled on the weekend in question when he knowingly had no intention of performing the round-trip travel home constituted an act of stealing which is covered by the definition of "dishonest" as set forth in Rule 1.6 (4) and, therefore, is deemed to be a very "serious" violation within the meaning of that term as set forth in Rule 48 (o).

In response to the Organization's argument that the discipline of dismissing Claimant was meant to punish Claimant rather than to attempt to correct his misconduct going forward, Carrier submits that Claimant's act of theft resulted in breaking the bond of trust so vital to the employment relationship that no amount of discipline short of dismissal from service can be deemed as corrective in nature. Additionally, when an act of theft is committed such as was committed here by Claimant, length of service coupled with the fact of a pristine work record cannot serve as factors in mitigation in assessing the quantum of discipline administered, specifically the discipline of dismissal. Carrier submits that Claimant's intent in submitting the claim for travel home for the weekend was clearly meant to deceive and defraud the Company as Claimant

well knew how the time-keeping system worked and that since his claim for travel pay home was common, that his supervisor would approve the claim without questioning the validity of the claim out of trust between himself and Claimant. Additionally, Claimant had nearly thirty (30) days from the time he submitted the claim for weekend travel home until the time he was cited for his alleged violation of Rule 1.6, to correct his so called "mistake" yet, at no time during this interim time period did he see fit to withdraw the claim, notwithstanding the Organization's assertion that Claimant was so overwhelmed with work during the month of May, 2008 that he just overlooked having incorrectly made the claim for pay.

Carrier submits the discipline of dismissal it imposed on Claimant was warranted under all the prevailing circumstances surrounding Claimant's case and therefore urges the Board to deny the subject claim in its entirety.

FINDINGS

Public Law Board No. 6302, 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.

The Board is persuaded that the arguments advanced by the Organization in defense of Claimant must be rejected. We are not in agreement with the central excuse put forward by the Organization that due to the fact that Claimant was engaged in substantial work during the month of May, 2008 that required him to work overtime during his regularly assigned work schedule as well as working overtime on his rest days that this circumstance somehow affected him to the point that he simply forgot or overlooked the fact he had submitted a bogus claim for weekend travel home for the dates of May 9 and 10, 2008. Every employee is affected in some way or another by the circumstances surrounding their work but most employees do not let such burdens interfere with complying with the rules and regulations governing their work. In this respect, Claimant is no different than other employees working for Carrier and because he was well versed in the time-keeping system and, because he was well aware he had not traveled home on the weekend of May 9 and 10, 2008, and too, that he was cognizant of the fact he had claimed such travel, we can only conclude his intent was to deceive and defraud the Company for the compensation claimed of \$725.00 for which he was not entitled to receive. Moreover, as additional evidence Claimant was well aware he had submitted a bogus claim for pay is the fact that he did not admit to doing so until he was caught by an audit conducted by the Carrier and confronted with his wrong-doing when testifying at the hearing. Although the Organization claims his admission he had made a claim for weekend travel he never performed was evidence of his true honest nature proving his claim for pay for which he was not entitled to receive

was simply a matter of mistake rather than an attempt to defraud Carrier, the Board is persuaded this is nothing more than a lame defense as Claimant had no other choice but to admit his wrongful conduct given the overwhelming evidence compiled by Carrier during its audit establishing his guilt even beyond a shadow of doubt of, having engaged in misconduct that was in violation of Rule 1.6.

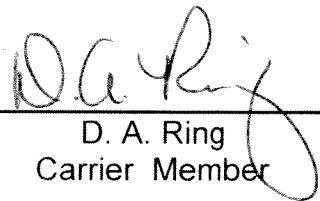
The Board concurs and is in full agreement that, given the facts and circumstances prevailing in this case, that dismissal of Claimant was proper and commensurate with Claimant's proven misconduct and that the quantum of discipline administered cannot be offset by Claimant's length of service and the undisputed fact that up until this incident, Claimant's work record stood unblemished. In this respect, we reject the Organization's claim that dismissal of Claimant was a disciplinary action too harsh.

Accordingly, the Board rules to deny the subject claim in its entirety.

AWARD

Claim Denied.


George Edward Larney
Neutral Member & Chairman


D. A. Ring
Carrier Member


T. W. Kreke
Employee Member

Chicago, Illinois
Date: April 13 2010