

**NATIONAL MEDIATION BOARD**

**PUBLIC LAW BOARD NO. 6302**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES**

and

**UNION PACIFIC RAILROAD COMPANY**

)  
) Case No. 81  
)  
) Award No.81  
)

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

Hearing Date: September 15, 2005

**STATEMENT OF CLAIM:**

1. The dismissal of Flange Oiler Maintainer R. B. Muilenberg for his alleged insubordination, alleged failure to timely report a vehicle accident and alleged untruthful statements in connection with same on August 6, 2004 was without just and sufficient cause, in violation of the Agreement and excessive and undue punishment (System File J-0448-61/1410553-D).
2. Flange Oiler Maintainer R. B. Muilenberg shall now be reinstated to service with seniority and all other rights unimpaired and compensated for wage loss suffered.

**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.

On August 10, 2004, Carrier notified Claimant to report for an investigation on August 13, 2004. The notice charged Claimant with allegedly violating Rule 1.1.3 and 1.6(3) and (4) by failing to promptly report an accident in a company vehicle on August 5, 2004, providing untruthful statements of facts concerning the accident and fusing to carry out an order to complete an accident report. The hearing was held as scheduled. On August 27, 2004, Carrier notified Claimant that he had been found guilty of the charges and dismissed from service.

The Organization contends that Carrier violated Rule 48 by withholding Claimant from service pending the investigation. We do not agree. Rule 48(0) expressly gives Carrier the right

to withhold an employee from service pending investigation for serious or flagrant violations of Carrier's rules. Rule 48(o) clearly applied to the instant charges and Carrier acted appropriately in withholding Claimant from service.

On August 5, 2004, Claimant was entering a freeway when the engine tote cover fell off his vehicle. Claimant stopped and backed up off the road so that he could retrieve the tote cover. In the process of doing so, Claimant backed into three highway barricades that belonged to the contractor performing highway construction at the site.

Rule 1.1.3 requires employees to "[r]eport by first means of communication any accidents . . ." However, Claimant did not report the accident on August 5, even though he had his supervisor's office and cellular telephone numbers. Claimant testified that it was the end of his shift and he did not think the accident was sufficiently serious to warrant reporting it until he could report to his supervisor in person the following day. However, Rule 1.1.3 does not give employees the discretion to decide whether an accident is sufficiently serious to warrant immediate reporting. It mandates that employees report any accident by first means of communication. Furthermore, Claimant did not report the accident when he reported for work the following day. The Manager Track Maintenance learned of the incident from the contractor the following morning. It was not until Claimant was called into the office for a random drug test that he mentioned the accident to the MTM. Carrier clearly proved the violation of Rule 1.1.3 by substantial evidence.

Rule 1.6(3) prohibits insubordination. The MTM testified that he took notes as Claimant described the accident, restating Claimant's description to ensure that his notes were accurate. He then told Claimant to complete an accident report and Claimant refused. According to the MTM, despite his advising Claimant of the reasons the accident report was needed, Claimant persisted in his refusal and, ultimately, the MTM told Claimant that if he was not going to complete the accident report, he should go home.

Claimant testified that he related the accident to the MTM and that the MTM began cross-examining and badgering him. Consequently, Claimant became agitated and said he wanted time to complete the accident report and turn it in later, but the MTM refused his request.

Claimant's version and the MTM's version of the events of August 6 differ significantly. As an appellate body that does not observe witness testimony, we are in a comparatively poor position to judge the relative credibility of witnesses. Consequently, we defer to the credibility judgments made on the property. In the instant case, we see no reason to deviate from this general approach. Moreover, it is undisputed that the MTM instructed Claimant to complete the accident report on the spot and Claimant refused to do so. We conclude that Carrier proved the Rule 1.6(3) violation by substantial evidence.

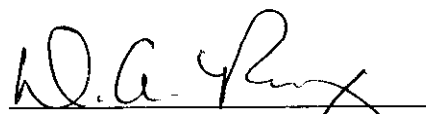

Rule 1.6(4) prohibits dishonesty. Carrier maintains that Claimant was dishonest because he gave conflicting accounts of the accident. The record reflects that Claimant advised the MTM that the tote cover was held on by a bungee cord which snapped. At one point Claimant stated

that he threw the broken bungee cord over the bank. At another point Claimant told the MTM that he did not know what he did with the broken bungee cord. The MTM also testified that Claimant first said that he backed over one barricade, when the MTM verified that account, Claimant stated that he backed over two barricades and when the MTM asked Claimant whether it was one or two, Claimant stated that it might have been three. The evidence reflects confusion on Claimant's part over some of the details of the incident, but there is no evidence of intentional dishonesty. We conclude that Carrier failed to prove the alleged Rule 1.6(4) violation by substantial evidence.

Thus, Carrier proved violations of Rules 1.1.3 and 1.6(3). The Organization contends that by dismissing Claimant, Carrier "made a mountain out of a mole hill." We cannot agree. Claimant's insubordination was a very serious act of misconduct. Moreover, it was aggravated by coming on the heels of Claimant's failure to report the accident right after it happened and further aggravated by Claimant's continued failure to report the accident first thing the following morning. Given the seriousness of the violation and its aggravated nature, we cannot say that the penalty imposed was arbitrary, capricious or excessive.

#### AWARD

Claim denied

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

Dated at Chicago, Illinois, January 20, 2006