

**NATIONAL MEDIATION BOARD  
PUBLIC LAW BOARD NO. 6402**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

and

**UNION PACIFIC RAILROAD COMPANY**

)  
) Case No. 6  
)  
) Award No. 3  
)

Martin H. Malin, Chairman & Neutral Member  
D. D. Bartholomay, Employee Member  
C. M. Will, Carrier Member

Hearing Date: January 21, 2002

**STATEMENT OF CLAIM:**

1. The discipline (Level 4 requiring thirty (30) days off work and passing necessary annual rules in order to return to work and developing a Corrective Action Plan upon return to work) imposed under date of June 21, 1999 upon Mr. H. K. Scott for allegedly violating Union Pacific Operating Rule 1.1.5 effective April 4, 1994, in connection with alleged absence without proper authority on April 6 and 21, 1999 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File MW-99-276/1202292D MPR).
2. As a consequence of the violation referred to in Part (1) above, Carrier shall remove all references of this discipline from Mr. H. K. Scott's personal record and in connection therewith he shall now be compensated at his respective rate of pay for any and all time he may have lost and for any incurred expenses.

**FINDINGS:**

Public Law Board No. 6402, 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 May 6, 1999, Carrier notified Claimant to report for an investigation on May 19, 1999, in connection with his allegedly violating Rule 1.1.5 on April 6 and 21, 1999. The hearing was postponed to and held on June 2, 1999. On June 21, 1999, Carrier informed Claimant that he had been found guilty of the charge and, in light of his prior record which was at UPGRADE Level 3, was assessed discipline at UPGRADE Level 4.

There is no dispute that Claimant was absent from work on April 6 and 21, 1999. Claimant testified that he was absent because he had difficulty breathing due to asthma attacks on

both days. Claimant provided medical documentation of the asthma attacks. The critical issue concerns whether Claimant properly reported his absences and obtained authority for them.

The Manager Track Maintenance testified that neither Claimant nor anyone else informed him that Claimant would be absent or the reasons for Claimant's absences. The MTM testified that the proper procedure was for an employee to notify a manager when he was going to be absent. The MTM testified that all employees had the phone number for his office and for his pager, and that there should be no reason for an employee not to contact him as long as he was not away on vacation.

Claimant testified that he did not know the MTM's phone numbers. Thus, Claimant's testimony conflicted with that of the MTM on this point. As an appellate body, we defer to resolutions of such conflicts in the testimony made on the property. We see no reason to not defer in the instant case.

Claimant testified that he called one foreman on April 6 and another foreman on April 21, and advised them he would be absent because of the asthma attacks. The MTM testified that neither foreman notified him of Claimant's call. Normally, one would expect the foreman to convey such information to the appropriate manager. Thus, the MTM's testimony that he received no report of Claimant's absence supports an inference that Claimant did not contact the foremen – an inference that conflicts with Claimant's testimony.

The crucial missing link in the evidence is testimony from the foremen. The Organization contends that Carrier had the burden to call the foremen as witnesses and that its failure to do so is fatal to the discipline imposed. The record, however, does not support the Organization's position.

As the MTM testified, all he knew was that Claimant did not report for work on the two days in question and no one had notified him that Claimant would be absent. Thus, at the beginning of the hearing, Carrier had no way of knowing that testimony from the foremen was potentially involved. Claimant and the Organization, however, knew that Claimant would testify that he notified one foreman on April 6 and a different foreman on April 21. Despite this, at the beginning of the hearing, they represented that they did not desire any witnesses and were ready to proceed.

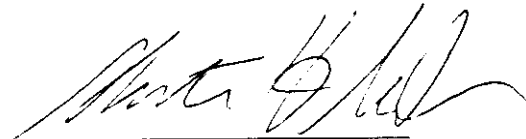
It was only after Claimant testified that the Organization demanded that Carrier produce the two foremen and that it do so that day. Claimant's representative stated that he would object to continuing the hearing but would accept a recess of a couple of hours to produce the foremen. The hearing officer offered to postpone the hearing to allow the Organization to arrange for the foremen to testify but the Organization expressly rejected the offer and insisted that Carrier produce the foremen that very day.

This Board cannot condone such game playing by the Organization. The purpose of the investigation is to develop the facts, not to provide for a game of "gotcha." The hearing officer's

offer was perfectly reasonable and the Organization's refusal of the offer was unjustified and operated to waive any claim to the foremen's testimony.

**AWARD**

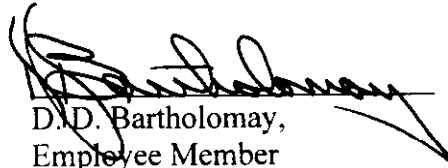
Claim denied.



Martin H. Malin, Chairman



C. M. Will,  
Carrier Member



D. D. Bartholomay,  
Employee Member

Dated at Chicago, Illinois, April 27, 2002.