NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6402

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES)
) Case No. 18
and)
) Award No. 9
UNION PACIFIC RAILROAD COMPANY)

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 dismissal of Track Foreman J. F. Torres for his alleged insubordination in that he failed to participate in daily exercises and alleged dishonesty because of a confidential call to a Company hot line to report possible intoxication of a supervisor was without just and sufficient cause, based on unproven charges and in violation of the Agreement (System File MW-00-141/1245318).

2. As a consequence of the violation referred to in Part (1) above, the Carrier shall now reinstate, Mr. Torres back to work and compensate him for all loss pay with all his seniority rights unimpaired to be reinstated back to him, all Vacation rights, all expenses incurred going to and from the investigation at Uvalde TX., to clear his personal record of all charges and to allot him all other rights due to him under the provisions of the current collective bargaining Agreement.

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 June 26, 2000, Carrier notified Claimant to report for an investigation on July 21, 2000, in connection with his alleged failure to follow instructions by the Manager Track Maintenance to participate in daily exercises and his alleged call to the hot line in Risk Management reporting the MTM as intoxicated on June 13, 2000. The hearing was held as scheduled. On August 22, 2000, Carrier informed Claimant that he had been found guilty of the "charges brought against you for the call you made to the Risk Management hot line informing them that [the MTM] was allegedly intoxicated . . . in violation of Union Pacific Rule 1.6," and

dismissed from service.

The Organization has raised a number of procedural objections. None require specific discussion and none provide a basis for disturbing the discipline. Accordingly, we turn to the merits of the discipline.

Initially, we note that Claimant was charged with violating Rule 1.13 by failing to follow the MTM's instructions to participate in daily exercises and with violating Rule 1.6 by being dishonest when he reported the MTM as possibly intoxicated. However, Carrier found Claimant guilty of only the Rule 1.6 violation in connection with the report to the Risk Management hot line. Thus, we concern ourselves only with the hot line report and the alleged violation of Rule 1.6.

The Organization argues that Carrier violated its own policy which provides that employees will not be disciplined, harassed or otherwise subject to adverse employment actions for using the hot line. We do not agree. Claimant was not dismissed for using the hot line. Claimant was dismissed for willful, deliberate dishonesty. It is irrelevant to Rule 1.6 that the dishonesty occurred in a report on the hot line or in some other venue. Thus, the issue is whether Carrier proved by substantial evidence that Claimant was willfully and deliberately dishonest, i.e. that he lied, when he made the hot line report.

The record reflects that on the morning of June 13, 2000, at Uvalde, Texas, the MTM had the employees line up for morning exercises. Claimant did not join them. The MTM asked Claimant to join the other employees but Claimant refused, saying that he was hurting. The MTM then asked Claimant to got outside and stand with the other employees while they did their exercises. Claimant again refused. The MTM told Claimant that if he was not well enough to stand with the other employees then he was not well enough to work and told him to go home. Claimant then called the hot line and reported the MTM as being possibly intoxicated. The call occurred at 7:55 a.m. As a result, Carrier had a Track Inspector drive the MTM to San Antonio for drug and alcohol tests. The tests were administered at approximately 10:15 a.m. and were negative.

Claimant testified that the MTM's eyes were bloodshot, his speech was slurred and he was incomprehensible. However, the Special Agent and the Director Track Maintenance, both of whom were present at the testing site in San Antonio, testified that they observed no signs of intoxication. Most significantly, the Track Inspector, who was present at the job site in Uvalde with Claimant and who drove the MTM to San Antonio testified that he smelled no alcohol on the MTM's breath and observed no signs of intoxication. That Claimant's call was made immediately after the MTM told him to go home supports a reasonable inference that the record does not present a good faith difference of opinion between Claimant and the Track Inspector but rather reflects a deliberate lie by Claimant in an effort to retaliate against the MTM for sending him home.

Accordingly, we find that Carrier proved the charge of dishonesty by substantial

evidence. This was a particularly serious offense. Under Carrier's UPGRADE policy, it warrants dismissal and we see no significant mitigating factors that would render that penalty arbitrary, capricious or excessive.

AWARD

Claim denied.

Martin H. Malin, Chairman

C. M. Will,
Carrier Member

D. D. Bartholomay,
Employee Member

Dated at Chicago, Illinois, May 30, 2002.