

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

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

UNION PACIFIC RAILROAD COMPANY

)
) Case No. 29
)
) Award No. 13
)

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 Bridge and Building Carpenter A. Sanchez for allegedly claiming time on payroll for attending therapy session on November 4, 6, 11, 13, 19, 20 and 24, 1998 was without just and sufficient cause, based on unproven charge and in violation of the Agreement (System File MW-99-93/1178398 MPR).
2. As a consequence of the violation referred to in Part (1) above, Bridge and Building Carpenter A. Sanchez shall be reinstated to service with seniority and all other rights unimpaired, and shall be compensated for all wage loss suffered commencing December 1, 1998 and continuing until his reinstatement.

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 December 1, 1998, Carrier notified Claimant to report for an investigation on December 8, 1998, in connection with his alleged dishonesty in claiming time for attending sessions on November 4, 6, 11, 13, 19, 20 and 24, 1998. The hearing was held as scheduled. On December 22, 1998, Carrier informed Claimant that he had been found guilty of the charge and dismissed from service.

The Organization has raised a number of procedural objections. None provide a basis for disturbing the discipline and none require specific discussion.

The Organization contends that Carrier failed to prove the charge by substantial evidence. The Organization argues that Claimant did not claim any time for attending therapy because

Claimant did not report his time. The Organization's argument misconstrues the alleged dishonesty. The alleged dishonesty did not result from the physical reporting of time. Rather, it resulted from Claimant's allegedly representing that he was attending therapy sessions at a clinic when, in fact, he was not.

It is undisputed that Claimant attended no physical therapy sessions at the clinic after October 23, 1998. Claimant testified that during November he followed his doctor's instructions and pursued a program of home therapy which included climbing the bleachers at his local high school. Claimant maintained that he left work each day at 2:30 p.m. to conduct the home therapy and that he had to leave work early so that he could climb the bleachers during daylight hours. Claimant denied representing that he was attending therapy at the clinic.

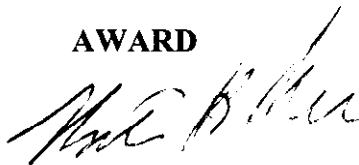
The Manager Bridge Maintenance, however, testified that Claimant told him that he needed to attend therapy sessions three days per week and needed to leave at 2:30 to make a 3:00 appointment. The reference to having to make a specific appointment would lead any reasonable person to believe that the therapy sessions were with a medical provider. Furthermore, the Manager Bridge Maintenance testified that Claimant represented that his last day of therapy at the clinic was November 27, 1998.

The record thus presents a conflict between Claimant's testimony and the testimony of the Manager Bridge Maintenance. As an appellate body, we are not in a position to assess the relative credibility of conflicting witnesses. We defer to the credibility determinations made on the property. We see no reason to depart from this general approach in the instant case. Accordingly, we conclude that Carrier proved the charge by substantial evidence.

Under Carrier's UPGRADE policy, dishonesty is a Level V - dismissal offense. Given the seriousness of the offense, Claimant's relatively short tenure (only three years) and the absence of any mitigating factors, we cannot say that dismissal was arbitrary, capricious or excessive.

Claim denied.

AWARD

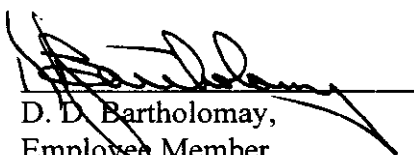


Martin H. Malin, Chairman



C. M. Will,
Carrier Member

Dated at Chicago, Illinois, June 11, 2002.



D. D. Bartholomay,
Employee Member