

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

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

UNION PACIFIC RAILROAD COMPANY

)
) Case No. 3
)
) Award No. 17
)

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

Hearing Date: June 25, 2002

STATEMENT OF CLAIM:

1. The dismissal of Mr. R. McKinley for his alleged violation of Union Pacific Rule 1.6 by allegedly requesting a duplicate paycheck for the first half of May 2001 and cashing the original and duplicate checks was without just and sufficient cause, based on an unproven charge and in violation of the Agreement.
2. Mr. R. McKinley shall now be reinstated to service with seniority unimpaired, and compensated for all straight time and overtime he was deprived of as well as any vacation and insurance benefits lost.

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 July 3, 2001, Carrier notified Claimant to report for an investigation on July 12, 2001. The notice charged that Claimant allegedly violated Rule 1.6 by requesting a duplicate paycheck for the first half of May 2001 and cashing the original and the duplicate. The hearing was postponed to and held on July 13, 2001. On July 27, 2001, Carrier informed Claimant that he had been found guilty of the charge and was dismissed from service.

The record in this case reflects the following. Claimant, with service dating from 1980, testified, without contradiction, that his paycheck for the first half of May was late and he requested a duplicate. He received the original and cashed it. He then received the duplicate check. Claimant's daughter had completed college for the academic year and returned to stay with her mother, but her mother put her out of the house. Consequently, the daughter called

Claimant and asked for financial assistance so that she could find a place to stay. Claimant cashed the duplicate check to provide his daughter with the requested financial assistance.

Claimant cashed the duplicate check on June 11, 2001. Two days later, on June 13, 2001, Claimant telephoned Carrier, advised what he had done and why he had done it, admitted that he acted wrongly and asked to repay the amount by forfeiting his next paycheck and having any remaining balance deducted from future paychecks. Indeed, it was Claimant's act of coming forward that led to the notice of investigation.

There is no question that Carrier proved the charge by substantial evidence. Claimant acted dishonestly when he cashed the duplicate check, knowing that he had already cashed the original. The only real issue is whether the penalty imposed was arbitrary, capricious or excessive.

Dishonesty is an extremely serious offense. It regularly results in dismissal, regardless of the offender's length of service, throughout the railroad industry and provides grounds for dismissal under Carrier's UPGRADE. Only under the most extreme and compelling circumstances may an arbitration board even consider disturbing a penalty of dismissal in a case of proven dishonesty.

However, if ever there was a case with such extreme and compelling circumstances, this is the case. It is clear that Claimant did not engage in a detailed scheme to defraud Carrier. Rather, Claimant requested the duplicate check in good faith -- his original check had not arrived. When the original check arrived ahead of the duplicate, Claimant cashed it in good faith. The only reason Claimant cashed the duplicate check was the desperate telephone call from his daughter. Of course Claimant acted dishonestly and wrongfully in cashing the duplicate check. With perfect hindsight, we may speculate concerning measures Claimant should have investigated, such as credit card cash advances or other short term loans or even inquiring about the availability of an advance against his next paycheck. The compelling circumstances that Claimant faced simply cannot justify the action that Claimant took.

The compelling circumstances, however, do mitigate against the severity of the offense. Most importantly, and providing the most mitigation, was Claimant's actions after he cashed the duplicate check. Only two days later he called Carrier, confessed and explained, and offered to make restitution as quickly as possible, even to the extent of forfeiting his entire next paycheck. The Chair of this Public Law Board can honestly say that he has not seen a case like this in the almost twenty years he has been serving as a neutral arbitrator.

Under the unique facts of this case, and without setting any precedent for future cases, we find that dismissal was excessive. Claimant should receive one last chance to demonstrate to Carrier that he can be a productive and honest employee. We shall order that Claimant be reinstated with seniority unimpaired but without compensation for time held out of service. Reinstatement shall be conditioned on Claimant complying with usual and reasonable requirements that Carrier imposes on employees returning to service, such as passing a physical


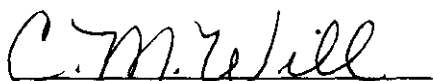
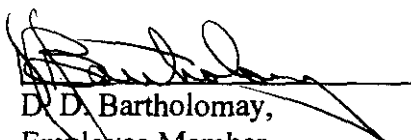
exam and drug and alcohol tests. Reinstatement shall also be conditioned on Claimant completing his restitution to Carrier if he has not yet done so. Finally, reinstatement shall be on a last chance basis. If, within two years following the date Claimant returns to service, Claimant violates any Carrier rule, no matter how minor the violation, Carrier shall have grounds for Claimant's permanent dismissal.

AWARD

Claim sustained in accordance with the Findings.

ORDER

The Board, having determined that an award favorable to Claimant be made, hereby orders the Carrier to make the award effective within thirty (30) days following the date two members of the Board affix their signatures hereto


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

Dated at Chicago, Illinois, November 19, 2002.