

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6402

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

and

UNION PACIFIC RAILROAD COMPANY

)
) Case No. 76
)
) Award No. 56
)

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

Hearing Date: January 25, 2006

STATEMENT OF CLAIM:

1. The dismissal of Carpenter Helper Gilbert Rodriguez for his alleged late reporting and falsification of an injury that occurred on August 10, 2004 was without just and sufficient cause, based on unproven charges and in violation of the Agreement (System File MW-05-28/1417614).
2. As a consequence of the violation referred to in Part (1) above, Carpenter Helper Gilbert Rodriguez shall now be reinstated to service with seniority and all other rights unimpaired and record shall also be cleared on this incident.

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 September 23, 2004, Carrier notified Claimant to appear for an investigation on September 29, 2004. The notice alleged that Claimant violated Rules 1.6(4) and 1.2.5 by allegedly being dishonest when he notified Carrier on August 30, 2004, that he had been injured on duty on August 4, 1004. The hearing was postponed to and held on November 10, 2004. On November 30, 2004, Claimant was notified that he had been found guilty of the charge and dismissed from service.

The Organization has raised a number of alleged procedural deficiencies in the investigation. We have reviewed the record thoroughly. We find that none of the Organization's procedural objections individually or taken together provide a basis for setting aside the

testify, we are in a comparatively poor position to resolve credibility conflicts. Instead, we generally defer to the assessment of witness credibility made on the property. In the instant case, the decision made on the property was that the Foreman, the MBM and the Assistant Foreman were more credible than Claimant. We see no reason to deviate from our general approach and, therefore, we defer to the credibility assessments made on the property.

A second conflict in the testimony arose with respect to the events of August 11. Claimant testified that in the morning, the gang stopped at a convenience store, as was its usual practice. According to Claimant, he returned to the convenience store and when the gang members asked why, he showed them Tylenol that he had purchased in an effort to deal with his back pain. However, the Foreman the Assistant Foreman and the Carpenter all testified and none had any memory of a second convenience store stop on August 11 or of Claimant showing them Tylenol that he had purchased. Here too, we defer to the credibility determination made on the property.

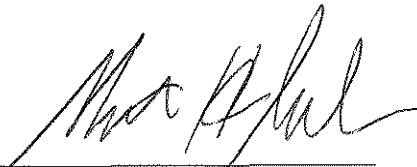
From the evidence presented, it was a reasonable inference that when Claimant claimed to have been injured on duty, he did so dishonestly. Accordingly, we hold that Carrier proved the charges by substantial evidence.¹

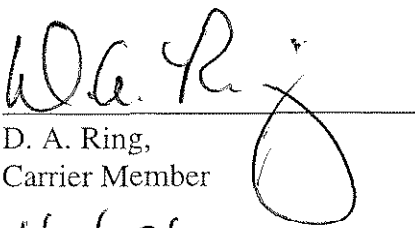
We turn to the penalty assessed. Our role is limited, We may only disturb the penalty if we find it to be arbitrary, capricious or excessive. Carrier proved that Claimant failed to report his alleged on-duty injury in a timely manner and that he was dishonest when he made the report. These are very serious charges that generally support a penalty of dismissal when proven. The penalty assessed was in keeping with Carrier's UPGRADE policy. Considering all of these circumstances, we see no reason to disturb the penalty of dismissal.

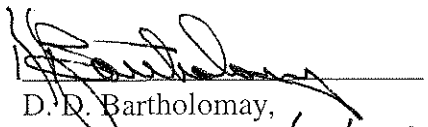
¹Carrier also argues that its finding of dishonesty is supported by Claimant's having initially claimed that the injury occurred on August 9 and having changed the date to August 10 after learning from the Foreman that the events which Claimant maintained led to the injury did not occur on August 9. We do not agree that Claimant's change in the date supports an inference of dishonesty. The Foreman testified that Claimant was unsure of the date on which the gang performed the bridge work that included use of the wheelbarrow. The change in date is consistent with Claimant honestly linking his injury to the specific work on the bridge but being unsure as to whether that work occurred on August 9 or 10. However, as indicated above, based on the other evidence in the record, we do find that Carrier proved the charge of dishonesty by substantial evidence.

AWARD

Claim denied.



Martin H. Malin, Chairman

D. A. Ring,
Carrier Member
4-4-06

D. D. Bartholomay,
Employee Member 4-4-06

Dated at Chicago, Illinois, March 30, 2006