NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6402

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES)
) Case No. 109
and)
) Award No. 88
UNION PACIFIC RAILROAD COMPANY)
)

Martin H. Malin, Chairman & Neutral Member
T. W. Kreke, Employee Member
B. W. Hanquist, Carrier Member

Hearing Date: January 7, 2008

STATEMENT OF CLAIM:

Claim on behalf of Dequincy Division, Foreman, C. A. Maida, for removal of the charges of the alleged violation of Rule 1.6 and the removal of Claimant's assessment of the Level 5 Discipline and his unwarranted, unfair and unjust termination from the Union Pacific Railroad and from his personal record and to be paid for all lost time at the Claimant's respective straight time rate of pay, beginning upon his release from his personal physician through and including on a continuous basis until this matter is settled and all lost time to be credited towards Railroad Retirement, vacation, hospitalization and all accident and illness supplementals and to be reinstated with all seniority unimpaired, all expenses to be paid including meals, lodging and mileage at the rate of $.44.5 a mile for Claimant attending the formal investigation on September 12, 2006, November 7, 2006, and November 14, 2006.

FINDINGS:

Public Law Board No. 6402 upon the whole record and all of 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.

In February 2006, Claimant was serving as Manager Track Maintenance in Beaumont, Texas. By letter dated March 2, 2006, Carrier notified Claimant that his employment was terminated, effective immediately, due to his failure to properly manage the process of scrap metal sales.

On March 8, 2006, the Assistant General Chairman wrote to Superintendent Livonia

Service Unit M. M. Whatley, the author of the March 2 letter, requesting a fair and impartial investigation for Claimant, citing Agreement Rule 21. Claimant was copied on this correspondence. On March 21, 2006, the Superintendent replied to the Assistant General Chairman:

> [L]et me clarify my correspondence of March 2, 2006. Mr. Maida was terminated from the employment of the company as a non-agreement employee. Non-agreement employees do not fall under the auspices of any 'agreement,' and therefore, the company is not required to grant such an employee a hearing. Should Mr. Maida elect to exercise seniority to a union position, he certainly has a right to do so.

On May 12, 2006, Carrier notified Claimant to report for a formal investigation on on May 31, 2006, concerning his alleged failure to properly document scrap-metal sales, to follow company procedures with respect to scrap-metal sales and failure to properly supervise the actions of contractors while working as MTM at Beaumont, Texas in violation of Rule 1.6. Following several postponements, the hearing began on July 25, 2006, continued on September 12, 2006, and was completed on November 14, 2006. On November 28,. 2006, Carrier notified Claimant that he had been found guilty of the charges and dismissed from service.

The Organization has launched a barrage of attacks on the hearing procedure. Most do not require discussion beyond noting that they do not provide a basis for setting aside the discipline. Two require further discussion.

The Organization contends that the notice of charges was not timely, arguing that Carrier knew of the basis for the charges as on March 2 when it notified Claimant that he was dismissed. However, it is clear that contractual time limits do not begin to run until a dismissed managerial employee notifies Carrier that he wishes to exercise seniority back to an Agreement-covered position. In the instant case, Claimant notified Carrier that he would exercise seniority after being medically released to return to duty. Claimant had not yet exercised seniority when Carrier notified him of the investigation. We see no violation of Rule 21's timelines.

The Organization contends that the hearing officer was biased and denied him a fair and impartial investigation. Most of the Organization's attacks on the conduct of the hearing confuse permissible actions by the hearing officer to control the hearing with denials of due process. However, one attack warrants further discussion. We are concerned that the hearing officer cut off Claimant's cross-examination of the Manager of Asset Disposition because he believed that Claimant was attacking her integrity. However, a purpose of cross-examination is to probe the witness' credibility, including any bias she may have and any reasons why her memory of relevant events may be faulty. The hearing officer interjected in a manner that could have impeded Claimant's ability to do this. However, we do not find that Claimant was prejudiced by such actions. The Manager of Asset Disposition's testimony went to establishing that Claimant was familiar with Carrier's processes for reporting sales of scrap. Yet, although Claimant maintained, and Carrier witnesses agreed, that Claimant never received Carrier's written procedures for Disposition of Scrap, Surplus or Obsolete Non-Warehouse Material, Claimant

acknowledged that he knew that he was to report all sales of scrap to Carrier's Supply Department. Claimant's defense was that he did report the sales. Thus, the principal subject of the Manager of Asset Disposition's testimony was not in dispute.

The record reflects that a contractor, Brown's Machine Works, was clearing scrap from the property and selling it to Calcasieu Recycling. Weigh tickets from Calcasieu Recycling reflected numerous sales which were paid in cash. These cash sales did not end up on the books of Brown's Machine Works. Although Claimant testified that he sent the weigh tickets to Carrier's Supply Department and maintained that he kept copies but those copies were destroyed in Hurricane Rita, the Special Agent testified that in his investigation, the Supply Department had no records of those weigh tickets or otherwise of the sales. The conflicting evidence thus required an evaluation of Claimant's credibility and of the inferences to be drawn from the Special Agent's findings. As an appellate body which does not observe the witnesses testify, we are in a comparatively poor position to make such findings. Instead we defer to the findings made on the property. In the instant case, we follow this general approach and defer to the findings made on the property and hold that Carrier proved by substantial evidence that Claimant failed to properly report the sales of scrap.

The record further reflects that on at least two occasions, Claimant approved the contractor's bills for payment of work performed on Carrier's property when the weigh tickets indicated that the same contractor employee was selling scrap to Calcasieu in Lake Charles, Louisiana. The record further reflects that the contract with Brown's Machine Works placed on Brown's the responsibility for transporting the scrap to the purchaser. Thus, the record established that on at least two occasions, Claimant approved contractor time for which the contractor was not entitled to be paid. We conclude that Carrier proved by substantial evidence that Claimant did not properly supervise the contractor's actions.

Carrier thus proved by substantial evidence that Claimant violated Rule 1.6. Our role is not to review the penalty imposed de novo. We defer to the penalty assessed on the property as long as it is not arbitrary, capricious or excessive. Under Carrier's UPGRADE policy, a violation of Rule 1.6 subjects the violator to dismissal. Under the circumstances, we cannot say that the penalty imposed was arbitrary, capricious or excessive.

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AWARD

Claim denied.

Martin H. Malin, Chairman

B. W. Hanquist
Carrier Member 4-9-08

T. W. Kreke 4-9-08
Employee Member

Dated at Chicago, Illinois, March 31, 2008