

**PUBLIC LAW BOARD NO. 6621**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

**AND**

**UNION PACIFIC RAILROAD COMPANY**

**Case No. 12**

**Statement of Claim:** Claim of the System Committee of the Brotherhood that:

- (1) The Level 5 UPGRADE discipline assessment (dismissal from service) to Mr. Kirk Curls for an alleged violation of Agreement Rules 1 and 48 when the Carrier sustained a violation of Operating Rules 1.15 (Duty-Reporting), 1.13 (Reporting and Complying with Instructions), 1.2.5 (Proper Reporting of Accidents), 1.2.7 (Withholding Information), and Rule 1.6 (Conduct) was not justified.
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be 'immediately reinstated to his respective assigned position, that his seniority and all other contractual rights be restored unimpaired, that he be compensated net wage loss he has suffered since his wrongful dismissal, and that all charges be expunged from his personal record.'

**Facts**

Claimant, with seniority dating from September 29, 1997, was employed as a system track laborer on Tie Gang 8564 when the incidents at issue occurred.

On March 19, 2002, Claimant was advised to report at Bakersfield, California for an investigation and hearing to develop the facts regarding the following charges:

On March 10, 2002, you claimed and reported you had incurred an alleged on-duty injury. In connection with this alleged injury, you were instructed by your Supervisor to call him if you needed to see a doctor at anytime, during or after work, and he would see that you were taken to a physician for treatment. On March 12, 2002, you did not report to work at the designated starting time. Later that day, you approached the Supervisor with a note from a doctor stating that you had been seen for alleged injury

and would require time off. The doctor's note did not include the reasons for your being required to be absent from work medically or otherwise.

At the time you presented this note, you were instructed to wait so the Manager could talk to you and have the remaining documentation completed in connection with your alleged injury. At that point, you allegedly became quarrelsome (disrespectful and threatening) to the Supervisor and left the Company property without complying with those instructions. Your actions could be considered as possibly being insubordinate.

In addition to allegedly being absent without proper authority on March 12, 2002, you have also been allegedly absent from service without proper authority on March 13, 2002 and March 14, 2002.

Further, the investigation and hearing will be held to determine if there is an alleged falsification of the injury reported on March 10, 2002 by you, and whether or not this alleged injury has been fraudulently claimed.

The investigative hearing ran from June 10, 2002 through June 13, 2002. Claimant, who was represented by BMW Vice General Chairman J. Villalobos, received proper and timely notice and had opportunity to prepare a defense and present witnesses in his behalf. At approximately 3:50 p.m. on June 12, the third day of hearing, Claimant announced that he had neck pain that would require surgery, and he left. When it became apparent that Claimant would not be returning that day, Hearing Officer White recessed the investigation in order to give Mr. Villalobos opportunity to locate Claimant. On June 13, 2002, Claimant did not appear, and Mr. White continued the investigation without Claimant being present.

By letter dated July 2, 2002, the Carrier notified Claimant that the charges against him had been sustained and that he, therefore, was dismissed from service.

The Organization appealed the dismissal, largely on procedural grounds. It

contended that Claimant was denied a fair investigation because (1) the Hearing Officer intimidated and harassed Claimant, (2) the investigation went forward in Claimant's absence, and (3) the decision sustaining the charges was rendered one day before the transcript of the hearing was forwarded to the Carrier.

The Carrier rejected the Organization's claims, maintaining that Claimant's due process rights were protected, and that there was substantial credible evidence presented at the investigation to support the finding of guilt. The matter was not resolved by the parties and was therefore submitted to this Board for adjudication.

### **Findings**

The Board has carefully reviewed the Record, which consisted of almost 900 pages. Undoubtedly, both parties could have acted in a more professional manner, but the testimony and evidence presented amply demonstrate that Claimant had a full and fair hearing. He had timely and proper notice of the charges against him and adequate opportunity to prepare a defense. He and his representative were permitted to examine and cross-examine witnesses. Claimant was also allowed to ask far ranging, irrelevant, and argumentative questions. Hearing Officer White, far from intimidating Claimant, permitted him the widest latitude in asking witnesses questions and exploring issues.

While the Organization argues that White erred in concluding the hearing on June 13 in Claimant's absence, the Board finds that it was Claimant who sought to disrupt and impede the investigation by walking out on June 12, allegedly because of neck pain that required surgery. When the Organization requested an indefinite recess, Hearing Officer White made it clear to Villalobos that the Carrier would require medical documentation

of Claimant's alleged neck injury and prospective surgery. As the Carrier explained, White could not have recessed an ongoing formal investigation to an unspecified future date based solely on Claimant's uncorroborated and undocumented allegation that he had to leave the investigation to undergo a surgical procedure. Claimant had sat through 2 ½ days of the hearing and never said anything about neck pain and pending surgery. The evidence suggests that Claimant's abrupt departure on June 12 and his failure to return on June 13 were motivated by his desire to avoid testifying at the investigation.

Absent medical documentation, Claimant was not free to absent himself from a formal, scheduled investigation and then charge the Carrier with a violation of his due process rights. Claimant walked away from the hearing just at the time he was to be questioned. To the extent that the Hearing Officer did not hear Claimant's version of the incident that triggered the investigation, it was Claimant's fault.

As to the date on the letter of dismissal, the Carrier offered a plausible explanation:

"It is obvious with a nearly 900-page transcript, the typist forwarded, via lotus notes, the transcript as it was completed, and it was read by Hearing Officer White, Assistant Hearing Officer Allen and Mr. Gaskill as it came to [the Carrier] 'hot off the press.' After reading the transcript, there was overwhelming evidence that Claimant was culpable of the charges against him, and when Ms. Yamamoto issued the letter dismissing Claimant Curls she mad a typographical error in dating the Letter issuing dismissal. (Carrier Ex. A-5)

As a general rule, the Board agrees with the Organization that no disciplinary decision should be reached before there has been a thorough review of the transcript made at a disciplinary investigation. Based upon the Record in this case, however, the Board does not believe that anything occurred that diminished Claimant's procedural protections under the Agreement. The Board emphasizes that its determination is predicated on the


particular facts of this case and is non-precedential.


With respect to the merits, the evidence supports the Carrier's conclusion that Claimant acted dishonestly. No less than five fellow employees testified that Claimant was out to get Supervisor Romero because Claimant was angry about his assignment shoveling ballast and that he had not injured himself at work. In fact, Claimant's roommate, Operator VanTassel, testified credibly that when Claimant awakened, he said he had a kink in his neck from the way he slept on his pillow, but he was going to claim an on-the-job injury. Based on the testimony of VanTassel and other co-workers, it is clear that Claimant's alleged work injury was premeditated. He dishonestly represented that he got hurt on the job, when, in actuality, he awoke one morning with a kink in his neck. Therefore, it is not surprising that (1) he refused medical attention when his supervisors offered it to him, and (2) he never presented appropriate medical documentation as to any on-the-job injury or subsequent surgery.

Claimant's conduct constituted a serious violation of the Carrier's rules. He dishonestly misrepresented an alleged work-related injury and filed a false report. For these transgressions, the Carrier had just cause to terminate his employment.

**Award**

The claim is denied.

  
JOAN PARKER, Neutral Member

  
CARRIER MEMBER

DATED: 11-10-03

  
ORGANIZATION MEMBER

DATED: 11-10-03