

**PUBLIC LAW BOARD NO. 6621**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

**AND**

**UNION PACIFIC RAILROAD COMPANY**

**Case No. 15**

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

- (1) The discipline of dismissal imposed upon Andres Aguiniga for an alleged violation of Agreement Rule 1 and 46 when the Carrier sustained the charges of Union Pacific Rule 1.6.4 (Dishonest), Chief Engineer Instruction Bulletins 136.7.1, 135.1.2 and 135.3.2 when Claimant supplied conflicting information regarding circumstances regarding an alleged personal injury.
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be reinstated to his respective assigned position, his seniority and all other contractual rights be restored unimpaired, that he be compensated net wage loss he has suffered and that all charges be expunged from his personal record.

**Background**

This case concerns the dismissal of Claimant Andres Aguiniga, who was charged with (1) failing to use proper lock out/tag out procedures, which caused him to injure himself, and then (2) lying about the incident both verbally and in a written accident report.

An investigatory hearing was held on May 1, 2002, and on May 9, 2002, the Carrier sustained the charges. Claimant was assessed Level 5 discipline for violating Rule 1.6.4 and Chief Engineer Instruction Bulletins 136.7.1, 136.1.2, and 135.3.2.

**Facts**

Claimant was a laborer on UP System Gang on April 3, 2002, operating an Auto Spiker in the area of Raymond, Nebraska. Helper Aguilar was working with him when a spike jammed in the gun of the spiker. Claimant told Aguilar to sit in the operator's seat and hit the recycle button. Aguilar did as told and noticed that Claimant had stuck his hand in the general area of the spike gun without first locking and tagging out the machinery. Claimant's hand got pinned under the gun, and he was unable to remove it until after the machine completed its cycle.

Initially, Claimant told Aguilar that he cut his finger. Claimant told Supervisors Neuner and Hildrith that he was trying to brush away a spike and caught his finger, incurring a cut. Claimant made no mention of Aguilar being in the spiker seat when the accident occurred. Inasmuch as Claimant's finger appeared to need stitches, Hildrith drove him to a hospital in Lincoln, Nebraska. Hildrith also was present when Claimant verbally advised the timekeeper what to write in his stead on the Accident Report.

Claimant had x-rays taken at the hospital, which revealed that he had broken his finger. Moreover, after interviewing Aguilar, Neuner reported to Hildrith that Aguilar's story differed from that of Claimant. Therefore, when Claimant returned from the doctor's office, Neuner questioned him again about the incident. Finally, Claimant admitted that he had gotten his finger caught when the machine recycled. When asked why he did not tell the truth when he was first questioned, Claimant said he did not want Aguilar to get in trouble for hitting the reset button with Claimant's hand under the gun.

The Carrier's assessment of Level 5 discipline was based upon his dishonesty, failure

to hold a job briefing, and violation of safety rules relative to tagging and locking out machinery for repair. The Organization filed the instant claim contending that there had just been a misunderstanding between Claimant and his supervisors and that Claimant was dismissed without fair and unbiased consideration of the investigatory record.

### **Findings**

Undisputedly, when Claimant was first questioned, he was not forthright about the circumstances of the incident that caused his injury. Specifically, he was dishonest in presenting an account that did not coincide without that of fellow track laborer Aguilar. Claimant expressly indicated on the accident report that the incident was not caused by any other employee, and he further stated that no one else was on the Spiker when the accident occurred. He attempted to lead management to believe that he had merely cut his finger with the tip of a spike.

Claimant adhered to this story when he was questioned on two separate occasions. He did not tell the truth until he was finally confronted with the fact that Track Laborer Aguilar had stated that he was on the spiker, hit the recycle button, and caused Claimant's hand to become stuck under the spiker gun. Ultimately, Claimant had to admit that he did not merely cut his finger with the tip of a spike; rather, his finger was broken because he had placed it under the spiker gun when it recycled.

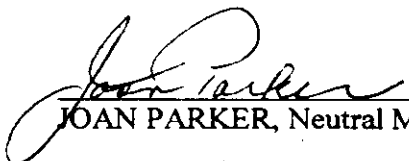
Compounding Claimant's dishonesty was his violation of safety rules. He admitted knowledge of the lock out/tag out procedures but said he had not previously used them for this type of machine. Clearly, it was dangerous for Claimant to have attempted to clear a jammed spike without first de-energizing the Auto Spiker. Likewise, it was a

mistake for Claimant to disregard the lock out/tag out rules and fail to familiarize himself with the rules in the operators' manual, which was located on the machine.

However, Claimant's dishonesty was motivated, at least in part, by a desire to prevent Aguilar from getting in trouble as a result of Claimant's errors. Recognizing that he shouldered much of the blame for the mishap, and feeling that Aguilar should not be penalized, Claimant tried to hide the truth. Based upon a full review of the circumstances and a belief that Claimant has learned from this experience and is not likely to make the same mistake again, the Board believes that Claimant's dismissal should be rescinded. Discipline has served a corrective purpose. Therefore, Claimant shall be reinstated without back pay, and his discipline shall be reduced to a suspension.

**Award**

The claim is sustained in part. Claimant's dismissal shall be rescinded, and he shall be reinstated without back pay for the time lost, but with a restoration of his seniority. His time off work shall be treated as a disciplinary suspension.

  
JOAN PARKER, Neutral Member

  
CARRIER MEMBER

DATED: 11-10-03

  
ORGANIZATION MEMBER

DATED: 11-10-03