

PUBLIC LAW BOARD NO. 6621

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
DIVISION - IBT RAIL CONFERENCE**

And

UNION PACIFIC RAILROAD COMPANY

Case No. 53

* * * *

Statement of Claim: It is the claim of the System Committee of the Brotherhood that:

1. The dismissal of Boom Truck Operator R. Nakatani for his alleged dishonesty on or about June 7, 2004, was without just and sufficient cause and in violation of the Agreement.
2. As a consequence of the violation referred to in Part (1) above, Boom Truck Operator R. Nakatani shall be reinstated to service with seniority and all other rights unimpaired and compensated for all wage loss suffered.

Background

Claimant R. Nakatani, with seniority dated from July 15, 1998, was working as a Boom Truck Operator on Gang 8519 when the incidents involved here occurred.

On or about June 7, 2004, railroad police found Claimant in possession of stolen Carrier property. By letter dated June 11, 2004, Track Supervisor Scott Bennett issued Claimant a letter of dismissal stating that Claimant was in violation of Rule 48(k) as a result of his failure to contact the Carrier as to his reasons for missing work for five

consecutive days. Claimant, in fact, had been absent from his assignment without proper authority as of May 21, 2004, and the letter informed him that he was considered as having voluntarily forfeited his employment with the Carrier. On June 21, 2004, Claimant was instructed to report for an investigation in regard to the stolen property that was found in his possession on or about June 7, 2004, in violation of Rule 1.6 – Conduct.

An investigation was held on July 15, 2004, following which Hearing Officer S.J. White found that the Carrier had presented substantial evidence to conclude that Claimant was in violation of Rule 1.6, and he sustained the Carrier's assessment of Level 5 discipline. Claimant was not in attendance at the hearing because he was incarcerated. Under date of August 2, 2004, he was dismissed from service.

By letter dated August 26, 2004, the Organization submitted a claim alleging that the Carrier had failed to provide Claimant with a fair and impartial hearing, in violation of Rules 1 and 45 of the Agreement, because it had refused to postpone the investigation in light of Claimant's absence. The claim did not mention any substantive issues or offer any explanation as to why Claimant was in possession of the stolen items.

Correspondence was exchanged by the parties, and the matter was timely and properly processed through the contractual grievance procedure, up to and including the Carrier's highest appellate officer. The parties did not reach a resolution, and the appeal now comes before this Board for adjudication.

Contentions of the Carrier

The Carrier contends that Claimant received a fair and impartial hearing without procedural defect. Claimant was duly notified of the charges against him, afforded enough information to develop a defense, and given opportunity to obtain representation,

present witnesses, and introduce evidence. Citing arbitral precedent, the Carrier argues that it has been consistently held that hearings held in absentia are not necessarily rendered unfair. Moreover, Claimant's incarceration was not justification for postponing the hearing because his presence was not necessary to fulfill the requirement of due process under the Agreement.

The Carrier further argues that Claimant's dismissal was based not only on his dishonest conduct, but also on his voluntary forfeiture of seniority. Rule 48(k) mandated that Claimant's employment be terminated as a result of his unauthorized absence from work for five consecutive days, and while Claimant was not entitled to a hearing, the Carrier held one because the second rule violation occurred within the appeal period of the Rule 48(k) termination.

With respect to the merits of the claim, the Carrier submits that it offered substantial evidence to conclude that Claimant did, in fact, violate Rule 1.6 because he was in wrongful possession of Company property. That property included a Chevrolet truck, a Union Pacific Railroad card on which Claimant had made unauthorized charges, and stolen license plates from another Carrier vehicle. His dismissal was neither arbitrary nor capricious because theft of company property is a major infraction, which undermines the trust an employer necessarily must place in its employees. Here, the Level 5 discipline was assessed in accordance with the Carrier's UPGRADE policy, which has been upheld by numerous arbitrators since its introduction.

Contentions of the Organization

The Organization contends that Claimant was denied a fair and impartial hearing. The Organization submits that it was unable to reach Claimant to confirm the date of the

investigation, and it therefore made a written request for a postponement of the hearing.

This request was orally denied, for no apparent reason.

In the Organization's view, the Carrier denied Claimant due process by insisting on holding the investigation in absentia. The Carrier prejudged Claimant before Claimant ever went to trial and in the absence of any criminal findings against him. The Organization argues that it was fundamentally unfair for the Carrier to have dismissed Claimant solely on the basis of his having been arrested and charged with a crime. Moreover, the Hearing Officer demonstrated a prejudicial attitude by continuing with the proceedings in spite of the vehement objections of the Organizations' representative. This attitude denied Claimant both his contractual and constitutional right to a fair hearing.

In view of the Carrier's actions, the Organization requests that Claimant be reinstated and made whole with full restoration of wages, benefits, and seniority.

Opinion

Turning first to the procedural issues in dispute, this Board finds that the fact that the hearing was held "in absentia" was not a violation of Claimant's due process rights. His absence from the hearing resulted from his incarceration for felonious activities.

Numerous arbitration awards have held that incarceration is not a valid reason for an employee's absence from an investigation; nor does it constitute a legitimate basis for postponing an investigation. As Referee Van Wart stated in *Public Law Board 4998*,

Award no. 8:

Incarceration, generally speaking, is, in effect, a self-inflicted wound....The Carrier may choose to hold a hearing. The Carrier, of course, must bear the consequences if there be circumstances ensuing from the Claimant's incarceration that showed he was

innocent or a victim of mistaken identity. In any event, rights under the Constitution are determined by a court of law and not, as here, at a Carrier held investigation.

The Carrier was under no obligation to wait until Claimant was convicted of the criminal charges against him in a court of law before dismissing him. The Carrier's procedural obligations are set forth in Rule 48 of the Agreement between the parties, pursuant to which Claimant was entitled to a statement of the charges against him, notice of the hearing with enough advance time to prepare a defense, opportunity to obtain representation, the right to examine and cross-examine witnesses and present evidence. The Record in this case shows that the Carrier afforded Claimant all of these contractual rights. Contrary to the assertions of the Organization, Claimant's personal presence at the hearing was not necessary in order for the Carrier to fulfill the requirements of due process under the Agreement.

Also of significance is the fact that Claimant had been absent from work for more than five consecutive days without authorization, and on June 11, 2004, he was sent a letter advising that he had forfeited his employment pursuant to the self-executing language of Rule 48(k). Under the Agreement, Claimant arguably was not entitled to a hearing due to the cessation of the employment relationship, but the Carrier held one because the second rule violation occurred within the appeal period of the Rule 48 (k) termination. In these circumstances, it is clear that Claimant was afforded his due process rights.

As to the merits of the case, the Record demonstrates that the Carrier met its burden of producing substantial evidence of Claimant's guilt, which is the applicable standard of proof that is required in the arbitration setting. The Organization contends that the Carrier has based its dismissal of Claimant solely on the Claimant's arrest. But that is not true.

The Carrier relied on the facts adduced and presented in the police report outlining the procedures followed during the criminal investigation, as well as summaries of conversations with Claimant himself explaining his activities. The credible evidence in the Record showed that Claimant unlawfully took a Carrier truck and tools and stole license plates from another Carrier vehicle to disguise the stolen truck. He also was in possession of Union Pacific Railroad Card #3973-1 on which he made several unauthorized charges. This conduct occurred during a period when Claimant was supposed to be on a 15-day leave of absence for causing an accident on the property and testing positive for illegal drugs.

Based upon the evidence in the Record, it was not unreasonable for the Hearing Officer to conclude that Claimant, indeed, had violated Rule 1.6. Moreover, the Carrier was not required to wait for Claimant's conviction in a court of law before deciding that there was enough evidence to support his discharge. This was especially true since Claimant had already forfeited his employment pursuant to Article 48(k).

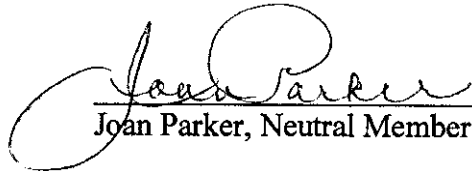
Theft of an employer's property is an extremely serious infraction, and one that is almost universally punishable by summary discharge. Theft undermines the trust an employer necessarily places in its employees and has been consistently been viewed by this Carrier, as other carriers, as a capital offense. Additionally, the Level 5 discipline meted out in this case was consistent with the Carrier's UPGRADE policy, which has been upheld by many arbitrators since its inception.

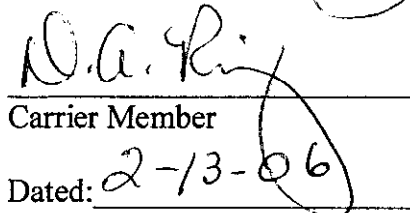
Given the finding herein that there were no procedural violations, and that the discipline imposed was neither arbitrary nor capricious, this Board has no choice but to uphold Claimant's dismissal.

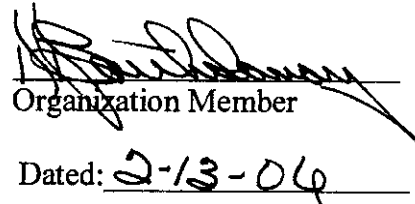
PLB 6621
Awd 53

Award

The claim is denied.


Joan Parker, Neutral Member


Carrier Member
Dated: 2-13-06


Organization Member
Dated: 2-13-06