

PUBLIC LAW BOARD NO. 7633

Case No.: 09/Award No. 09
System File No.: UP306WF12/1569856
Claimant: C. J. Lockett

UNION PACIFIC RAILWAY COMPANY)
)
 -and-)
)
 BROTHERHOOD OF MAINTENANCE)
 OF WAY EMPLOYEES DIVISION)

Organization's Statement of Claim:

1. The discipline (Level 5 Dismissal) imposed on Mr. C. Lockett by letter dated June 28, 2012 for alleged violation of Rule 1.6 Conduct – (4) Dishonest in connection with allegations that the Claimant was dishonest in claiming time not worked on May 9, 2012 was without just and sufficient cause, unwarranted and in violation of the Agreement (System File UP306WF12/1569856).
2. As a consequence of the violation referred to in Part 1 above, the Carrier must remove the discipline from Mr. Lockett's record with seniority and other benefits unimpaired and compensate him for all wages and other losses suffered as a result of the Carrier's unjust and improper discipline.

Facts:

By letter dated May 25, 2012, the Claimant was directed to attend a June 13, 2012 “investigation and hearing on charges to develop the facts and place responsibility, if any, that while employed as Trackman on Gang 9160, at Houston, Texas you were allegedly dishonest claiming time not work (sic) on May 9, 2012.”

The Notice further identified Rule 1.6 Conduct (4) Dishonest as the Rule allegedly violated and noted that the Claimant was being withheld from service pending the results of the investigation and hearing.

Carrier Position:

Substantial evidence shows that the Claimant attempted to receive pay for six hours not worked. Supervisor Ritch did not see the Claimant after he supposedly

returned from an investigation. Neither Timekeeper D. Johnson, Bus Driver M. Johnson nor Track Supervisor Phillips recalled seeing the Claimant after the investigation. Bus Driver M. Johnson did not recall transporting the Claimant from the job briefing trailer to the work site. Employee statements indicate no sighting of the Claimant at the work site. The dishonest claim of six hours not worked was an extreme breach of trust and a violation of Rule 1.6 (Conduct-Dishonesty).

The proven offense is a serious one and the Board lacks the authority to overturn the discipline. The Carrier's action was not arbitrary or capricious and was consistent with the UPGRADE policy.

The investigation was fair and impartial with all due process rights honored. Simply because the Carrier discovered the attempted dishonesty before the Claimant was paid for the six hours does not excuse or alleviate his dishonesty. Supervisor Ritch's apology did not show that the Claimant had actually returned to work. Statements from other employees simply supported the testimony of those who provided substantial evidence that the Claimant never returned after the investigation. The Hearing Officer's statement to which the Organization objected was simply a statement of the Carrier's position and not representative of a verdict.

Organization Position:

The Claimant did not receive a fair and impartial hearing because statements were admitted depriving the Organization of an opportunity to cross examine the writers, because the Hearing Officer, the Claimant's immediate Supervisor, had knowledge of the alleged incident prior to the investigation and because the Hearing Officer showed bias when characterizing the admitted statements as factual when no cross examination was possible and because he indicated a verdict before the investigation was completed.

The Carrier did not meet the necessary burden of proof since the Claimant testified that he returned to work after the investigation. Supervisor Ritch apologized for not seeing the Claimant after he returned and the Carrier never paid for the disputed six hours.

The dismissal was unwarranted and excessive even for a proven violation because it was punitive and not corrective.

Findings:

The Board finds that the Claimant received a fair and impartial hearing. The five statements that the Carrier introduced simply supplemented and supported the testimony of the witnesses who made the *prima facie* case against the Claimant. For reasons noted below, the Board does not find that those written statements prejudiced the investigation.

While not every Hearing Officer will have knowledge prior to the investigation of the events in question, it is certainly not unique when the Hearing Officer is aware of

what led to the charges. Pre-investigation knowledge is not per se prejudicial as such knowledge does not have to equate to an unfair and impartial hearing. It did not in this instance. Nor is Supervisor Ritch's apology to the Claimant viewed as evidence that the latter did return to work as he claims. Hearing Officer Rose articulated the Carrier's position that it was the claim for six hours, and not the Carrier's decision not to pay for the time that resulted in the Rule 1.6 charge, but the explanation of the Carrier's position is not viewed as a conclusion.

The Carrier has presented more than substantial evidence that the Claimant violated Rule 1.6. The record includes testimony from Supervisor Ritch, Timekeeper D. Johnson, Bus Driver M. Johnson and Supervisor Phillips that they did not see the Claimant after the investigation, even though the Claimant testified that he interacted with all but Supervisor Phillips. Furthermore, the Claimant testified that after his return he was seen by Dan Spradley, Assistant Foreman Jacob and members of the Tie Gang who rode back from work on the bus with him. However, there is no evidence in the record to support the Claimant's testimony. When the Board weighs the totality of the evidence, the only reasonable conclusion is that the Claimant did not return to work following his investigation, but yet he took affirmative action to obtain pay for the six hours that he was missing. The Carrier's discovery of the attempt and its refusal to pay for the six hours does not excuse the Claimant's dishonesty.

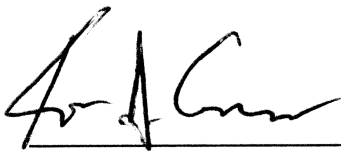
The Carrier's UPGRADE policy is well established and has been supported in prior awards. That policy includes Level 5 discipline for a violation of Rule 1.6. The Carrier was within its right to permanently dismiss the Claimant for this serious breach of trust. There is no basis for the substitution of the Board's judgment for that of the Carrier.

Award:

Claim denied.

Order:

The Board, after consideration of the dispute identified above, hereby orders that no award favorable to the Claimant be entered.



Kevin D. Evanski, Organization Member



Katherine N. Novak, Carrier Member

A handwritten signature in black ink, appearing to read 'I. B. Helburn', followed by a long horizontal line.

I. B. Helburn, Neutral Referee

Austin, Texas
March 10, 2014