

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6089

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES)
and) Case No. 5
UNION PACIFIC RAILROAD COMPANY) Award No. 3

Martin H. Malin, Chairman & Neutral Member
R. B. Wehrli, Employee Member
D. A. Ring, Carrier Member

Hearing Date: April 6, 1998

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The removal from service and dismissal of Group 26 System Gang Laborer A. Yellowhair for his alleged violation of Union Pacific Rule 1.15 on November 4, 9, 10, and 18, 1996 was harsh, arbitrary and capricious and in violation of the Agreement (System File D-641/1050123-D).
2. Group 26 Gang Laborer A. Yellowhair shall now be reinstated to service with all rights, his record expunged of the discipline and he shall be compensated for all wage loss suffered, beginning with the date he was unjustly withheld from service on November 19, 1996 and continuing until his reinstatement.

FINDINGS:

Public Law Board No. 6089, upon the whole record and all 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.

On November 19, 1996, Carrier notified Claimant to report for three investigations on November 22, 1996. The notices charged Claimant with three separate violations of Rule 1.15 arising from his allegedly being absent without proper authority on November 4, 9 and 10, and 18, 1996. Carrier also withheld Claimant from service.

The hearings were held as scheduled. On November 22, 1996, Carrier advised Claimant that he had been found guilty of the first charge and assessed Level 1 discipline (a written reprimand), guilty of the second charge and assessed Level 2 discipline (up to one day alternative assignment to develop a corrective action plan) and guilty of the third charge and assessed Level 5 discipline (dismissal). The organization filed claims on each discipline assessment which were handled fully on the property and consolidated for consideration by this Board.

The Organization contends that Carrier violated Claimant's due process rights. The Organization maintains that Carrier prejudged Claimant's guilt as reflected in Carrier's decision to withhold Claimant from service. The Organization argues that Claimant did not pose a risk to himself or others or to Carrier and, therefore there was no reason to withhold Claimant from service for relatively minor attendance issues.

The Organization further argues that Carrier failed to prove the charges, as there were factors present which mitigate against Claimant's responsibility. The Organization observes that Claimant lived ten to eleven hours away from the job site and was trying to keep his family together. The Organization urges that the absences on November 4 and 18 were beyond Claimant's control and that the absences on November 9 and 10 were due to Claimant's attempts to keep his family together.

Finally, the Organization contends that Carrier failed to follow its own UPGRADE policy in dismissing the Claimant. The Organization argues that under the UPGRADE policy, discipline is to be corrective, rather than punitive, and that Claimant was not given an opportunity to correct his behavior. The Organization characterizes the Level 1 and Level 2 discipline assessed against Claimant as farcical and not designed to help Claimant correct his behavior, but were instead designed to set the groundwork for Claimant's dismissal.

Carrier maintains that it properly removed Claimant from service. Carrier relies on Rule 48(o) which authorizes suspension pending hearing for "serious and/or flagrant violations." Carrier observes that it did not withhold Claimant from service until his third incident of unauthorized absence within two weeks. Carrier urges that its actions are supported by ample precedent.

Carrier further argues that Claimant essentially admitted his guilt to all three charges. The November 4 absence resulted from an argument that Claimant had had with his wife. Carrier argues that the argument does not excuse Claimant's failure to protect his assignment or his failure to telephone his supervisor. With respect to the November 9 and 10 absences, Carrier observes that Claimant simply took it upon himself not to

work the required rest days overtime and never asked his supervisor to be excused. With respect to the November 18 absence, Carrier maintains that Claimant failed to leave sufficient time for the drive from his home to the work site and failed to contact his supervisor when he realized that he would not make it in time.

Carrier maintains that dismissal was appropriate and in accordance with the UPGRADE policy. Carrier contends that the UPGRADE policy clearly provides for dismissal of an employee who violates the same rule three times within thirty-six months. Carrier notes that the "three strikes and you're out" provision of the UPGRADE has been upheld several times, including as applied to attendance violations. Furthermore, Carrier urges, the instant case is aggravated in that Claimant's violations occurred within a two week time period. Moreover, Carrier observes, Claimant had only six months of service at the time of the violations.

The initial issue raised is whether Carrier violated the Agreement by withholding Claimant from service. Rule 48(o) authorizes Carrier to withhold an employee from service pending a hearing where the charges involve flagrant or serious violations. Claimant's repeated absences without authority and his repeated failure to contact supervision were flagrant violations which justified Carrier's withholding him from service in accordance with Rule 48(o). See, e.g., Third Division Awards Nos. 32139, 31910.

Accordingly, we turn to the merits of the claim. There is no question that Claimant was absent on each of the dates in question and that he did not obtain proper authority for his absences. Furthermore, with respect to each incident, Claimant did not even attempt to obtain authority from his supervisor. The only real issue is whether his dismissal was arbitrary, capricious or excessive.

Carrier maintains that dismissal was appropriate under the UPGRADE policy. Carrier is correct that under the UPGRADE policy, an employee who violates the same rule three times within thirty-six months may be dismissed. Other Boards have upheld the application of this provision of the UPGRADE policy to absences without authority. See, e.g., Public Law Board 5855, Award No. 1; Special Board of Adjustment 279, Award No. 728.

As we have indicated in Awards Nos. 1 and 2, the UPGRADE policy provides for fair, consistent and progressive discipline and is entitled to considerable arbitral deference. Nevertheless, we cannot abdicate our responsibility to review the discipline to ensure that it does not violate the Agreement. The instances in which application of the UPGRADE will yield discipline that is arbitrary, capricious or excessive are rare.

The Organization, however, contends that the instant case is one of those rare exceptions because Claimant was never afforded an opportunity to correct his behavior.

Attendance violations are one of the classic examples of infractions that are amenable to corrective discipline. The facts of this case, however, persuade us that dismissal was not arbitrary, capricious or excessive.

The Organization paints a picture of Claimant as an individual struggling with marital difficulties centered around his absence from the family home. The Organization maintains that Claimant was torn between the need to spend more time with his family and his responsibilities toward his job. Progressive discipline was called for to correct Claimant's behavior and give him an opportunity to formulate a corrective action plan to remedy his rule violations.

The record, however, indicates otherwise. Following Claimant's November 4 absence, his supervisor counselled him concerning the need to obtain proper authority for an absence and advised him that he was subject to discipline under the UPGRADE.¹

November 9 and 10, were the gang's scheduled rest days. The record indicates that on Tuesday, the supervisor advised the gang that there was a good chance they would have to work the coming weekend. On Thursday, the supervisor confirmed the need to work on Saturday and Sunday.² Claimant testified that he felt the need to go home for the weekend because of the problems in his marriage. He conceded that he did not ask his supervisor to excuse him from working that weekend, and explained his actions as follows:

A: Because the past couple of weeks it's been rush rush rush and they've been overtime. We want to get this project done. And the weather has been off and on, good off and on. So, he might of just said no.

Q: Well why didn't you ask?

¹ Claimant testified that the supervisor did not counsel him concerning his November 4 absence. Claimant's testimony was not credited on the property and we see to reason to credit it here.

² Claimant testified that the supervisor did not inform the gang that they would have to work the weekend, but rather bus driver informed them at the end of the shift on Friday. Claimant's testimony was not credited on the property and we see to reason to credit it here.

A: I took it upon myself to have those days off.

With respect to the November 18 absence, Claimant testified that, because he tried to spend as much time with his family as possible, he left home between 5:00 and 6:00 p.m. to drive the ten to eleven hours to the job site. He encountered a snow storm along the way which lasted sixty miles, causing him to arrive late. He acknowledged that he made no effort to contact his supervisor, but simply assumed that because he was late, he would not be allowed to work and, therefore, went directly to the motel and waited until the next morning to report for work.

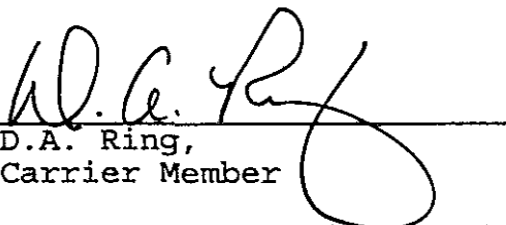
The record thus reflects that Claimant, despite being counselled about his attendance, believed he could do whatever he wanted when he wanted. He made no effort to inquire about being excused from having to work the weekend on November 9 and 10. Instead, he decided to just leave the job site and go home. On November 18, he made no effort to contact supervision, even after arriving in the vicinity of the job site. He just took it upon himself to go to the motel and report the following day.


The record reflects more than attendance issues which would be amenable to correction through disciplinary measures short of dismissal. The record reflects Claimant's complete disregard for his responsibilities as an employee to communicate with supervision. This case might be different if Claimant had a record of long satisfactory service prior to the incidents in question. However, Claimant had only six months of service when he disregarded his responsibilities on three separate occasions within two weeks. We cannot find that Carrier violated the Agreement in applying the UPGRADE policy's provision for dismissal for violating the same rule three times within thirty-six months.

AWARD

Claim denied.


 Martin H. Malin, Chairman


 D.A. Ring,
 Carrier Member


 R.B. Wehrli (See Attached Dissent)
 Employee Member

Dated at Chicago, Illinois, August 22, 1998.

ORGANIZATION MEMBER'S DISSENT

TO

AWARD NO. 3 OF PUBLIC LAW BOARD 6089 (REFEREE M. H. MALIN)

It has been said more than once that one school of thought among railroad industry arbitration practitioners is that dissents are not worth the paper they are printed on because they rarely consist of anything but a regurgitation of the arguments which were considered by the Board and rejected. Without endorsing this school of thought in general, it is equally recognized that a dissent is required when the award is not based on the on-property handling. Such is the case here.

As pointed out by this Organization, the Carrier's CEO, Dick Davidson, indicated that "[t]he goal of UPGRADE is to establish a Disciplinary Policy that is fair, consistent and effective, with an emphasis on corrective action and training rather than on punitive discipline." (underscoring added) Likewise, on page 1 under UPGRADE Discipline Policy Introduction it states, "UPGRADE is intended to serve as a consistent, less punitive, yet progressive method of documenting discipline problems and modifying behavior with the objective of ensuring that problem behavior does not recur." (underscoring added) Finally, page 1 of the Policy Guidelines indicate the following guidelines must be followed:

- All possible rule violations, except certain Level 5 violations, must be reviewed with the Employee prior to implementing UPGRADE discipline procedures.
- Managers are encouraged to verbally counsel Employees, when appropriate.

The record in this case clearly established the following:

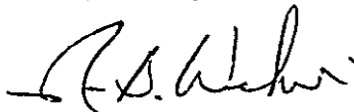
- There was no emphasis on corrective action and training.
- There was no progressive method of documenting discipline problems and modifying behavior with the objective of ensuring the problem did not recur.
- There was no review of the possible rule violations with Mr. Yellowhair prior to implementing UPGRADE discipline procedures.

It remains the Organization's position, that there is absolutely no way the Claimant could have developed a corrective action plan and modify his behavior in line with the 'progressive' UPGRADE Policy after he received the Level 1 and/or Level 2 discipline because all the levels of discipline (i.e. Levels 1, 2 and 5) were issued **on the same day** at a time when he was already out of service. In effect, there was no progressive process

that took place here and, therefore, the local supervision was guilty of failing to comply with UPGRADE Policy guidelines and commitments. Further, the majority of the Board erred when it ignored these facts and circumstances.

In light of my opinion in this regard, I believe this award is seriously flawed, of no precedential value, and I, therefore, dissent.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "R. B. Wehrli". The signature is fluid and cursive, with a prominent initial "R" and a long, sweeping underline.

R. B. Wehrli
Organization Member