

PUBLIC LAW BOARD NO. 7633

Case No.: 28/Award No.: 26

System File No.: LCS:1583061/BMWED: UP410WF13

Claimant: A. D. Phelps

UNION PACIFIC RAILWAY COMPANY)

-and-

BROTHERHOOD OF MAINTENANCE)
OF WAY EMPLOYES DIVISION)

Organization's Statement of Claim:

1. The discipline (dismissal) imposed on Mr. A. Phelps, by letter dated March 13, 2013, for alleged violation of General Code of Operating Rules (GCOR) Rule 1.6 Conduct (4) Dishonesty in connection with allegations that Mr. Phelps falsified Company documents and claimed per diem he was not entitled to on December 20 and 21, 2012 and various dates in January 2013 was without just and sufficient cause, unwarranted and in violation of the Agreement.
2. As a consequence of the violation referred to in Part 1 above, the Carrier must remove the discipline from Mr. Phelps' record and compensate him for all losses suffered as a result of the Carrier's unjust and improper discipline.

Facts:

By letter dated February 11, 2013, a corrected Notice of Formal Investigation, the Claimant was directed to report on February 21, 2013 “for investigation and hearing on charges to develop the facts and place responsibility, if any, that you allegedly falsified company documents by claiming you reported to a work location over 50 miles from your residence, when you did not. You also claimed per diem payments on those work days, resulting in monetary payments to you that you were not entitled to. It is alleged that these violations occurred while you were employed as a Welder on the Houston Service List. These infractions occurred on December 20-21, 2012 and numerous workdays in the month of January 2013. Union Pacific became aware of these alleged violations on January 29, 2013.” The Notice further informed the Claimant that if he were to be found in violation of Rule 1.6 (4) Dishonest, he would be subject to Level 5 discipline (dismissal) under the UPGRADE policy and that he was being withheld from service pending the outcome of the investigation.

Carrier Position:

Substantial evidence, the Claimant's admission and statements made during the investigation, establish the Claimant's violation in that he received per diem to which he was not entitled. Supervisor Monge relies on employees to report time honestly. His delay in finding the discrepancies does not absolve the Claimant of responsibility. The serious nature of the infraction, of which the Claimant was aware, warrants dismissal despite his long tenure. The Carrier must have employees who often work without direct supervision and who are honest and trustworthy. The Claimant's due process rights were maintained and no procedural defects exist that would require voiding the dismissal. The Carrier's UPGRADE discipline policy has been approved by previous Boards.

Organization Position:

The Carrier has failed to meet the higher burden of proof required when the charge involves dishonesty because the Carrier has not shown that the Claimant intended to deceive the Carrier or to be dishonest. At worst the Claimant made a mistake in judgment. He did not input his own time or locations and initially Supervisor Monge approved the information that was submitted. Even if the Claimant violated Rule 1.6, under the circumstances the dismissal was punitive rather than corrective.

Findings:

The Claimant was alleged to have falsified company documents and to have claimed per diem to which he was not entitled. The allegation that the Claimant, a member of Gang 9599, falsified company documents has been disproven. Mr. Marshall's admission that he entered payroll information, including tie-up locations, for all Gang 9599 members has not been contested. Therefore, the Board considers only the allegation that the Claimant received per diem to which he was not entitled.

The days involved are December 20-21, 2012 and January 3 and 7-10, 2013. The Claimant disputes the December dates, when records showed an alleged tie-up at the Millican Yard and an actual tie-up at the Lloyd Yard, which is within 50 miles of the Claimant's residence. A statement from MTM Gitlitz indicated that Gang 9599 was tied up at Lloyd Yard on the December dates. The Claimant's testimony at the investigation did not contain an explanation for why he disputed the December dates. Thus the Board accepts the accuracy of the Carrier's allegation regarding per diem received for all seven dates.

In his closing statement at the investigation, the Claimant honestly and forthrightly stated that there was per diem in his check that he was not due and that he did not report the overage. Arguably, this demonstrates an intent to keep pay not due—a dishonest act that is not erased simply because Supervisor Monge failed initially to identify the discrepancy. Nevertheless, for reasons cited below, recognizing that this may be an exception to the rule, the Board finds dismissal to be an excessive reaction to the unique facts that relate to this case. First, the Carrier alleged two dishonest acts but proved only one. Yet, the disciplinary notice referred to both dishonest acts. The Board is unsure of the discipline that might have been assessed had only the

retention of the per diem overage and not the falsification of company documents been considered. Second, to deny the claim in this case would in essence punish the Claimant for his ultimate honesty. Third, while the Claimant's 7 ½ years of service at the time of the dismissal does not constitute an overwhelming "bank of goodwill" to draw on, it is not insignificant and it comes with a clean record. The Board believes the Claimant can be rehabilitated and that corrective discipline will serve the intended purpose. That said, the Board notes that the Claimant failed in his obligation to the Carrier and that his failure merits severe discipline. The Board emphasizes the likelihood that future dishonesty will surely result in dismissal.

Award:

Claim partially sustained

Order:

The Board, after consideration of the dispute identified above, hereby orders that the Claimant be reinstated with a time served suspension. The Carrier is to make the award effective on or before the thirtieth (30th) day after the award is adopted.



Andrew Mulford, Organization Member



Katherine N. Novak, Carrier Member



I. B. Helburn, Neutral Referee

Austin, Texas
April 3, 2015