

PUBLIC LAW BOARD NO. 7633

Case No.: 29/Award No.: 27

System File No.: LCS: 1583059/BMWED: UP406WF13

Claimant: L. Rodriguez

UNION PACIFIC RAILWAY COMPANY)

-and-

BROTHERHOOD OF MAINTENANCE)
OF WAY EMPLOYES DIVISION)

Organization's Statement of Claim:

1. The discipline (dismissal) imposed on Mr. L. Rodriguez, by letter dated March 13, 2013 for alleged violation of Rule 1.6 Conduct in connection with allegations that Mr. Rodriguez falsified company documents and claimed per diem he was not entitled to on various dates in January 2013 was without just and sufficient cause, unwarranted and in violation of the Agreement.
2. As a consequence of the Carrier's violation referred to in Part 1 above, the Carrier must remove the discipline from Mr. Rodriguez's 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 a per diem payment on this work day, resulting in monetary payments to you that you were not entitled to. It is alleged that this violation occurred on August 7, 2012 while you were employed as a Welder Helper on the Houston Service Unit. Union Pacific became aware of these alleged violations on January 29, 2013.” The Notice added that a substantiated violation of Rule 1.6 Conduct (4) Dishonest could result in Level 5 discipline (dismissal) under the PGRADE policy and that the Claimant was being withheld from service pending the results of the investigation.

Carrier Position:

The Carrier has provided substantial evidence, including the Claimant's admission, of his violation, as he input work locations. Evidence from others at the investigation supported the allegation. Supervisor Monge's failure to initially discover the inaccurate information does not excuse the Claimant's behavior. He submitted a fraudulent time sheet and in so doing violated the trust placed in him. There is strong precedent within the industry for the dismissal of dishonest employees. The Claimant's due process rights were not violated and there were no procedural defects requiring the dismissal to be set aside. The Carrier's UPGRADE policy has met with approval by previous Boards.

Organization Position:

The Carrier has failed to meet the higher burden of proof required when there is an allegation of dishonesty. There has been no showing that the Claimant intended to be dishonest or to defraud the Carrier, as he did not input his own time or location and Supervisor Monge knew where he was working and did not, upon review, find fault with the information provided. At the worst, the Claimant made a mistake in judgment. But even if the rule was violated, dismissal is excessive because it is punitive and not 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 9833, falsified company documents, has been disproved. Mr. Junious' admission that he entered payroll information, including tie-up locations, for all Gang 9833 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 August 7, 2012 and January 2, 3, 7-10, 14-18 and 21-22, 2013. This information was not disputed by the Claimant and have been established by the testimony of MTP Shields, MTM Mross and Exhibit 4 provided by MTP Shields.

During the investigation the Claimant stated that he had problems at home that he wasn't going to bring to work and problems at work that he wasn't going to take home, "So, honestly, I didn't check my paycheck on the stuff I got. So, I received the money. Yes, I received it. I'm guilty. . ." (TR-63) The Board accepts the explanation as reasonable and does not find that the Claimant knowingly kept per diem to which he was not entitled. However, the Board also finds that the Claimant acted negligently in violation of Rule 1.6 when he did not carefully review his paystub, which showed the amounts for straight time, overtime and per diem that comprised his total pay. Had he done so and reported the overage, it is likely that he would not be the subject of this case since he did not make the false entries in the Time Entry Portal. However, he owed a much higher degree of responsibility to the Carrier and his negligence is not excused simply because Supervisor Monge initially failed to discover the discrepancy. The negligence merits severe discipline.

For reasons cited below, the Board finds dismissal excessive. First, the Carrier alleged two dishonest acts, proved only one, and has not convinced the Board with substantial evidence that the Claimant was intentionally dishonest as opposed to imprudent. The disciplinary notice referred both to falsifying company documents and accepting the ill-gotten per diem. The Board is unsure of the discipline that might have been assessed had only the retention of the unwarranted per diem and not the falsification been considered. Second, bad judgment and negligence is not the same as intentional dishonesty. Third, the Claimant's eight years of service with a seemingly good record convinces the Board that he 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 emphasizes the likelihood that future seemingly dishonest behavior 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