

PUBLIC LAW BOARD NO. 7633

Case No.: 31/Award No. 29

System File No.: LCS: 1583663/BMWED: UP409WF13

Claimant: W. Hill

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

Organization's Statement of Claim:

1. The discipline (dismissal) imposed on Mr. W. Hill, by letter dated March 13, 2013 for alleged violation of Rule 1.6 Conduct in connection with allegations that Mr. Hill falsified company documents and claimed per diem that he was not entitled to on various dates in October 2012, December 2012 and 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. Hill'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 6, 2013, Notice of Formal Investigation, the Claimant was directed to appear 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 Helper on the Houston Service Unit. These infractions occurred on numerous weekdays in the months of October 2012, December 2012 and January 2013. Union Pacific became aware of these alleged violations on January 29, 2013.” The Notice further stated that substantiated allegations would constitute a violation of Rule 1.6 Conduct (4) Dishonest and could subject the claimant to Level 5 discipline (dismissal) under the UPGRADE policy. Additionally, the Claimant was told that he was being withheld from service pending the outcome of the investigation.

Carrier Position:

The Carrier has provided substantial evidence, including the Claimant's admission that he collected per diem that he was not due as a result of payroll information that he submitted. Statements by Carrier witnesses establish locations where the Claimant actually worked on the days in question. Supervisor Monge, who initially approved the submitted information, does not work with the gang on a daily basis and trusts employees to be honest and accurate in their reporting. Dishonesty is a serious offense justifying dismissal, as established by numerous on-property awards. The Claimant provided no justification for his actions. The Organization has provided no due process or procedural arguments. The UPGRADE policy has been approved in previous awards. There is no basis for this Board to disturb the Carrier's disciplinary action.

Organization Position:

An allegation of dishonesty requires a higher standard of proof than just substantial evidence. The Carrier has not met the higher standard in this case because it has not shown that the Claimant was intentionally deceptive or dishonest. A mistake in judgment is not the equivalent of intent to deceive or defraud. The Claimant did not create the documents claiming per diem and Supervisor Monge initially approved the payroll information that was submitted for the Claimant.

Findings:

The Carrier has alleged that the Claimant falsified company documents and then improperly kept the ill-gotten per diem that resulted from the falsified tie-up or reporting locations. The investigation established that from December 15, 2012 on, Mr. Johnson, another member of Gang 4140, was responsible for reporting payroll information and that prior to December 15, 2012 a member of the gang other than the claimant or Mr. Johnson had that responsibility. The Carrier has not shown that the Claimant falsified any company documents.

While the Formal Notice of Investigation indicated that alleged violations occurred in October and December 2012 and January 2013, the testimony of MTM Kreifels, supported by an exhibit, showed that the claimant worked on October 13, 20, 27 and 28, 2012 and on January 20, 2013. The Claimant testified that he did not tell anybody to turn in time for him or to pay per diem. In closing, he also noted that he had no knowledge of any of the four October dates. But he also admitted that he never brought the per diem he received to anybody's attention or asked about it, explaining that "We were working overtime for the days appointed and I just didn't really notice it as being per diem" (TR-129). The Board does not find substantial evidence of intentional dishonesty. However, because the pay stub accompanying the Claimant's twice-monthly checks show separate straight time, overtime and per diem payments included in the total payment, he was negligent in his failure to carefully review payment details and to alert the Carrier to the overpayment. Supervisor Monge's initial failure to discover the discrepancy does not relieve the Claimant of his obligation to the Carrier.

However, for reasons hereafter noted, the Board finds dismissal to be excessive. First, the notice of dismissal repeats the allegations contained in the Formal Notice of Investigation, even though the investigation established that the claimant falsified no company documents and did not accept per diem for work done in December. The Board is unsure of the discipline that might have been levied had only the retention of the unwarranted per diem overage and not the falsification of company documents been considered. Second, bad judgment and negligence is not the same as intentional dishonesty. Third, the Claimant's 22 years of service with only one seemingly relatively minor infraction shown gives him a significant "bank of goodwill" and 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. The Board emphasizes the likelihood the 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