

**BEFORE PUBLIC LAW BOARD NO. 6367**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

**And**

**BANGOR & AROOSTOOK RAILROAD COMPANY**

**Case No. 1**

**STATEMENT OF CLAIM:** Claim of the System Committee of the Brotherhood that:

1. The discipline [one hundred eighty (180) days' suspension and disqualification as a foreman] imposed upon Mr. J. G. Potvin for alleged violation of Safety Rules 9002 and 9012 on September 17, 18, 22, 23, 24, 25 and 26, 1997 was arbitrary, capricious, excessive, on the basis of unproven charges and in violation of the Agreement.
2. That claim as presented by Vice Chairman R. D. Wilmot to Chief Operating Officer D. R. Sabin shall be allowed as presented because said claim was not disallowed by Chief Operating Officer D. R. Sabin in accordance with Article IV, Section 3(a).
3. As a consequence of the violations referred to in Parts (1) and/or (2) above, the Claimant's record shall be cleared of the charges leveled against him, he shall be reinstated to his former foreman's position with seniority and all other rights unimpaired and he shall be compensated for all wage loss suffered.

**FINDINGS:**

Claimant J. G. Potvin entered the service of the Carrier on July 17, 1979 as a Trackman and was promoted to Section Foreman on May 10, 1994. On November 6, 1997, the Carrier notified the Claimant to appear for a formal hearing to determine his responsibility, if any, in connection with submitting claims for overtime to which he was not entitled and for failing to report such alleged overtime to his immediate supervisor.

The hearing occurred on December 10, 1997. Thereafter, the Carrier notified the Claimant that he was found to have violated Carrier's Rules 9002 (insubordination) and 9012 (time card falsification). For these violations, the Claimant was suspended from service for a period of one hundred eighty (180) days, and he was disqualified as a Foreman with the Carrier.

The facts giving rise to the discipline, for the most part, are undisputed. On September 17, 1997, the Claimant was offered the opportunity to protect a temporary foreman's vacancy that existed at Squa Pan, Maine. Assistant Roadmaster M.P. Ouellete met with the Claimant and discussed with him the conditions of the vacancy. He advised the Claimant that he was not being forced to protect the vacancy and that he would not be entitled under the Collective Bargaining Agreement to travel expenses (including paid travel time) if he accepted the vacancy. During the formal hearing, it was learned that Lyle Shelly, an Engineering Department Clerk, had also discussed the temporary vacancy with the Claimant early on September 17, 1997 and had informed him that there was no contractual entitlement to travel expenses.

The Claimant decided to protect the position and left immediately for Squa Pan. On September 28, 1997, it was discovered that Claimant had claimed overtime for September 17, 18, 22, 23, 24, 25 and 26, 1997 on his time card. A review of the records also showed that he had not submitted a daily overtime report to Ouellete for the period in question.

Based on these events, the Carrier contends that the Claimant was insubordinate in claiming unauthorized overtime. It emphasizes that Mr. Ouellete expressly discussed this

issue with the Claimant before he was allowed to protect the temporary vacancy.

Although the Claimant was told that there was no entitlement to travel expenses, he claimed overtime on his time card for that very purpose. Moreover, he did not report such overtime on the required daily overtime reports. Therefore, the Carrier submits that Claimant was guilty, not only of insubordination, but also of willfully falsifying his time card in order to secure a monetary windfall to which he was not entitled.

The Organization challenges the discipline as arbitrary, capricious, and excessive. It also asserts that there was a procedural violation of the Agreement in that the Carrier did not properly deny the claim within the sixty day time limit set forth in Article IV. Specifically, the Organization contends that pursuant to Article IV, Section 3(a), when a claim is disallowed, whoever filed the claim will be notified, in writing, within sixty (60) days from the date the claim was filed. In this case, it is undisputed that the authorized Carrier officer to receive the claim was Chief Operating Officer D. R. Sabin. Pursuant to the usual and customary practice of the parties, as memorialized in the Carrier's letter of instruction, dated February 26, 1996, Chief Operating Officer Sabin was obligated to also respond to the claim. However, Deputy Chief Operating Officer B.F. Collins disallowed the claim, despite the fact that Chief Operating Officer Sabin had been granted a 30-day extension to issue his response. The Organization contends that Chief Operating Officer Sabin's failure to issue a timely response to the claim (in fact, *any* response) was a serious procedural violation which requires that the claim be sustained.

It is the Organization's additional position that the Carrier has failed to prove the

charges leveled against the Claimant. First, to the extent that the charges rest upon anything Lyle Shelly told the Claimant, they must be set aside because the Claimant neither reported to nor received instruction from Clerk Shelly. With respect to what Assistant Roadmaster Ouellete allegedly said to Claimant, the Organization argues that the Record is inconclusive as to whether he was merely expressing an opinion that there was no entitlement to travel expenses or giving a direct order to Claimant not to submit travel expenses. Given the fact that Ouellete's version of the exchange was uncorroborated, his testimony has no greater credibility than the conflicting testimony of the Claimant.

As to the charge that Claimant intentionally falsified his time cards, the Organization contends that the Carrier has failed to support this accusation with clear and convincing evidence of dishonesty. The Claimant reasonably believed he was entitled to travel expenses because the work he accepted was emergency and relief work. Thus, the Organization argues that at worst, the Claimant made an honest error, which did not justify the harsh and excessive penalty he received.

**OPINION OF THE BOARD:**

The parties have been unable to resolve these issues, which now come before this Board.

This Board has reviewed the procedural arguments raised by the Organization and finds them to be without merit.

Based on a careful review of the testimony and evidence in this case, the Board finds that there is sufficient evidence in the Record to support the conclusion that

the Claimant did disobey his supervisor's direct order to not submit travel expenses and did willfully make false and unauthorized claims for overtime. Clearly, Claimant disagreed with Ouellete's instruction that there would be no travel expenses paid for filling the temporary vacancy. But instead of expressing that disagreement through legitimate contractual mechanisms, he went behind Ouellete's back and submitted time cards that contained unauthorized overtime.

If Claimant had really believed he was entitled to the overtime for traveling, he would have been up front with the Carrier when claiming it, and he properly would have submitted it on daily overtime reports to Mr. Ouellete. He knew he was supposed to submit daily overtime reports if any overtime was claimed. His failure to do so leaves no doubt that he knowingly claimed time that was not approved and to which he was not entitled under the Collective Bargaining Agreement. While the Claimant testified that he was not insubordinate because Ouellete was merely expressing an opinion about his right to travel expenses, the credible testimony in the Record supports the Carrier's contention that Ouellete gave a direct order that Claimant disobeyed. The time-honored rule in labor relations is that if an employee disagrees with an order, he must obey it first and grieve later, unless following an order would place him in severe jeopardy. Obviously, that was not the situation here.

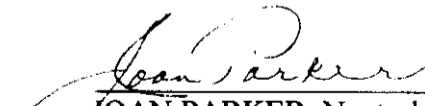
As to the Organization's argument that the vacancy was emergency or relief work, suffice it to say that there is no basis in the Collective Bargaining Agreement

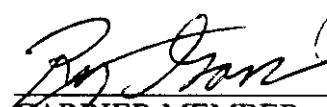
for that finding. Claimant was not required to travel and was not forced to protect the temporary Section Foreman vacancy. He was offered it solely because he was the oldest in seniority on the furloughed list. He voluntarily chose to protect that vacancy knowing that no travel expenses were due.

For these reasons, the Board finds that the Claimant did violate Carrier's Rules 9002 and 9012 and, therefore, warranted discipline. The penalty that the Carrier imposed, however, was unduly harsh. The Claimant has been in the Carrier's service since 1979 and has an almost unblemished record. Disqualification as a Foreman, in conjunction with a 180 day suspension was excessive in these circumstances, a fact that the Carrier apparently recognized because Claimant was made a Foreman again on October 16, 1998. Given this history, and Claimant's unquestioned ability to perform section foreman work, there is basis to modify the discipline. It is the decision of this Board to sustain the Claimant's suspension but to reinstate him to his former Section Foreman's position with seniority restored as of May 10, 1994, but with no back pay.

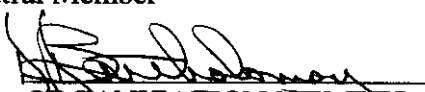
**AWARD:**

The Carrier did not act arbitrarily or capriciously in finding that the Claimant violated Rules 9002 and 9012. The discipline imposed, however, was excessive. The claim is denied in part and granted in part. The Claimant's suspension is upheld, but he is to be reinstated to his former Section Foreman's position with seniority restored as of May 10, 1994, but with no back pay.

  
JOAN PARKER, Neutral Member

  
CARRIER MEMBER

DATED: 6/4/01

  
ORGANIZATION MEMBER

DATED: 6-11-01