

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6402**

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

UNION PACIFIC RAILROAD COMPANY

)
) Case No. 31
)
) Award No. 15
)

Martin H. Malin, Chairman & Neutral Member
D. D. Bartholomay, Employee Member
C. M. Will, Carrier Member

Hearing Date: June 25, 2002

STATEMENT OF CLAIM:

1. The dismissal (withheld from service and subsequent Level V dismissal) imposed upon M. D. Weathersby for alleged violation of Union Pacific Rules 1.2.5, 1.2.7 and 1.6 in connection with an incident that occurred while working as a trackman on June 6, 2000 and reported on June 7, 2000 and an alleged failure to follow instructions on June 15, 2000 was arbitrary, capricious, without just and sufficient cause, and in violation of the Agreement (System File CE100900R/1249824 PR).
2. As a consequence of the violation referred to in Part (1) above, Mr. M. D. Weathersby shall now be reinstated to service immediately with seniority unimpaired, compensated for all straight time and overtime he was deprived of as well as any vacation and insurance benefits lost.

FINDINGS:

Public Law Board No. 6402, 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 June 16, 2000, Carrier notified Claimant to report for an investigation on June 27, 2000, in connection with his alleged failure to properly report an incident that allegedly occurred on June 6, 2000, not reporting the incident until June 7, 2000, and failure to follow instructions on June 15, 2000. Following two postponements, the hearing was held on September 12, 2000. On October 2, 2000, Carrier informed Claimant that he had been found guilty of the charges and dismissed from service.

The Organization has raised a number of procedural objections. We have reviewed the record carefully and find that Carrier afforded Claimant a fair and impartial hearing.

One of the Organization's procedural objections requires specific discussion. The Organization maintains that the record presented significant differences in testimony of several witnesses, thereby requiring evaluation of the witnesses' credibility. However, the Organization observes, the determination of guilt and imposition of discipline was made by a Carrier officer other than the hearing officer. Yet, the Organization urges, the hearing officer observed the demeanor of the witnesses and was in the best position to evaluate their credibility.

We agree that where there are significant conflicts in the testimony, the hearing officer who observes the witnesses testify must evaluate their credibility. We further agree that in the instant case, discipline was imposed by a Carrier officer other than the hearing officer. However, the record developed on the property reflects that the Carrier officer who imposed the discipline did confer with the hearing officer prior to doing so. On this record, we are unable to say that discipline was imposed in a vacuum and without the benefit of the hearing officer's credibility determinations.

The record reflects that on June 7, 2000, Claimant advised his supervisor that his back was sore, that he might have injured it the prior day on duty and that he wanted to complete a report in case the back should worsen. Claimant completed a personal injury report and worked that day. Claimant also worked the following day. However, on June 9, 2000, Claimant called in and advised that he was not able to work that day. There is a dispute in the testimony as to whether Claimant advised that he had a migraine headache or advised that his back was also troubling him. Claimant saw his doctor on June 10 and left two voice mail messages for his supervisor on June 11. On June 12, the supervisor contacted Claimant. There is a dispute in the testimony as to what, if anything, Claimant said to his supervisor about his back at that time. On June 15, 2000, Claimant's wife contacted the supervisor and advised that Claimant was off due to an injured back. The supervisor called Claimant and either instructed him or asked him to report that day to complete a new injury report. Claimant stated that he would report within an hour but did not show up. The following day, the injury report was faxed to the supervisor by Claimant's attorney.

The Organization contends that Carrier failed to prove the charges by substantial evidence. The Organization argues that Claimant did not realize he had injured his back on June 6 and reported the possible injury the following day when his back began tightening up on him. Unfortunately, Claimant's own testimony is to the contrary. Claimant testified that at the end of the workday on June 6, he felt sore but continued:

But, I didn't -- it wasn't anything worth writing down. Because, for one, no one was around that day, and I guess he would've had to make calls or whatever, it would've been an hour or two before somebody could've come down. So, it was, more or less, I'm okay; let's see how it is in the morning.

Thus, it appears that Claimant weighed the severity of any injury against the inconvenience of reporting it. Claimant decided to see how he felt in the morning because he did not want to wait the hour or two that he believed it would take to report the injury. Yet, Claimant

had already been counseled that he should report any injury, even if he thought it was minor and thought it would not lead to any disabling condition. Carrier has a right and a responsibility to know of such matters immediately so that it can take measures to protect the injured employee and so that it can investigate and, if necessary, correct an unsafe work condition. Claimant's own testimony provides substantial evidence for the charge that he did not report his personal injury in a timely manner.

Claimant admitted that his back was hurting him sufficiently that he was not fit for work on June 9 and that he scheduled a doctor's appointment for June 10. Claimant also admitted that when he called his supervisor on June 9 to advise that he would not be able to work. T one point, Claimant testified that he mentioned only his headache. At another point, he testified that he reported the headache and back trouble. The supervisor testified that Claimant mentioned only his headache as the reason he could not work and when the supervisor asked him about his back Claimant replied that it was stiff but Claimant did not report that it was disabling or the reason he was seeing the doctor. We defer to the decision made on the property to credit the supervisor's testimony over Claimant's inconsistent testimony.

Claimant testified that he saw his doctor on June 10, was aware he had a back injury and was being treated by the doctor for a back strain. However, Claimant did not call his supervisor to report the development, even though he had the supervisor's cell phone number. Instead, on Sunday, June 11, Claimant left two voice mail messages reporting that he would not be in to work on Monday but not reporting that he was under doctor's care for his back.

Claimant admitted that on June 15, his supervisor called him and that he told the supervisor he would be in within an hour to complete a new personal injury report. Claimant further admitted that he did not come in or complete the report and that he did not contact the supervisor to advise that he would not be in. Claimant maintained that the supervisor merely asked him to come in, whereas the supervisor testified that he instructed Claimant to come in that day and complete a new personal injury report. As an appellate body, we defer to the decision made on the property to credit the supervisor's version of the conversation. In any event, Claimant testified that he did not come in to complete the new personal injury report because he wanted first to check with his lawyer out of concern that coming in to complete the report might be viewed as inconsistent with his legal case that he was disabled due to an on duty injury. Claimant did not claim that he was physically unable to come in and complete the report. Claimant had no legitimate reason for failing to comply with his supervisor's direction and, certainly, no legitimate reason for not calling the supervisor and telling the supervisor that he would not be in.

Carrier contended that the personal injury reports that Claimant completed on June 7 and June 16 were so dissimilar and contradictory that at least one of them must have been falsified. Thus, Carrier contends that it proved that Claimant was dishonest. However, we have compared the two reports and find that, although the June 16 report is more specific, they are not inconsistent with each other. We are unable to find substantial evidence of dishonesty.

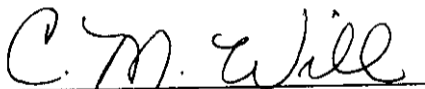
Nevertheless, we find that Carrier proved by substantial evidence that Claimant was insubordinate on June 15 when he failed to follow instructions to come in and complete a new personal injury report and that Claimant repeatedly violated Carrier's rules requiring prompt reporting of personal injuries, follow up medical visits and new developments. The charges that Carrier proved are extremely serious. The charge of insubordination merits dismissal under Carrier's UPGRADE. On the record presented, we cannot say that the penalty imposed was arbitrary, capricious or excessive.

AWARD

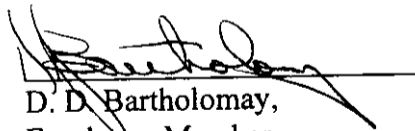
Claim denied.



Martin H. Malin, Chairman



C. M. Will,
Carrier Member



D. D. Bartholomay,
Employee Member

Dated at Chicago, Illinois, November 19, 2002.