NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6402

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	)
	) Case No. 35
and	)
	) Award No. 21
UNION PACIFIC RAILROAD COMPANY	)

Martin H. Malin, Chairman & Neutral Member
D. D. Bartholomay, Employee Member
D. A. Ring, Carrier Member

Hearing Date: April 1, 2003

STATEMENT OF CLAIM:

1. The Level 5 (dismissal) assessed Foreman A. S. Mena for his alleged dishonesty when he entered eight (8) hours' pay on the payroll for January 11, 2002, was without just and sufficient cause, based on an unproven charge and in violation of the Agreement (System File MW-02-71/1317313-D).

2. As a consequence of the violations referred to in Part (1) above, Foreman A. S. Mena shall now be ". . . paid and compensated and the charges be removed and the Level 5 discipline be removed from his personnel record, returned to active service with all charges be removed from the Claimant's personal record, to be paid all wages at the Claimant's respective straight time rate of pay and any all (sic) overtime at the Claimant's respective overtime rate of pay acquired by Gang #2537, as outlined in the first paragraph of this letter, and this to be paid and compensated in addition to any and all other compensation the claimant may have already have received for the time lost and credit to be applied to Railroad Retirement, hospitalization, vacation, to begin on April 24, 2002 through and including on a continuous basis until this matter is settled and to be compensated for any and all expenses acquired by Claimant by attending this investigation such as meals and mileage at the rate of $ .36.5 a mile."

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 February 11, 2002, Carrier notified Claimant to report for an investigation on February 20, 2002. The notice charged that Claimant with alleged dishonesty and falsifying his time on January 11, 2002. Following several postponements, the hearing was held on April 10, 2002. On April 24, 2002, Carrier informed Claimant that he had been found guilty of the charge and was dismissed from service.

The Organization has raised several procedural objections to the conduct of the hearing. We have reviewed the record carefully and concluded that the Organization's procedural objections lack merit. The notice was sufficiently precise to enable Claimant to discern the nature of the charge and prepare a defense. Claimant was afforded a fair and impartial hearing.

The critical question is whether Carrier proved the charge by substantial evidence. Several facts are not in dispute. Claimant's regularly scheduled shift was from 6:30 a.m. to 3:00 p.m., with a thirty minute lunch break. Claimant properly reported at 6:30 a.m. at the McKinney Street compound. Following exercises, reading of safety rules and job briefing, Claimant proceeded to Navigation Yard where his gang was assigned to work. Claimant became ill and the truck driver took Claimant back to McKinney Street prior to his 3:00 scheduled departure time. Shortly after 11:00 a.m., Claimant entered the time for the gang, reporting eight hours for each employee, including himself.

There was conflict in the testimony concerning when Claimant returned to the McKinney Street facility. The Manager Track Maintenance testified that around 1:00 he looked for the gang at Navigation Yard, could not find them and called on the radio. The truck driver answered and advised that they were a few minutes away. When they arrived, Claimant was not with him. The truck driver advised the MTM that Claimant was ill and they had dropped him off at McKinney Street around 12 noon. The MTM proceeded to McKinney Street but was unable to locate Claimant there.

The truck driver testified that he dropped Claimant off at McKinney Street at about 1:40 p.m. According to the truck driver, he left the compound around 2:00 p.m. and Claimant was still there. On questioning by the hearing officer, the trackman testified that they brought Claimant back to McKinney Street around 12:00 or 12:30 and that the discussion between the truck driver and the MTM took place between 1:30 and 2:00. On examination by Claimant's representative, the trackman testified that they brought claimant back to McKinney Street around 1:10 or 1:15. Claimant testified that he was brought back to McKinney Street around 1:30 and that he went to the bathroom for 20 to 30 minutes and left the property at 2:15.

As an appellate body, we are in a very poor position to resolve factual disputes such as these. Instead, we defer to the resolution reached on the property because the hearing officer was in the best position to reconcile conflicting testimony as he observed the witnesses. Furthermore, regardless of which version of events is credited, it is plain that Claimant did not work until his scheduled 3:00 departure time. Under any version, Claimant was not entitled to the eight hours

that he paid himself.

Of course, Claimant submitted the time shortly after 11:00 a.m. and at that time he did not know he would leave early. However, payroll did not close until January 15, giving Claimant sufficient time to correct his time report. Claimant made no attempt to correct his time report.

Moreover, on January 10, the MTM counseled Claimant about the importance of accurate time reporting. Claimant had been off the prior Tuesday but paid himself for eight hours. The MTM counseled Claimant that he had to obtain approval to take a personal day and that he was to pay himself eight hours only if he worked eight hours. Despite such a recent admonition, Claimant failed to correct his time for January 11 with the result that he was paid eight hours when he did not work eight hours. In light of the clear counseling concerning accurate time reporting, it is difficult to dismiss Claimant's failure to correct his time for January 11 as an honest mistake. Carrier did not consider it an honest mistake and we see no reason to disturb that finding. Accordingly, we conclude that Carrier proved the charge by substantial evidence. An act of dishonesty in violation of Rule 1.6 is a very serious offense. The penalty of dismissal is in keeping with Carrier's UPGRADE policy and we are unable to say in this case that it is arbitrary, capricious or excessive.

AWARD

Claim denied.

Martin H. Malin, Chairman

D. A. Ring,
Carrier Member

D. D. Bartholomay,
Employee Member

Dated at Chicago, Illinois, July 29, 2003.