

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6402

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

UNION PACIFIC RAILROAD COMPANY

)

) Case No. 39

)

) Award No. 26

)

Martin H. Malin, Chairman & Neutral Member

D. D. Bartholomay, Employee Member

D. A. Ring, Carrier Member

Hearing Date: March 22, 2004

STATEMENT OF CLAIM:

1. The dismissal of Foreman Curtis W. Ogburn for his alleged violation of Union Pacific Rule 1.6(4), Dishonesty, was without just and sufficient cause, in violation of the Agreement, excessive and undue punishment.
2. As a consequence of the violation referred to in Part (1) above, Foreman Curtis W. Ogburn shall now be reinstated to service with seniority and all other rights unimpaired and compensated for all wage loss suffered.

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 April 24, 2003, Carrier offered Claimant UPGRADE Level 5, Permanent Dismissal, in connection with a charge that he falsified his payroll between January 3, 2003 and April 18, 2003, in violation of Rule 1.6(4). By letter dated May 5, 2003, the Organization notified Carrier that Claimant had rejected the offer and requested an investigation. On May 15, 2003, Carrier notified Claimant to appear for an investigation on June 10, 2003, concerning the charge. The hearing was held as scheduled. On June 29, 2003, Claimant was notified that he had been found guilty of the charge and dismissed from service.

The Organization has advanced numerous procedural arguments. We have reviewed all of those arguments and the transcript and find that Claimant was afforded a fair and impartial hearing and that none of the procedural arguments provides a basis for setting aside the discipline. Only two of the arguments merit further discussion.

The Organization contends that Carrier violated Rule 21 because it failed to schedule the hearing within fifteen days of Claimant's rejection of the proposed discipline. However, Rule 21(2) does not mandate that the hearing be held within fifteen days of rejection of proposed discipline. Rather, it provides, "When discipline is rejected, Carrier will make every effort to schedule and hold a formal hearing within fifteen (15) calendar days from the date of receipt of rejection and hearings held outside the thirty (30) calendar day period referred to above will not be a violation of this rule." There is no evidence that Carrier did not make the required effort to hold the hearing within fifteen days of receipt of the rejection of proposed discipline, even though it was actually held outside the fifteen day timeline. Furthermore, there is no evidence of any prejudice to Claimant from the passage of additional time between his rejection of discipline and the holding of the hearing.

The Organization also contends that Carrier violated the agreement and denied Claimant a fair hearing when the hearing officer questioned two witnesses called by the Organization in the presence of the other witnesses. The hearing officer questioned each of the Organization witnesses, a Truck Driver and a Trackman, at the beginning of the hearing and prior to sequestering witnesses. The hearing officer asked the witnesses identifying information, such as their names, addresses, positions and length of service, and asked them if they were involved in inputting Claimant's time and whether they had observed anything pertinent to the investigation. After hearing their answers, the hearing officer announced that neither witness had any testimony to offer relevant to the investigation but stated that he would allow them to testify anyway.

Certainly, the hearing officer had discretion to qualify the witnesses at the outset, and without sequestering them, i.e., to obtain such identifying information as name, address, job title and length of service. However, when the hearing officer asked the Truck Driver and the Trackman what information they had that was pertinent to the charge, he was inquiring into the substance of their testimony. He should have deferred such inquiries until the witnesses had been sequestered. However, it is clear from the transcript and the testimony of the Carrier witnesses that nothing that the Truck Driver and Trackman stated in response to the hearing officer's questions could have had any influence on the testimony of the other witnesses. Thus, although it would have been better had the hearing officer refrained from substantive questioning of the Truck Driver and Trackman until witnesses were sequestered, we cannot say that his failure to do so prejudiced Claimant's right to a fair and impartial determination of his guilt or innocence.

Accordingly, we turn to the merits of the case. Claimant testified that he used his personal cell phone for Carrier business and submitted additional hours of overtime to compensate himself for the additional expense that he incurred. Claimant further testified that his Supervisor had authorized the use of his cell phone for Carrier business and the submission of additional overtime as compensation.

The Truck Driver testified that the Supervisor also authorized him to use his personal cell phone for Carrier business and to submit additional overtime as compensation. As such, the

Truck Driver's testimony tended to corroborate Claimant. However, the Supervisor testified and denied authorizing any of his subordinates to use their personal cell phones for Carrier business or to compensate for the additional expenses by submitting additional hours of overtime. Furthermore, Claimant gave no details, such as guidelines for determining how much additional time to submit. As an appellate body, we do not observe the witnesses and therefore are in a relatively poor position to resolve conflicts in witness credibility. Rather, as a general practice, we defer to credibility judgments made on the property. We see no reason to depart from this practice in the instant case. We defer to Carrier's crediting the Supervisor's testimony and conclude that Carrier proved the charge by substantial evidence.

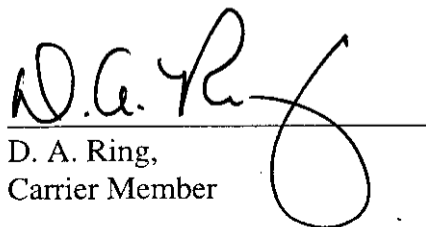
We recognize that Claimant was a long term employee. Claimant's length of service is a mitigating factor. However, the offense was particularly egregious and under Carrier's UPGRADE, it warranted dismissal. The dismissal of such a long-term employee is indeed tragic but the Agreement does not require Carrier to retain in its service one who intentionally falsifies his payroll. We cannot say that the penalty imposed was arbitrary, capricious or excessive.

AWARD

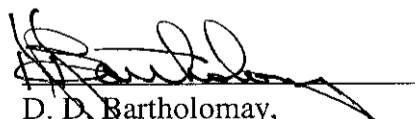
Claim denied.



Martin H. Malin, Chairman



D. A. Ring,
Carrier Member



D. D. Bartholomay,
Employee Member

Dated at Chicago, Illinois, July 23, 2004