

**PUBLIC LAW BOARD NO. 6621**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

**And**

**UNION PACIFIC RAILROAD COMPANY**

**Case No. 22**

**Statement of Claim:** Claim of the System Committee of the Brotherhood that:

The Carrier violated the terms and provisions of the current Collective Bargaining Agreement when on November 12, 2002, it held a formal investigation in connection with Claimant F. F. Gaona's alleged violation of Union Pacific Rule 1.6 – Conduct (#4 Dishonest), that it further violated that Agreement when, subsequent thereto, it dismissed Claimant from its service without benefit of impartial and unbiased consideration being given to the testimonies of the transcript record.

In view of the Carrier's action of assessing the ultimate discipline...of dismissal, and accomplished same without according him his contractual rights to due process, we respectfully request that Claimant now be reinstated to the service of the Carrier to his former position, with seniority and all other rights restored unimpaired, compensated for net wage and benefit loss suffered by him...and the alleged charge(s) be expunged from his personal record.

**Background**

Claimant, system bus driver F. F. Gaona, was hired by the Carrier on August 19, 1996. During his tenure with the Carrier, he worked as a truck driver and laborer, mostly on traveling system gangs.

In August and October 2002, Claimant filed three fraudulent claims for travel allowances, resulting in the theft of approximately \$3,375.00. The fraudulent claims

were discovered after an internal audit of travel expenses revealed that between March and October 2002, Claimant had received in excess of \$20,000 for driving between his residence and his system gang workplace. System gang employees are entitled to highway travel allowances pursuant to Rule 36, Section 7(a), and the allowances are intended to cover driving expenses incurred with long highway trips to and from employees' homes.

The Claimant resides in Indio, California, and his workplace was Proviso, Illinois. Following the internal audit, the Carrier's special police conducted an investigation and concluded that on at least two occasions, Claimant filed a claim for driving mileage after flying back to the workplace from California. On a third occasion, private investigators hired by the police determined that Claimant never drove between his workplace and residence on a weekend when he claimed the driving allowance.

A hearing was held on November 12, 2002 pursuant to the UPRR/BMWE disciplinary rules. As a result of that investigation and Claimant's admissions of guilt, the Carrier dismissed him for dishonesty in violation of Rule 1.6. The Organization appealed on January 16, 2003. The Carrier denied the appeal at every level, and the instant arbitration ultimately ensued.

#### **Contentions of the Carrier**

Preliminarily, the Carrier contends that the dismissal at issue was challenged by the Organization under the wrong discipline handling rule and by the wrong general chairman. The proper general chairman did not file a protest under the applicable rule, and the 60-day limitations period expired. Therefore, according to the Carrier, this Board

is without jurisdiction to hear the merits of the case.

Specifically, under Section 1 of the UPRR/BMWE Implementing Agreement effective August 1, 1998, all system gang operations were consolidated under the auspices of the UPRR/BMWE Collective Bargaining Agreement. The Carrier submits that Claimant, as an employee working under the UPRR/BMWE Collective Bargaining Agreement, was properly noticed for investigation under UPRR/BMWE Rule 48, and the appropriate general chairman, David Tanner, was notified. The Organization, however, filed its claim under Rule 45 of the Southern Pacific/BMWE Collective Bargaining Agreement, which is not applicable to employees working on system gangs. The Carrier further argues that SP/BMWE general chairman Below, who filed the instant claim, was not the duly accredited representative under the UPRR/BMWE Collective Bargaining Agreement. The failure of David Tanner to submit the claim within the 60-day limitations period, in the Carrier's view, rendered the instant claim non-arbitrable.

As to the merits, the Carrier contends that the facts are not disputed. The Claimant admitted his guilt, acknowledged his abuse of Rule 36, and offered restitution. Therefore, the Carrier argues that it has satisfied its burden of proof.

The Carrier further asserts that the Level 5 discipline it assessed was not overly harsh, arbitrary or capricious. There is ample industry case law recognizing an employer's right to discharge employees for dishonesty. The Carrier urges this Board to apply that case law and uphold the Level 5 discipline which was imposed.

#### **Contentions of the Organization**

The Organization contends that the Carrier imposed unduly severe discipline on

Claimant for actions he took at a time of high stress and anxiety in his life. The credible testimony in the Record showed that during the time frame at issue, Claimant's wife was in need of serious medical surgery, and he was also coping with the illness and death of his grandfather. As a result of these family problems, Claimant exercised poor judgment. The Organization contends, however, that he never acted with malice toward the Carrier. Rather, his thoughts were focused solely on using the fastest means of traveling to maximize his time with his family during this critical period. The Organization also emphasizes that Claimant offered to reimburse the Carrier the monies he fraudulently claimed. Based on these facts, and Claimant's length of service, the Organization urges the Board to modify the Level 5 discipline imposed by the Carrier.

### **Findings**

As to the Carrier's procedural objections with respect to the processing of the instant claim, this Board makes no ruling. The issue is being addressed and resolved in another forum.

With respect to the substance of the claim, the facts giving rise to Claimant's dismissal are not in dispute. For the rest-day period of August 9, 2002 through August 18, 2002, Claimant claimed he drove round trip from Proviso, Illinois to Indio, California and he was paid \$1,125.00. However, he later admitted that he flew ATA Airlines from Los Angeles to Chicago on August 18, 2002 instead of driving.

Claimant also put in a claim for allegedly driving round trip from Proviso, Illinois to Indio, California the weekend of August 23, 2002 to August 25, 2002. He received \$1,125.00 for the round trip, but subsequently admitted that he did not make a round

trip to and from his residence that weekend.

For the weekend period of October 11, 2002 through October 13, 2002, Claimant claimed he drove a round trip from Proviso, Illinois to Indio, California. He was paid \$1,125.00, but he later acknowledged that he flew ATA Airlines from Los Angeles to Chicago instead of driving.

Given these admitted facts, as well as Claimant's testimony that he knew his claims were not proper under Rule 36, there can be no doubt that the Carrier has sustained its burden of proof. Claimant knowingly submitted fraudulent claims, and his subsequent offer to make restitution to the Carrier cannot make up for his willful dishonesty.

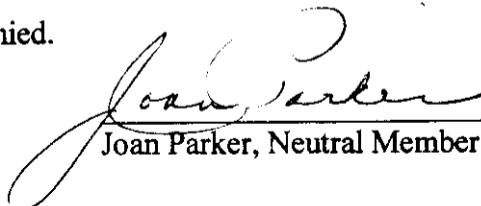
While the Organization argues that Claimant's family issues, i.e. his wife's surgery and his grandfather's funeral, should be viewed as mitigating factors, the granting of leniency lies within the Carrier's discretion. This Board may not act solely on the basis of personal sympathy. The case law in the railroad industry has long recognized the right of an employer to dismiss employees who steal or engage in other acts of dishonesty. (See, for example, *PLB 6302, Award 32 (Malin)* and *Third Division Award 28484 (Mason)*). In the instant case, Claimant claimed a mileage allowance to which he was not entitled and thereby destroyed the trust that is essential in any employment relationship.

**Award**

The claim is denied.

  
Carrier Member

Dated: January 9, 2004

  
Joan Parker, Neutral Member

  
Organization Member

Dated: 1-9-04