

PUBLIC LAW BOARD NO. 6621

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

And

UNION PACIFIC RAILROAD COMPANY

Case No. 31

Statement of Claim: It is the claim of the System Committee of the Brotherhood that:

- (1) The dismissal of Water Service Mechanic S.R. Windsor for his alleged acceptance of stolen property between the time of January 2000 through October 17, 2000 was without just and sufficient cause and excessive punishment.
- (2) As a consequence of the violation referred to in Part (1) above, Water Service Mechanic S.R. Windsor shall not be reinstated to service with seniority and all other rights unimpaired and compensated for all wage loss suffered.

Background

Claimant Stephen R. Windsor was initially hired by Union Pacific Railroad (former Southern Pacific Transportation Company – Western Lines) on September 22, 1997. Thereafter, he established seniority in various classes within the Water Service Subdepartment. At the time of the incident that led to his dismissal, he was assigned as a Water Service Composite Mechanic, headquartered at West Colton, California.

Special Agents of the Carrier had received reports of burglaries from trains in the Rimlon, California area starting in January 2000 and extending through October 2000. On April 28, 2000, Special Agent M.A. Jimenez received an anonymous telephone call from a Company employee who stated that another employee had offered him stolen

property: Nike shoes, Salem cigarettes, and Old Navy blouses or shirts. Thereafter, an on-going investigation began, which ended in mid-October.

On October 17, 2000, Officers Jimenez and Hornback interviewed three employees – John Thompson, Wayne Twarry, Jr., and Claimant Stephen Windsor. During Claimant's interview, he admitted taking Salem cigarettes, which he allegedly found in the Rimlon tree line, and he acknowledged that he realized at the time that they were stolen property.

On October 24, 2000, a notice of investigation was issued to Claimant to develop the facts and place responsibility, if any, regarding his alleged admission to receiving stolen property between January 2000 and October 17, 2000 during an interview with Union Pacific Police Officers. After a hearing, which was held on November 2, 2000, Claimant was found to have violated Union Pacific Rule 1.6 – Dishonesty and Rule 1.25 – Credit/Property, which states in relevant part: "Employees must care for all articles of value found on railroad property and promptly report same to the proper authority." This rule became effective April 2, 2000. As a result of this finding, Claimant was assessed a level 5 discipline and dismissed from service.

On January 30, 2001, the Organization appealed Claimant's dismissal. The appeal was processed through the grievance procedure and was discussed in conference on August 28, 2001. The parties were unable to resolve the matter, however, which now comes before this Board for adjudication.

Opinion

Initially, both parties raised procedural arguments. The Carrier contended that the claim was untimely filed and therefore was not arbitrable on its merits. The Organization

contended that there were procedural defects in the Carrier's handling of the case. However, in presenting its position to this Board, the Carrier withdrew its timeliness claim. As to the Organization's due process arguments, the Board has reviewed them and finds them to be without merit. Claimant had a full and fair hearing, with representation, and was afforded ample opportunity to testify, present witnesses and evidence, confront his accusers, and respond to all charges.

As to the merits of the case, the Carrier contends that there is substantial evidence to find Claimant guilty because when he was interviewed, he admitted to Special Agents Jimenez and Hornback that he and Wayne Twarry found at least 33 cartons of cigarettes along the right-of-way. Instead of turning in the cartons, Claimant kept them for his personal use. Claimant repeated this story at his hearing, admitting that he split the cigarettes with Twarry and smoked them.

In light of this admission, there is no doubt that the Carrier has met its burden of proof. As Claimant freely conceded:

I was a smoker. You know, there was cases that were -cartons that were crushed. You know, empty, you know, packs, there was crushed ones...And I was a smoker. I, you know, I don't know why. It was a mistake....Wayne Twarry was there. And, you know, good, free cigarettes, I'm going to smoke these. And, like you know, don't snitch out on your fellow man. And, you know, grabbed a bunch and, you know. (Carrier's Ex. C, p. 51).

The Organization contends that the Carrier failed to prove the charges against Claimant because the charge letter accused Claimant of receiving stolen property between January 2000 and October 17, 2000, and Claimant admitted that he found and kept cartons of cigarettes in July 1999. The Board, however, finds this contention to be

unpersuasive. First, receiving property that one knows to be stolen is a dischargeable offense, regardless of when it occurs. Second, Claimant's story that he found the cigarettes in July 1999 was not convincing. The Carrier's Special Agents were tipped off in April 2000 that Wayne Twarry had offered an employee stolen property, including Salem cigarettes. An investigation was commenced that took approximately six months, and when the Special Agents interviewed Twarry and Claimant, both admitted to finding and keeping Salem cigarettes. Twarry did not dispute that the incident occurred in 2000, but Claimant said that it occurred in July 1999.

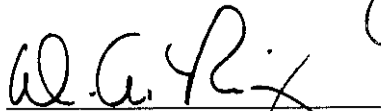
There is no reason to believe Claimant's story. First, Twarry did not corroborate it. Second, Claimant initially told the Special Agents that a third employee, John Thompson, participated in the incident and also kept cartons of the Salem cigarettes. At the hearing, however, Claimant changed his story and stated that Thompson was not there. When questioned as to why he initially implicated Thompson and then stated that Thompson was not present, Claimant was vague and evasive. He testified that when he was interviewed, he was "confused." But his testimony was not credible. Nor was the testimony of John Thompson, who insisted that he did not participate in keeping stolen cigarettes, but who was equally unpersuasive. Claimant's obvious lying at the hearing raises serious doubts about his entire story that the cigarettes were found in 1999, rather than 2000. But, in any event, regardless of when he came upon them, he had an absolute obligation to notify the Carrier.

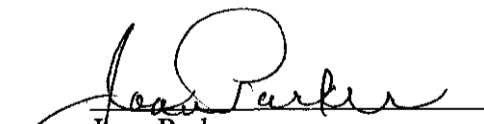
In sum, Claimant knowingly participated in keeping stolen cigarettes. He was fully aware that he should have turned the cartons in to management, but he couldn't resist the

temptation to keep the contraband for personal use. While Claimant expressed remorse for his misconduct, his lack of truthfulness as a witness undermined the sincerity of his apology. Moreover, there is no question that dishonesty/theft is an extremely serious offense that cannot be tolerated by the Carrier. Given the seriousness of Claimant's misconduct, and his relatively short-term service, the Carrier was within its rights in assessing level 5 discipline and dismissing Claimant from employment.

Award

The claim is denied.


Carrier Member
Dated: 6-10-04


Joan Parker
Neutral Member


Organization Member
Dated: 6-10-04