

PUBLIC LAW BOARD NO. 6621

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION –
IBT RAIL CONFERENCE**

and

**UNION PACIFIC RAILROAD COMPANY
[FORMER SOUTHERN PACIFIC TRANSPORTATION COMPANY (WESTERN
LINES)]**

Case No. 59

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

1. The dismissal of Welder Andrew Davis for his allegedly being absent without permission from April 28 to May 13, 2005, which was the third such violation of Rule 1.1.3, was without just and sufficient cause (Carrier's File 1430068).
2. Welder Andrew Davis shall now be reinstated to service with seniority and all other rights unimpaired and be compensated for all wage loss suffered.

Background:

Claimant Andrew Davis holds seniority with the Carrier as of July 5, 1995. At all times pertinent herein, Claimant worked at Alamogordo, New Mexico, Monday through Friday, starting at 7:00 a.m. Carrier Rule 1.13, Reporting and Complying with Instructions, provides:

Employees will report to and comply with instructions from supervisors who have the proper jurisdiction. Employees will comply with instructions issued by managers of various departments when the instructions apply to their duties.

Claimant was charged with violating Rule 1.13 on January 22, 2003, for which he was assessed discipline at Level 2. He was also charged with violating Rule 1.13 on March

17, 2003. His discipline status at the time was Level 3, so that under the Carrier's UPGRADE discipline policy, the March 17, 2003 violation resulted in an assessment of Level 4.

In January 2005,¹ Alamogordo Manager of Track Maintenance Robert Onate, held a meeting with Claimant and the other employees under his management to discuss employee compliance with Carrier instructions regarding absenteeism and tardiness. On March 9, Onate spoke with Claimant again about the need to call in if he were going to be late or absent. From April 18 to April 22, Claimant was on vacation. He reported to work in accordance with his regular schedule on April 25 and 26. On April 27, however, Claimant called out, alleging that he had a doctor's appointment. On April 28 and 29, Claimant neither reported for work, nor called in. At approximately 7:45 a.m. on April 29, Onate called Claimant's home. Claimant's wife told Onate that Claimant was in jail. Onate asked her to tell Claimant to call Onate. When Claimant's wife asked if vacation days could be used to cover Claimant's jail time, Onate again told her to have Claimant call him. Claimant was entitled to three weeks' vacation per year, but had already taken eight days of vacation prior to April 27.

On May 2 and 3, Claimant was again no show – no call. At 5:58 p.m. on May 3, Claimant's wife called Onate and advised him that Claimant's release date would be May 13. From May 4 through May 13, Claimant neither called out or reported for work. On Monday, May 16, Claimant reported to work at 6:50 a.m., but was told that he was removed from service pending investigation into charges that he failed to comply with instructions to notify his supervisor if he could not report for work. Claimant gave no

¹ Unless otherwise stated, all dates hereafter are 2005.

reason at that time for not having called in from April 28 to May 13, and said that he understood the instructions regarding notifying his supervisor.

On May 20, the Carrier issued Claimant a Notice of Investigation instructing him to appear on June 7 for a hearing:

To develop the facts and place responsibility, if any, that while working as Welder, you allegedly failed to comply with previous instructions to notify the undersigned [Onate] that you were taking the day off on April 28, 2005, and you were allegedly absent without proper authority through and including May 13, 2005, reporting to work on May 16, 2005. This is your third violation of the same rule, 1.13, Reporting and Complying with Instructions.

Your alleged actions indicate a possible violation of the current Union Pacific Rule 1.13 Reporting and Complying with Instructions.

The Carrier's UPGRADE Discipline Policy mandates that if an employee violates the same rule three times within a thirty-six month period, discipline shall be assessed at Level 5, permanent dismissal. After the scheduled investigation in the instant case was held, the hearing officer's decision was rendered by letter dated July 6, finding Claimant guilty and assessing discipline at Level 5, dismissal. The Organization filed a claim by letter dated July 27, which the Carrier denied by letter dated September 15. An October 4 appeal letter by the Organization was denied by the Carrier on December 2. The parties discussed the matter in conference on February 16, 2006, but were unable to reach a resolution, and have therefore presented it to this Board for final decision.

Carrier's Position:

The Carrier contends that Claimant was afforded all due process and a fair and impartial hearing. In response to the Organization's assertion that due process was violated because the hearing officer for the investigation in the instant matter was the charging Carrier official for Claimant's January 22 and March 17, 2003 Rule 1.13

violations, the Carrier argues that the Organization made no objection at hearing to the hearing officer's handling of the investigation, and has identified no specific misconduct on the hearing officer's part.

The Carrier further argues that substantial evidence at hearing demonstrated that Claimant was absent without authority April 28 through May 13 and violated Rule 1.13. Claimant admitted that he knew he was supposed to call his supervisor if he could not report for work, and that he had not called on any of the days in question. Claimant made no attempt to obtain authority for his absence, and the only excuse he offered was that he was incarcerated, which arbitral precedent has found to be no justification for absence without authority (citing *P.L. B. No. 6302, Award No. 80* (Malin, January 20, 2006)).

It is the Carrier's additional position that the discipline assessed was not arbitrary, capricious, or an abuse of discretion. Claimant had previously violated Rule 1.13 twice in 2003. The Carrier's UPGRADE Policy mandates that "if an employee commits three repetitions of the same rule infraction during a thirty-six (36) month period ... the discipline will be assessed at Level 5 – Permanent Dismissal." Claimant admitted that he was fully aware of the Carrier's UPGRADE Policy. Moreover, the Carrier submits, Claimant's ten-year history with the Carrier included several other disciplinary matters, and therefore the Level 5 – dismissal assessed Claimant was warranted.

Organization's Position:

The Organization contends that Claimant did not receive a full and fair hearing because the hearing officer who conducted the investigation acted as "judge, prosecutor and jury," preventing a disinterested development of the evidence, unbiased review of the record, and objective assessment of the penalty was not provided. The Organization

points out that the hearing officer in the instant case was the initiating manager in assessing Level 2 discipline for Claimant's January 22, 2003 violation of Rule 1.13.

It is the Organization's additional position that even in the absence of any procedural flaws, Claimant's dismissal was based on unproved charges, and was arbitrary and capricious. The Organization alleges that during the period involved, the Carrier credited Claimant with a week's vacation. Because Claimant was unable to call to request vacation time, and Claimant's wife could not validly request it for him, the Organization argues, one of the Carrier's managers must have requested the vacation, indicating that Claimant must have secured proper authority for his absence.

Testifying on his own behalf at hearing, Claimant asserted that he was unable to contact Onate prior to reporting for work on May 16 because he was in jail, and was "unable to get my one phone call from the time that I was put in." (Car. Exh. B-2 at 32.) When asked if he had received any visitors while in jail, Claimant answered: "No sir. I did not have any outside contact with anybody. I was unable to let my wife or anybody know where I was." (Car. Exh. B-2 at 43.) Claimant also asserted that he had a paystub that showed one week's vacation time paid during the period he was in jail, but admitted that he did not know whether that week of vacation was the week he had taken between April 18 and 22. Claimant acknowledged that because eight of his fifteen annual vacation days had already been used, he could not have covered the twelve days he was incarcerated with vacation time. Claimant stated that he understood Rule 1.13 and the UPGRADE Policy's requirement of dismissal for repeated violations of the same rule.

Findings:

As a threshold matter, the Board finds that Claimant was afforded a full and fair hearing, with timely notice of the charges, time to prepare a defense, and the opportunity to produce and examine witnesses and evidence. The Organization has cited no specific misconduct showing partiality by the hearing officer, or any other support for its assertion that Claimant did not receive due process. The Board therefore rejects the Organization's claim in this regard.

Claimant admitted at hearing that from April 27 to May 13, 2005, he was absent without authority and did not comply with instructions to notify his supervisor that he was unable to report for work. Claimant asserted as excuse not only that he was incarcerated, but that he was held incommunicado for the entire time of his incarceration. The Board finds Claimant's story in this regard without credibility. If Claimant—as he asserted at hearing—was unable to let anyone know where he was, then how was Claimant's wife able to tell Onate that Claimant was in jail on April 29? Moreover, how was she able to tell Onate on May 3 that Claimant's release from jail would be May 13? Someone must have been in communication with Claimant for this information to have come in to his wife's possession. Furthermore, constitutional protections ensure that incarcerated persons are allowed communication and visitation with an attorney, if no one else. The Board rejects Claimant's contention that he was unable to notify the Carrier that he could not report for work during his period of incarceration.

Claimant also asserted, and the Organization has argued, that Claimant received five days' vacation pay during his period of incarceration, indicating in the Organization's view authorization of Claimant's absence by Carrier management.

However, an examination of claimant's paystub for the pay period ending April 30, 2005 reveals forty hours, vacation pay, sixteen hours' straight time pay, and twenty-four hours no pay. This tally matches perfectly with Claimant's having taken vacation April 18 to April 22 (forty hours vacation), worked April 25 and 26 (sixteen hours straight time) and then called off on April 27 and was absent without calling April 28 and April 29 (twenty-four hours no pay).

By Claimant's own admission, he violated Rule 1.13 in April – May 2005. It is unrefuted that Claimant had violated Rule 1.13 twice in 2003. His 2005 violation of Rule 1.13 was therefore the third violation of the same rule within a thirty-six month period. The Carrier's UPGRADE Policy, which has been upheld numerous times in arbitral review, mandates a penalty of dismissal (Level 5) for three violations of the same rule within thirty-six months. Claimant's dismissal must therefore be upheld.

Award:

The claim is denied.


JOAN PARKER, Neutral Member


CARRIER MEMBER

DATED: May 1, 2007


ORGANIZATION MEMBER

DATED: 5-7-07