

BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 924

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

And

**UNION PACIFIC RAILROAD COMPANY
(former Chicago and North Western Transportation Co.)**

Case No. 252

Award No. 229

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of Trackman A. Martinez for his alleged use of a Company vehicle for personal use without proper authority on August 6, 1999, was without just and sufficient cause, capricious, and in violation of the Agreement (Organization File 9KB-6564T; Carrier File 1208232 CNW).
- (2) Trackman A. Martinez shall now be " * * * reinstated with all rights unimpaired, be compensated all lost time, be made whole for all losses and have any reference to the investigation removed from his personnel record."

FINDINGS:

Claimant A. Martinez was employed by the Carrier as a ~~trackman~~ at the time of this claim.

On August 9, 1999, the Carrier notified the Claimant to appear for a formal investigation to develop the facts and place responsibility, if any, in regards to the charges that on August 6, 1999, the Claimant allegedly used a Carrier vehicle for personal use without proper authority and on Carrier time. The Carrier charged the Claimant with having allegedly violated Rules 1.6, 1.13, 1.15, and 1.19. The Claimant was withheld from the service of the Carrier pending the outcome of the investigation.

The hearing took place on August 13, 1999. On August 23, 1999, the Carrier notified the Claimant that he had been found guilty of all charges and was being assessed a Level 5 dismissal discipline under the UPGRADE discipline policy.

The Organization filed a claim on behalf of the Claimant. The Organization contends that the Claimant has almost twenty years of service with the Carrier and has never been charged with an investigation or disciplined. In fact, the Organization argues that the Claimant has even served as a role model for his co-workers. The Organization further contends that the Claimant was not afforded a fair and impartial hearing when the conducting officer of the hearing refused to step down at the Organization's request. The Organization maintains that the conducting officer met with various witnesses prior to the investigation when all aspects, details, and evidence were discussed and, thereby, developed preconceived notions concerning the Claimant. The Organization further argues that the discipline assessed the Claimant was excessive in that the only Level 5 rule cited and discussed at the investigation was Rule 1.6, and nothing in the transcript of the investigation revealed that the Claimant was insubordinate or dishonest. The Organization maintains that, at the time of the incident, the Claimant was with his superior, a Mr. **Palma**, and was following the direct orders of his superior to operate a Carrier-owned pickup truck and to follow him to a location which was not disclosed to the Claimant before the trip. The Organization argues that the Claimant was unaware of his supervisor's plans, but merely followed orders and cooperated to get the job done. The Organization contends that the Claimant believed he was only helping his superior and that the particular job he performed was for the benefit of the Carrier. The

Organization argues that it is absurd that the Carrier disciplined the Claimant for following the direct orders of his superior. The Organization also acknowledges that the Carrier offered to return the Claimant to work under various conditions, but rejected the offer contending that the Claimant should be returned to work without any restrictions and paid for the time he was out of work

The Carrier denied the claim, arguing that the transcript reveals that the Claimant acted in violation of the rules. The Carrier argues that the conducting officer made the correct decision and did not do so from prior information. The Carrier maintains that there is no rule or agreement provision that precludes the conducting officer from having multiple roles. The Carrier contends that, on the date in question, between 9:30 a.m. and 10 a.m., the Claimant was observed by Carrier special agents at the home of his supervisor loading material into a Carrier vehicle when he was supposed to have been working and did not have authority to be absent. The Carrier argues that the Claimant did not have permission to use a Carrier vehicle for personal purposes. In addition, the Carrier maintains that the Claimant sought payment for the time that he spent at his supervisor's home. The Carrier maintains that the Claimant knew that his conduct was inappropriate when he went to a private residence to perform personal duties while under pay with the Carrier. The Carrier asserts that the Claimant's explanation that his supervisor told him to do so does not excuse the Claimant since he could have declined to participate. The Carrier argues that the Claimant was fully cognizant of his duties and responsibilities and that his discharge constituted reasonable discipline. The Carrier, however, did extend an offer of leniency to the Claimant in early 2000 which the

Claimant initially declined; however, in May of 2000, the Carrier offered to return the Claimant to service with his rights unimpaired, but without pay for lost time.

The parties being unable to resolve the issues, this matter came before this Board.

This Board has reviewed the procedural arguments raised by the Organization, and we find them to be without merit. The fact that one person played multiple roles in the investigation is not necessarily a violation of the due-process rights of the Claimant.

This Board has reviewed the evidence and testimony in this case, and we find that the Carrier has failed to meet its burden of proof that the Claimant violated Carrier rules and used a Carrier vehicle for personal use without proper authority on August 6, 1999. Therefore, the claim must be sustained.

The record reveals that the Claimant was an assigned trackman who took orders from several supervisors, including Mr. Palma. Mr. Palma was a track supervisor on the date in question, and he was giving instructions and orders to the Claimant that day. The record reveals that Mr. Palma instructed the Claimant to assist him and to follow him in a pickup truck. Mr. Palma testified that he did not tell the Claimant that they were going to Mr. Palma's residence. At Mr. Palma's residence, the Claimant loaded scrap material for the purpose of dumping it. Mr. Palma testified, without rebuttal, that the Claimant "had no idea what you were doing when you left Global One and went to your residence."

The Claimant testified that he was simply following the instructions of Mr. Palma, his supervisor, on August 6, 1999. He followed Mr. Palma to Mr. Palma's home and then helped Mr. Palma put some trees in the dump truck. The entire job took approximately fifteen minutes. The Claimant testified that he "feeled (sic) bad not to help him at that

time.”

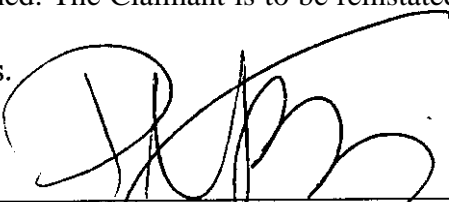
The record also reveals that the Claimant had almost twenty years of service with the Carrier and had never been disciplined.


Given the fact that the Claimant was only following orders of his supervisor on the date in question, this Board **cannot find** that the Carrier met its burden of proof that the Claimant acted wrongfully in such a way that it justified discipline when he assisted his supervisor performing work at his supervisor’s home.

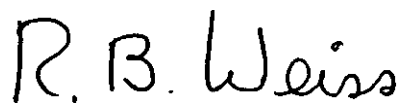
As stated above, the Carrier bears the burden of proof in all discipline cases. The Carrier has failed to prove its case in this situation, and this Board orders that the Claimant be reinstated with full back pay, minus any interim earnings.

AWARD:

The claim is sustained. The Claimant is to be reinstated to service with back pay, minus any interim earnings.



PETER R. MEYERS
Neutral Member

ORGANIZATION MEMBER
DATED: 4-04-01

CARRIER MEMBER
DATED: 04-11-01