

BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 924

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

**UNION PACIFIC RAILROAD COMPANY
(FORMER CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY)**

Case No. 260

Award No. 236

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

1. The Level 2 which resulted in the assessment of a Level 3 [five(5) day suspension] assessed Laborer W.C. Martinez for his alleged late reporting for duty on July 23, 2003, was without just and sufficient cause, based on unproven charges and in violation of the Agreement (System File UPSW-2055D/1386945D).
2. As a consequence of the violations referred to in Part (1) above, Laborer W.C. Martinez '... must be compensated for all time lost and have any reference to the investigation removed from his personal record as outlined in Rule 48 of the effective Agreement.'"

FINDINGS:

At the time of the events leading up to this claim, the Claimant was employed by the Carrier as a Laborer on Gang 9086.

By letter dated August 6, 2003, the Claimant was notified to appear for a formal investigation and hearing to develop the facts and determine the Claimant's responsibility, if any, in connection with the charge of being absent without authority on July 23, 2003. After a postponement, the hearing was conducted on August 27, 2003. By

letter dated September 11, 2003, the Claimant was notified that as a result of the hearing, he had been found guilty as charged. This letter further notified the Claimant that as a result of his prior disciplinary history of Level 2, combined with the current Level 1, the Claimant was being placed at a Level 3 UPGRADE discipline status, meaning that he was being issued a five-day suspension. The Organization filed a claim challenging the Carrier's decision, and the Carrier denied the claim.

The Carrier initially contends that the Claimant was afforded all elements of due process in accordance with the Agreement. The Claimant received adequate notice of his investigation, was allowed ample representation, and was able to present his own witnesses, as well as cross-examine all of the Carrier's witnesses who were present at the investigation. The Carrier points out that the Organization's only procedural objection is based on the argument that the Carrier allegedly prevented the Claimant from presenting a written statement to support his explanation for being late to work on July 23, 2003, and prevented the Claimant from presenting a witness who would have corroborated this explanation. The Carrier argues that it has no duty to provide witnesses for the Claimant. The Claimant's inability to secure his witness' appearance at the investigation is not attributable to the Carrier, so it is not a valid basis for a procedural objection. As for the Claimant's written explanation, the Carrier emphasizes that the Hearing Officer took into account the Claimant's verbal explanation, so the written statement had no material effect on the outcome of this investigation.

The Carrier then argues that the transcript contains substantial evidence in support of a finding of guilt. The Carrier asserts that the Claimant admitted that he had the means of contacting his supervisors in emergencies, and he understood his responsibilities with regard to reporting for duty. The Carrier insists that these admissions establish that the Claimant knew the seriousness of his absence and the extent of his violations. Moreover, at the time of the incidents at issue, the Claimant had been working with this gang for only one week, yet he already had been tardy twice. The Claimant also admitted that he was tardy on July 23d, and he failed to inform his supervisor within the one-hour time limit set forth in the Gang Policy.

The Carrier argues that it is well established that admission of guilt is *per se* substantial evidence of a rule violation. The Carrier asserts that the evidence adduced at the investigation, in conjunction with the Claimant's admission of guilt, is more than enough substantial evidence of the Claimant's culpability. The Carrier maintains that there is no substantive reason for the Claimant's discipline to be overturned.

The Carrier goes on to contend that once an arbitral panel verifies that substantial evidence supports a finding of guilty, the panel lacks authority to overturn the level of discipline assessed, even if the discipline may seem harsh, unless there is a sufficient demonstration that the discipline was arbitrary, capricious, or an abuse of Carrier discretion. The Carrier insists that the discipline at issue was not arbitrary, capricious, or an abuse of Carrier discretion. The Carrier emphasizes that discipline assessed in the

Grievant's case was correct and in accordance with the Carrier's UPGRADE Policy. The accumulation of discipline up to Level 3 is a direct effect of the Claimant's refusal to take responsibility for his actions. The Carrier maintains that there is no reason for the discipline imposed to be overturned.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Organization initially contends that the Carrier failed to afford the Claimant a fair and impartial investigation. The Organization points out that the Hearing Officer failed to allow the Claimant to enter a signed statement from a witness who was unable to be present at the hearing, and the Carrier also denied the Organization's request to have Foreman Bell in attendance at the hearing for questioning.

The Organization also argues that the Carrier failed to refute the Organization's positions as they were set forth in the initial appeal. The Organization maintains that this failure means that the statements in the Organization's initial appeal must be accepted as fact. The Organization emphasizes that, as set forth in the initial appeal, the Claimant arrived at the work site on June 21st with about twenty other employees, and there has been no explanation for why Foreman Bell considered this as being late. The Organization points out that the Grievant was only a few moments late on the date in question due to problems with his automobile.

The Organization maintains that the discipline assessed the Claimant was

capricious, unsupported, and must not stand. The Organization ultimately contends that the instant claim should be sustained in its entirety.

The parties being unable to resolve their dispute, this matter came before this Board.

This Board has reviewed the evidence and testimony in this case, and we find that there is sufficient evidence in the record to support the finding that the Claimant was guilty of reporting late to work on July 23, 2003. The record reveals that the Claimant came a few minutes late because of battery problems with his car and he admitted that he did not call a supervisor.

Once this Board has determined that there is sufficient evidence in the record to support the guilty finding, we next turn our attention to the type of discipline imposed. This Board will not set aside a Carrier's imposition of discipline unless we find its actions to have been unreasonable, arbitrary, or capricious.

There is no question that the Claimant was late in this case. However, the Claimant did have a good excuse that he had car problems. Although the Carrier had a justifiable reason to find the Claimant guilty of violating the attendance policy, the discipline imposed against the Claimant was without just cause because it was too severe given the circumstances. The Claimant was issued a Level 3 discipline, which translated into a five-day suspension. Given the seriousness of the wrongdoing in this case, this Board must find that the action taken by the Carrier was without just cause and

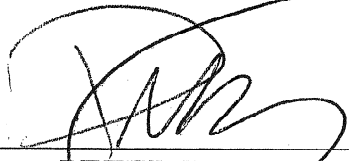
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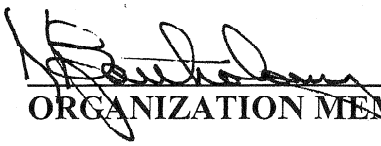
constituted unreasonable arbitrary punishment.

This Board hereby finds that the discipline should be reduced to a Level 2 (written warning) and the Claimant should be made whole for any lost pay resulting from the improper issuance of a Level 3 to this Claimant.

AWARD:

The claim is sustained in part and denied in part. The Level 3 discipline of the Claimant shall be reduced to a Level 2 (written warning) and the Claimant shall be made whole for any back pay that he lost as a result of the five-day suspension.



PETER R. MEYERS
Neutral Member

ORGANIZATION MEMBER

DATED: 11-9-05



CARRIER MEMBER

DATED: November 9, 2005