

BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 924

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION
IBT RAIL CONFERENCE**

and

UNION PACIFIC RAILROAD COMPANY

Case No. 269

Award No. 245

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

1. The dismissal of Machine Operator Henry Prinkleton for his allegedly falsifying an injury report and falsifying an injury was without just and sufficient cause and in violation of the Agreement (System File UPWJ-7419D/1416275D).
2. As a consequence of the violations referred to in Part (1) above, Machine Operator Henry Prinkleton shall now be reinstated with seniority and all other rights unimpaired, compensated for all wage loss suffered and have his record cleared of this incident."

FINDINGS:

At the time of the events leading up to this claim, the Claimant was employed by the Carrier as a Machine Operator.

By letter dated September 27, 2004, Claimant was directed to appear for a formal investigation and hearing on charges that the Claimant had violated Carrier Rules in connection with the Claimant's report of an on-duty injury incurred during an incident on September 13, 2004. After a postponement, the investigation was conducted on October 26, 2004. The hearing was held *in absentia* after the Claimant failed to appear for the hearing. By letter dated November 11, 2004, the Claimant was informed that as a result of the investigation, the Claimant had been found guilty as charged and was being

assessed Level 5 discipline, which is dismissal from the Carrier's service. The Organization thereafter tiled an appeal, challenging the Carrier's decision to dismiss the Claimant. The Carrier denied the claim.

The Carrier asserts that it presented substantial evidence that the Claimant violated the Carrier's rules when he lied about the cause of his alleged injury, failed to report the alleged injury promptly, failed to provide adequate information, and intended to lie to the Carrier. The evidence shows that the Claimant was not injured in the September 13th accident, and he did not report any injuries following the accident despite being questioned about possible injuries. The Carrier insists that the testimony further shows that the Claimant intended to feign an injury in order to work out a "deal" concerning his Level 4 discipline assessment and CORE plan participation. The Carrier argues that the Claimant's behavior can lead to no other conclusion than that the Claimant was dishonest in his dealings with the Carrier. The Claimant's actions violated the Carrier's rules.

The Carrier maintains that instead of arguing that the Claimant did not lie to the Carrier about his alleged injury, the Organization attempted to hide behind the smoke screen of asserting a "fruit of the poisonous tree" argument. The Carrier asserts that this argument does not apply here because the hearing was properly held and the Claimant was afforded all due process rights. The Carrier insists that the testimony and evidence demonstrate that the Claimant was culpable and the discipline was properly assessed.

The Carrier argues that the alleged ankle injury certainly would have been known to the Claimant immediately after the September 13th accident, if this accident had been the cause. The Claimant, however, denied being injured when questioned after the

accident, and other employee witnesses stated that they did not see any indication of an injury to the Claimant's ankle. The Carrier additionally points out that the Claimant waited until September 24th to say anything about the injury, in clear violation of the Carrier's reporting rules. The Carrier insists that the facts clearly demonstrate that the Claimant was lying about the cause of his injury. The Carrier therefore contends that the assessment of discipline in this case should not be disturbed.

The Carrier contends that numerous awards have found that holding a hearing in *absentia* does not violate a claimant's right to a fair and impartial hearing. The Carrier insists that it did all that was necessary to ensure that the Claimant had an opportunity to appear at the hearing, and it was by the Claimant's own choice that he failed to avail himself of this opportunity. The Carrier asserts that under the circumstances, the assessed discipline must stand.

The Carrier goes on to point out that once this Board determines that substantial evidence of guilt has been presented, it lacks the authority to overturn the level of discipline assessed. The Carrier argues that although the discipline may seem harsh, the discipline **cannot** be overturned unless it was arbitrary, capricious, or an abuse of Carrier discretion. The Carrier maintains that the discipline assessed the Claimant was in accordance with the Carrier's UPGRADE Policy, and violations of this type are very serious and carry Level 5 discipline assessments. The Carrier emphasizes that Boards traditionally have found that dishonesty is very serious and a breach of the trust between the Carrier and its employees, and dismissals on such grounds will not be overturned. The Carrier argues that the Claimant's violations were serious and deserving of the

discipline imposed. The Carrier asserts that the Board should not alter the Carrier's assessment of discipline in any way.

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

The Organization initially contends that the Carrier's failure to grant the requested postponement of the hearing was a violation of Rule 48. The Organization maintains that the Carrier had prior knowledge of the reason for the Claimant's absence from the investigation, and the Carrier received documentation only fifteen minutes after its artificially imposed deadline of fifteen minutes after the start of the investigation. The Organization insists that one of the basic tenets of a fair and impartial investigation is that the employee must have the opportunity to be present and face his/her accusers. The Organization argues that the Carrier was made aware of the reason why the Claimant could not be at the investigation, and the Claimant provided documentation to support that reason. The Organization asserts, however, that the hearing officer apparently had already decided that the investigation was *pro forma* and the Claimant was guilty of the charges.

The Organization argues that the Carrier violated the Agreement when it failed to afford the Claimant a fair and impartial hearing on the charges against. The Organization therefore asserts that the discipline assessed must be found wholly improper 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 procedural arguments raised by the Organization, and we find that the Claimant was not allowed to offer his side of the story at the hearing that eventually led to his dismissal. The Claimant had notified the Carrier that his stepfather had been taken to the hospital for treatment of a heart attack and he needed a postponement of the hearing. The hearing was not postponed and the Claimant was found guilty of the charges in absentia.

This Board realizes that the charges of which the Claimant was found guilty are very serious and often lead to dismissal. It is very possible that once the Claimant is given an opportunity to present his side of the story that the decision will still be the same in finding that the Claimant was guilty of the rule violation and he may still be terminated. However, this Board cannot find that the hearing that found the Claimant guilty of falsifying an injury report without the Claimant being given a fair opportunity to address the hearing officer was fair and impartial.

This Board finds that the claim is sustained in part on procedural grounds. The Claimant shall be reinstated as an employee, without back pay, and the hearing into his alleged rule violation shall be re-opened and the Claimant shall be given an opportunity to address the hearing officer and present whatever proof he has to substantiate his side of the case.

AWARD:

The claim is sustained in part and denied in part. The investigation in this matter

shall be re-opened and the Claimant shall be given an opportunity to present his side of the story. The hearing officer shall swear the Claimant and allow the Claimant to testify and present whatever evidence he has to support his position in this case. Once the Claimant has provided that information and both parties have been given an opportunity to support or rebut it, the hearing officer shall then issue a final decision in this case.



PETER R. MEYERS
Neutral Member


ORGANIZATION MEMBER
CARRIER MEMBER

DATED: 5-30-06

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