NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6302

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES)
) Case No. 90
and)
) Award No. 87
UNION PACIFIC RAILROAD COMPANY)

Martin H. Malin, Chairman & Neutral Member
D. D. Bartholomay, Employee Member
D. A. Ring, Carrier Member

Hearing Date: September 15, 2005

STATEMENT OF CLAIM:

1. The Carrier violated the Agreement when it refused to allow Mr. J. A. Matthews to exercise his Maintenance of Way seniority after he vacated his exempt position as Director of Track Maintenance (DTM) and properly made a written request therefore under date of September 7, 2004 (System File D-04-33D/1416740).

2. The Carrier further violated the Agreement when its dismissal of Mr. J. A. Matthews for alleged violations of Rules 1.6, 1.13, 1.9, 1.26 and 1.19 of the General Code of Operating Rules, Fourth Edition, effective April 2, 2000; Item 10-A of System Special Instructions effective April 1, 2004; and the Union Pacific Visa Purchasing Card Policy, Part 1, Overview, Section 1, General Information; Part 2, Policies, Section 3, What Cannot Be Bought; Part 3, Procedures, Section 2, Using the Purchasing Card was procedurally flawed and exceedingly harsh.

3. As a result of the violations in Parts 1 and/or 2 above, the Claimant will be reinstated to service with seniority unimpaired, his record will be expunged and he will be compensated for all wage loss suffered, to be calculated based upon the highest rated position he could have exercised seniority to on September 13, 2004 and continuing until allowed to properly exercise his seniority in the Maintenance of Way and Structures Department.

FINDINGS:

Public Law Board No. 6302, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties

to the dispute were given due notice of the hearing thereon and did participate therein.

At the time of the incidents that led to his dismissal, Claimant was employed as a Director Track Maintenance, a position not covered by the Agreement. By letter dated August 26, 2004, Carrier advised Claimant that he had been dismissed from service. By letter dated September 7, 2004, Claimant advised Carrier that he had vacated an exempt position and wished to exercise his seniority as an Agreement-covered employee pursuant to Agreement Rule 22(c)(2). By letter dated September 13, 2004, Carrier notified Claimant to appear for an investigation on September 28, 2004. The notice alleged that Claimant exhibited unethical and possibly dishonest behavior in using his position and his Visa Procurement Card for personal gain, by receiving merchandise which resulted in Carrier being overcharged for railroad material that in some cases Carrier did not receive during a 25-month period ending July 31, 2004, and by receiving a set of gold clubs purchased for him by a subordinate with a Carrier Visa card. The hearing was held as scheduled. On October 15, 2004, Claimant was notified that he had been found guilty of the charge and dismissed from service.

The Organization contends that Carrier violated Rule 48(a) because it failed to hold the hearing within thirty days of the date Carrier had knowledge of the occurrence to be investigated. The Organization further contends that Carrier violated Rule 48 by dismissing Claimant for conduct while Claimant was performing in a position not covered by the Agreement. The Organization maintains that when Carrier dismissed Claimant from his non-Agreement position, Claimant had a right under Rule 22 to exercise his seniority and Carrier violated Rule 22 by denying Claimant that right.

We do not agree with the Organization's position. In this regard, this case is identical to Public Law Board 6402, Case No. 60, Award No. 39, and Case No. 61, Award No. 40.[1] Both of those Awards involved employees who occupied exempt management positions at the time of their dismissals and who sought to exercise seniority under the Agreement. In both cases, the Board found that Carrier acted properly in noticing the employees for investigation following receipt of notices that they wished to exercise seniority and return to Agreement-covered positions. In both cases, the Board found that Carrier acted properly in charging the employees for misconduct committed while serving in their non-Agreement positions. Furthermore, the Board held in both cases:

> When Carrier dismissed Claimant from service . . . , it was incumbent on Claimant, if he wanted to exercise his seniority under the Agreement, to notify Carrier of that desire. Only upon such notice was Carrier obligated to schedule an investigation. By holding the investigation within thirty days of the notice of Claimant's desire to exercise his seniority,

[1]We note that the members of this Board are also the members of PLB 6402.

Carrier complied with Rule 21(a)(1).[2]

Accordingly, we follow PLB 6402, Awards 39 and 40 and hold that it was proper for Carrier to notice Claimant for an investigation following receipt of his letter advising of his desire to exercise seniority to an Agreement-covered position, that the investigation could be based on misconduct during performance of the duties of an exempt position, and that the time for holding the hearing ran from the date Carrier received notice of Claimant's desire to exercise seniority.

The Organization further contends that Carrier denied Claimant a fair and impartial hearing. In the Organization's view, Carrier had pre-judged Claimant's guilt and the hearing was a mere charade guaranteed to produce a pre-ordained result. We have reviewed the record carefully and find no evidence of any prejudgment. On the contrary, the record demonstrates that Carrier fully respected Claimant's due process rights and provided Claimant with a fair and impartial investigation.

The Organization maintains that Carrier failed to prove Claimant's guilt by substantial evidence. The Organization concedes that Claimant admitted to receiving gratuities and to mishandling the situation when he discovered the golf clubs on a subordinate's Visa statement. However, the Organization argues, Carrier failed to prove dishonest intent and that receipt of gratuities and mishandling of the golf clubs charge were not sufficiently serious to warrant the dismissal of an employee who had 35 years of service.

The record reflects that, over a 25-month period, Claimant ordered track blankets and ice melt from two Florida-based companies. Claimant received gratuities of caps, jackets, dinner at a restaurant for Claimant and his wife while on vacation, and tickets to National Hockey League games. The material was ordered for use in Granby, Colorado; Claimant was based in Denver. Although Claimant ordered and paid for 50 pound bags of ice melt, 30 pound bags were delivered instead. Claimant admitted that the price he paid for the material was higher than the price he would have paid had he ordered the material through Carrier's stores, via its Clarus or E-procurement system.

Claimant testified that he recognized that he was expected to order the materials through Carrier's stores. He explained that the ice melt available through Clarus/E-procurement had a metallic content that caused problems with electrical circuits on road crossings. He further explained that the track blankets deteriorated after a few uses. Claimant testified that the materials he ordered from the Florida companies were superior in quality and met the needs better than what was available through Carrier's stores.

Taken at face value, Claimant's testimony would support a finding of a lack of dishonest intent. If taken at face value, Claimant's receipt of the gratuities was incidental to his ordering

[2]Although PLB 6402 was established by the same parties and consists of the same members as this Board, it sits under a different Agreement from this Board. However, we see no differences between the Agreement at issue before PLB 6402 and the Agreement at issue before this Board to justify any different result in the instant case.

from the Florida companies and his motive for doing business with the Florida companies was procuring the superior products, not getting the gratuities. Claimant's testimony would also support a finding that Claimant was at most negligent in not following up to ensure that everything he ordered was in fact delivered.

There was, however, considerable evidence that contradicts this picture. At no time did Claimant report the problems he was experiencing with the ice melt from Carrier's stores. At no time did Claimant seek to have appropriate Carrier officials approve the ice melt he was ordering from the Florida companies. Claimant admitted that the track blankets he initially ordered from Carrier's stores deteriorated because he had ordered the wrong blanket. Although Claimant had discretion to order outside the E-procurement system to meet emergency needs, his ordering from the unauthorized Florida companies extended over a 25-month period with no effort made to report the problems he had encountered with the materials from Carrier stores and no effort to secure approval for the ice melt and track blankets from the Florida companies. This evidence supports an inference that Claimant was purchasing from the Florida companies to continue to receive the gratuities and was dishonest in not seeking approval for the purchases or otherwise trying to resolve his problems with the quality of the ice melt and track blankets from E-procurement through proper channels.

Thus, the record supports conflicting inferences concerning Claimant's intent. As an appellate body that does not observe witness testimony, we are in a comparatively poor position to resolve such conflicts. Rather, we defer to the resolution reached on the property as long as the resolution is a reasonable one in light of the record as a whole. In the instant case, we see no reason to deny the resolution reached on the property the deference which it is due. Accordingly, we conclude that Carrier proved the charges with respect to the ice melt and track blankets by substantial evidence.

We similarly find that Carrier proved the charges with respect to the golf clubs by substantial evidence. Claimant testified that he believed that a group of subordinates had shared the cost of the golf clubs and given them to him as a gift at a dinner. Claimant testified that the golf clubs were a total shock to him. However, there is simply no explanation for Claimant's approving the subordinate's log of Visa purchases when he received it with the golf clubs two months later. Again, the inference of dishonest intent drawn on the property was reasonable and we defer to it.

Accordingly, we turn to the penalty imposed. Claimant had 35 years of service and, apparently, only one incident or prior discipline which occurred a considerable period of time before the instant matter. In Award No. 39, Public Law Board 6402 observed:

> Claimant had 34 years of service. He was cooperative during the investigation. However, the Board has no authority to grant leniency. The Board may only disturb the penalty if it is arbitrary, capricious or excessive. Given the very serious nature of the offense and the magnitude of the offense, we are unable to find that the penalty was arbitrary, capricious or excessive. Accordingly, we lack authority to disturb it in any way.

PLB 6302
Awd 87

The comments of PLB 6402 apply with equal force to the instant case.

AWARD

Claim denied

Martin H. Malin, Chairman

D. A. Ring,
Carrier Member

D. D. Bartholomay,
Employee Member 3-10-06

3-10-06

Dated at Chicago, Illinois, February 27, 2006