NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6302

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES)
) Case No. 91
and)
) Award No. 88
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. M. J. Gallegos to exercise his Maintenance of Way seniority after he vacated his exempt position as Manager of Track Maintenance (MTM) and properly made a written request therefore under date of September 10, 2004 (System File D-04-34D/1416741).

2. The Carrier further violated the Agreement when its dismissal of Mr. M. J. Gallegos 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 18, 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 Manager Track Maintenance, a position not covered by the Agreement. By letter dated September 7, 2004, Carrier advised Claimant that he had been dismissed from service. By letter dated September 13, 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 14, 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 being dishonest with Railroad Police and Corporate Audit while being interviewed on August 19, 2004. The hearing was held as scheduled. On October 15, 2004, Claimant was notified that he had been found guilty of the charges 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 which occurred 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 record reflects that, over a 25-month period, Claimant ordered switch lube and ice melt from two Florida-based companies. Claimant received gratuities of a Chicago Bears jacket and a $400.00 money order. Claimant clearly understood that receipt of these gratuities was improper. He testified that he kept the money order in his desk for two weeks, but ultimately decided to cash it "because I didn't think anything would ever come about it." The record further reflects that the Florida companies charged Claimant's Visa procurement card for items that he did not order or that were never received. Claimant contested a $1,303 charge but ultimately approved it for payment because the company threatened to turn the matter over for collection and Claimant felt compromised by having accepted the gratuities.

The record further reflects that when questioned by Carrier's police and audit representatives, Claimant stated that he used the $400 to pay for a safety dinner for his subordinates. When confronted with a charge for the dinner to his Visa procurement card, Claimant explained that he charged the excess over $400. Only after being confronted with the actual bill from the restaurant did Claimant admit that he used the $400 for personal expenditures.

Claimant admitted the violations to Carrier's Regional Director Police and again admitted the violations at the hearing. There is no question that Carrier proved the charges by substantial evidence.

Accordingly, we turn to the penalty imposed. Claimant had 10 years of service and, after his initial dishonesty, cooperated fully with Carrier's investigation. In Award No. 39, Public Law Board 6402 observed:

---

[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.

PLB 6302
Awd 88

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.

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
3-10-06

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

Dated at Chicago, Illinois, February 27, 2006