

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6402

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

UNION PACIFIC RAILROAD COMPANY

)
) Case No. 61
)
) Award No. 40
)

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

Hearing Date: March 31, 2005

STATEMENT OF CLAIM:

1. The Level 5 UPGRADE discipline assessment (dismissal from service) to Mr. B. W. Vickers for an alleged violation of Union Pacific Visa Purchasing Card Policy, Rule 1.3, 1.9, 1.26, 1.19, 1.6(4) and System Special Instructions 10-A by letter dated November 4, 2004 was not justified.
2. As a consequence of the violations referred to in Part (1) above, the Claimant shall have the charge letter be removed from all company records, the Railroad will compensate him for all loss of time, vacation rights, including the reinstatement of all seniority rights unimpaired and for all personal expenses to be reimbursed back to him to attend the investigation.

FINDINGS:

Public Law Board No. 6402, 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. On September 21, 2004, Carrier advised Claimant that he had been dismissed from service, that he was disqualified from returning to any Agreement craft in which he held seniority and that he would not be considered for re-employment. By letter dated September 24, 2004, received by Carrier on October 1, 2004, the Organization submitted a claim on behalf of Claimant maintaining that he had been dismissed from service without a hearing and was entitled to exercise seniority as a Welder. On October 5, 2004, Carrier notified Claimant to appear for an investigation on October 20, 2004. The notice alleged that Claimant exhibited unethical and possibly dishonest behavior in using his

position and his Visa Procurement Card for personal gain, purchasing products not allowed under the Visa Purchasing Card Policy, receiving a gift certificate, checks and money orders, resulting in Carrier being overcharged for material and in some cases being charged for material never received during a 25-month period ending July 31, 2004. The hearing was held as scheduled. On November 4, 2004, Claimant was notified that he had been found guilty of the charge and dismissed from service.

Carrier contends that it has the right to dismiss a member of management, that such dismissal includes all positions with Carrier and that as a member of management, Claimant had no recourse. Carrier acknowledges that there are conflicting awards on this issue. We need not decide which line of authority to follow because we find that, assuming Claimant could not have his seniority under the Agreement terminated except in accordance with the Agreement, Carrier complied with the Agreement and the claim must be denied.

The Organization contends that Carrier violated Rule 21(a)(1), which provides, "Carrier will make every effort to schedule and hold a formal investigation under this rule within thirty (30) calendar days from date of the occurrence to be investigated except as herein provided or from the date the Carrier has knowledge of the occurrence to be investigated." Carrier contends that the hearing was timely because it was held within thirty days of the date it was notified that Claimant wished to exercise seniority back to the craft.

In NRAB Second Division Award No. 13171, Carrier furloughed a Sheet Metal Worker who then worked as a lineman under the IBEW Agreement. The employee was dismissed from service as a lineman for dishonesty following an investigation held under the IBEW Agreement. Thereafter, a Sheet Metal Worker vacancy occurred and the employee sought to exercise his Sheet Metal Worker seniority. Carrier recalled a more junior Sheet Metal Worker and the Organization filed a claim. The Board held that Claimant was entitled to a hearing once he made known to Carrier his desire to exercise his Sheet Metal Worker seniority and to be considered for further employment. The Board reasoned:

[T]here is no dispute that Claimant maintained his seniority as a furloughed S.M.W. while he was working as a lineman under the I.B.E.W. Agreement. Under the instant Agreement, that seniority entitled him to certain rights, including the right to an Investigation prior to having his seniority taken away. That right appears to this Board to be independent of any similar right he may have had under the I.B.E.W. Agreement. While there is no doubt that Carrier must be permitted to rely upon Claimant's conduct while in its employ to discipline him, regardless of which craft he is working in, and that theft has been held to be an offense meriting dismissal, Claimant has a right to an Investigation under this Agreement which includes consideration of his S.M.W. seniority, prior to losing that seniority.

In exercising rights under Rules 18 and 29, an employee must make his desire to be considered for the vacancy or transfer known to Carrier before Carrier has any obligation to consider his seniority rights. Especially in the case where Claimant has

been dismissed from service, and that dismissal is upheld, Claimant must be held to have some responsibility to "mark up" or make known to Carrier that he wishes to exercise his S.M.W. seniority and be considered for continued employment. Claimant failed to do so in this case and the Organization's appeal on his behalf cannot be held to be an adequate substitute.

We find the reasoning of Award 13171 persuasive. When Carrier dismissed Claimant from service on September 21, 2004, 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, Carrier complied with Rule 21(a)(1).

The Organization further argues that Carrier denied Claimant a fair and impartial hearing by pre-judging his guilt. We fail to see the logic of the Organization's argument. Claimant was dismissed from his position as an MTM. He was not entitled to a hearing prior to his dismissal. His entitlement to hearing arose, if at all, when he advised Carrier of his desire to exercise his Agreement seniority. At that time, Carrier scheduled the hearing. We fail to see how Carrier could have acted differently. Indeed, we note that in Award 13171, the Board ordered that the claimant notify Carrier within fifteen days if he wished to exercise S.M.W. seniority and ordered Carrier upon receiving such notice to schedule a timely investigation. There is no suggestion in Award 13171 that holding such an investigation after having dismissed Claimant once for the offense that would for the basis for the investigation would amount to pre-judgment.

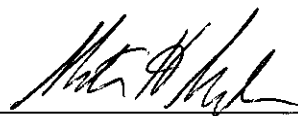
The record reflects that during the period in question, several related vendors billed \$17,000 to Claimant's Carrier-issued Visa card for a variety of products. The record further reflects that the products were billed at inflated prices, products were billed that were never delivered and products were billed that were never ordered. The record further reflects that Claimant received money orders, checks to be used at restaurants and a Sears gift card from the vendors as gratuities, in violation of Carrier policy and that Claimant feared initiating action against the billings for products that were not delivered because he had compromised himself by accepting the gratuities. There is no question that Carrier proved the charge by substantial evidence.

Claimant had 21 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.

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AWARD

Claim denied.



Martin H. Malin, Chairman



D. A. Ring,
Carrier Member



D. D. Bartholomay,
Employee Member

Dated at Chicago, Illinois, May 14, 2005