

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6402

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

UNION PACIFIC RAILROAD COMPANY

)
) Case No. 81
)
) Award No. 66
)

Martin H. Malin, Chairman & Neutral Member
D. D. Bartholomay, Employee Member
B. W. Hanquist, Carrier Member

Hearing Date: September 14, 2006

STATEMENT OF CLAIM:

1. The discipline of dismissal imposed upon S. Seiler, ID 0231394 for an alleged violation of Union Pacific Rule 1.6 was unwarranted, arbitrary and on the basis of unproven charges.
2. As a consequence of the violation referred to in Part (1) above, the Claimant shall be reinstated to service with seniority and all other rights unimpaired, his record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered continuing from August 2, 2005 until he is returned to service.

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.

On August 3, 2005, Carrier notified Claimant to report for a formal investigation on August 23, 2005. Claimant was withheld from service pending investigation. The notice alleged that Claimant violated Rule 1.6(4) when on July 5, 2005, he purchased motor oil for personal use using a company Wright Express fuel card. The hearing was held as scheduled. On November 1, 2005, Carrier notified Claimant that he had been found guilty of the charge and dismissed

from service.

The Organization has raised a number of procedural objections. One of those objections is dispositive of the claim.

As indicated above, the hearing was held on August 23, 2005. The Organization filed a claim on September 28, 2005, 36 days after the hearing. Carrier issued a notice of dismissal on November 1, 2005. On November 9, 2005, Carrier offered to resolve the claim by reinstating Claimant on a leniency basis without compensation for time out of service. Claimant rejected the offer and on November 17, 2005, Carrier denied the claim. The Organization appealed the denial on November 21, 2005. Carrier denied the appeal on January 5, 2006. However, on January 16, 2006, Carrier unilaterally returned Claimant to service.

The Organization argues that by waiting until November 1, 2005, to issue the notice of discipline, Carrier violated Rule 21(i). Rule 21(i) provides:

It is understood that nothing contained in this rule will prevent an employee being suspended from service pending formal investigation where serious or flagrant violations of Carrier rules or instructions are apparent. In such cases, the Carrier will make every effort to schedule and hold a formal investigation within twenty (20) calendar days of the date the employee is suspended, and render a transcript and decision within twenty (20) calendar days following the date the hearing is concluded.

The Organization relies on Public Law Board 6302, Case No. 24, Award No. 23, which sustained a claim because Carrier rendered its decision twenty-one days after conclusion of the hearing and the Agreement required it to render its decision within twenty days. Carrier responds that Rule 21(i) does not require a decision within twenty days following the hearing but merely provides that Carrier will make every effort to render a decision within twenty days. Carrier relies on our decision in Case No. 39, Award No. 26. Carrier urges that the Organization knew of the decision to dismiss Claimant, as evidenced by its filing a claim on September 28, 2005, that the Organization did not complain in its claim of a late decision or the absence of a transcript, and that the Organization was not prejudiced by the late provision of the transcript as evidenced by the arguments it advanced in its September 28 claim.

We agree with Carrier that Public Law Board 6302, Case No. 24, Award No. 23 does not control the instant case. PLB 6302, Award No. 23 concerned Rule 48(e) of the Agreement at issue in that case. Rule 48(e) required that the decision be rendered within twenty days of the conclusion of the hearing and Carrier conceded that it violated Rule 48(e). At issue before PLB 6302 was the consequence of the violation. PLB 6302 held that a violation of the Rule 48(e) time limit mandated that the claim be sustained.

In contrast, Rule 21(i) does not require that Carrier render the decision within twenty days following the hearing. Rather, it requires that Carrier "make every effort" to render the decision and transcript within twenty days. In Case No. 39, Award No. 26, we addressed the "make every

effort" language contained in Rule 21(a)(2) which provides, "When discipline is rejected, Carrier will make every effort to schedule and hold a formal hearing within fifteen (15) calendar days from the date of receipt of rejection and hearings held outside the thirty (30) calendar day period referred to above will not be a violation of this rule." In that case, on May 5, 2003, Claimant rejected proposed discipline of dismissal and requested a hearing which was not held until June 10, 2003. We rejected the Organization's contention that the delay in holding the hearing required that we sustain the claim. We reasoned:

There is no evidence that Carrier did not make the required effort to hold the hearing within fifteen days of receipt of the rejection of proposed discipline, even though it was actually held outside the fifteen day timeline. Furthermore, there is no evidence of any prejudice to Claimant from the passage of additional time between his rejection of discipline and the holding of the hearing.

We agree with Carrier that Award 26 recognized that the "make every effort" language does not make Carrier a guarantor that, in Award 26 the hearing would take place, and in the instant case the decision will be rendered within the time frame specified. Beyond that, however, Award 26 provides no guidance for the decision in the instant case.

By our calculation, Carrier took 68 days to render its decision, more than three times the time frame specified in Rule 21(i). Indeed, the decision came more than one month after the Organization filed the claim. This is not a de minimis deviation from the twenty day time frame, which might imply that absent a showing to the contrary Carrier made every effort to decide the case within twenty days. This is a severe delay that warrants some explanation from Carrier to show that Carrier complied with its obligation to "make every effort" to render a timely decision. However, Carrier provided absolutely no explanation for the delay or any other showing of the effort it made to decide the case in a timely manner.

We note that the Organization is in a very different position with respect to delays under Rule 21(i) than with respect to delays under Rule 21(a)(2). Rule 21(a)(2) concerns the scheduling of the hearing. The Organization may protest the delay prior to or at the hearing and may question appropriate witnesses as to the reason for the delay. On the other hand, Rule 21(i) concerns the rendering of the decision. The Organization is in no position to take evidence as to the reasons for the delay in the decision. Clearly, when Carrier takes more than three times the specified amount of time to decide the case, it must come forward with an explanation of how it complied with its obligation to make every effort to decide the case within twenty days.

Carrier argues that the Organization failed to protest the delay in its September 28 claim. We do not agree. The claim clearly stated, "The organization requested copies of the tapes and transcript recorded during the closing of the investigation . . . The carrier has failed to comply with our request in a timely manner . . ." Although the Organization had no right to the tapes themselves, it did have a right to have Carrier make every effort to render the transcript within twenty days. The September 28 claim further protested, "The organization feels that a decision

has not been made in a timely manner.”¹

We are also unable to say that the Organization was not prejudiced by the late rendering of the transcript. Although the Organization’s September 28 claim did discuss the evidence presented at the hearing, its November 21 appeal, presumably aided by the transcript, discussed the evidence in considerably greater detail. We have no way of knowing what the outcome of the claim would have been, had such detail been presented in the initial step, rather than on appeal.

For all of the reasons detailed above, we find that the claim must be sustained. As indicated above, Carrier unilaterally reinstated Claimant on January 16, 2006. Accordingly, the appropriate remedy is for Carrier to compensate Claimant for the wage loss he suffered between the date he was removed from service and the date of his return pursuant to his reinstatement.

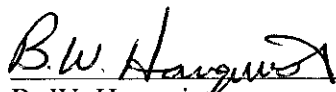
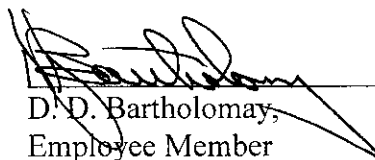
AWARD

Claim sustained in accordance with the Findings.

ORDER

The Board, having determined that an award favorable to Claimant be made, hereby orders the Carrier to make the award effective within thirty (30) days following the date two members of the Board affix their signatures hereto



Martin H. Malin, Chairman
B. W. Hanquist
Carrier Member
D. D. Bartholomay,
Employee Member

Dated at Chicago, Illinois, March 8, 2007

¹We recognize that the Organization’s September 28 claim cited Rule 21(c) and did not expressly cite Rule 21(i). However, the September 28 claim clearly put Carrier on notice that the Organization’s position was that the decision and transcript had not been rendered in a timely manner.