

BEFORE PUBLIC LAW BOARD NO. 6621

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

And

UNION PACIFIC RAILROAD COMPANY

Case No. 33

Statement of Claim: Claim of the System Committee of the Brotherhood that:

1. The discipline (Level 5 dismissal) imposed upon Mr. A.L. Whitson under date of May 15, 2001, for alleged inappropriate use of the Company fuel card for the years of 1999 through 2001, was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement.
2. As a consequence of the violation referred to in Part (1) above, Mr. A.L. Whitson shall “ . . . now be reinstated to service of the Carrier on his former position with seniority and all other rights restored unimpaired, compensated for all wage and benefit loss suffered by him, including, but not limited to, medical and/or insurance premium costs for the Claimant and his family beginning on the date the Claimant lost compensation and continuing, and the alleged charge(s) be expunged from his personal record.”

Background:

A. Whitson, a Semi Truck Driver with 33 years' seniority, had a fuel credit card issued by the Carrier for use on the 200 gallon capacity diesel semi assigned to him. In order to purchase fuel with the card, Claimant had to produce the card and provide both his PIN and the mileage on the odometer of his truck.

In early 2001, the Carrier conducted an audit of fuel card transactions by all railroad employees. Claimant's fuel card transactions raised questions about whether Claimant had made illegitimate purchases with the card, because, for example: (1) although the semi assigned to Claimant had a capacity of 200 gallons, many of the purchases were of for fewer than 20 gallons;

(2) many of the purchases were of unleaded fuel, although the semi assigned to him used diesel fuel; (3) many of the unleaded fuel purchases were made in Fairfield, where Claimant resided; (4) many of the unleaded fuel purchases were made only a few minutes after diesel purchases, with identical odometer readings given to vendors for the diesel and unleaded fuel purchases; and (5) when Claimant went on extended vacations, the unauthorized purchases of unleaded fuel stopped.

By letter dated March 19, 2001 from R.L. Matthews, the Carrier notified Claimant of an investigation and hearing to be held on April 3, 2001 regarding the allegedly inappropriate fuel purchases from 1999 to March 2001. At the hearing, where R.L. Matthews was a principal Carrier witness, Claimant testified that supervisors and fellow employees regularly asked Claimant to fuel their vehicles, and explained that others had access to his fuel card and to his PIN – the last six digits of his social security number. On the other hand, Claimant was unable to provide any specific explanation of most of the purchases of unleaded fuel.

Following the hearing, by letter dated May 15, 2001, R.L. Matthews advised Claimant that he was dismissed for inappropriately using the Carrier's fuel card from 1999 through 2001:

I have now carefully reviewed and considered all the testimony contained in the hearing transcript. I have found more than a substantial degree of evidence was presented to warrant sustaining all charges brought against you, for your violation of the above cited charges.

Accordingly, you are hereby assessed with a Level Five discipline and dismissed from the service of the Union Pacific Railroad Company.

(Carrier Ex. E.) Jerry Tausz, Manager Special Projects, denied the Organization's claim challenging Claimant's dismissal. Although the Organization had been informed that appeals should be directed to Carolyn Will, it submitted its appeal to Dominic Ring, Director of Labor Relations. Ms. Will denied the Organization's appeal, citing both its failure to file the appeal

with her and its failure to overcome the overwhelming evidence of Claimant's improper use of the Carrier's fuel card.

Carrier's Position:

The Carrier asserts that Mr. Matthews' multiple roles in the proceeding did not cause Claimant to be denied any appropriate procedural safeguards or a fair hearing. In that connection, the Carrier notes that Claimant and his Representative were allowed to make a thorough presentation of his case.

Furthermore, the Carrier argues that it easily met its burden of proving that Claimant made numerous unauthorized purchases of unleaded fuel with the Carrier's fuel card, using his PIN. For example, the Carrier cited the following facts: (1) Of all of the Carrier's employees, Claimant had the most purchases of fewer than 20 gallons; (2) a large number of his purchases were of unleaded fuel, although the semi assigned to him used diesel fuel; (3) many of the purchases of unleaded fuel were in Fairfield, where Claimant resided; (4) whoever purchased the unleaded fuel provided Claimant's PIN, the last six digits of his Social Security number, and gave the odometer reading on the semi assigned to Claimant; and (5) Claimant never was authorized to purchase unleaded fuel. Because Claimant was unable to adequately explain how someone else could have made the purchases, the Carrier contends that Claimant was culpable. Moreover, because the misuse of a Carrier credit card is a serious offense involving dishonesty, the Carrier, citing arbitral cases, urges that dismissal was reasonable.

Organization's Position:

The Organization claims that Claimant did not receive a fair and impartial hearing, as Mr.

Matthews assumed multiple roles: (1) the individual who charged Claimant with the alleged offenses; (2) a principal witness at the hearing; and (3) the Carrier representative who made the post-hearing determination that Claimant was guilty of the charges that he had leveled. According to the Organization, such multiple roles have been repeatedly been condemned as violative of due process.

On the merits, the Organization contends that there was an undisputed and condoned practice of asking Claimant to fuel vehicles other than the one assigned to him. Moreover, because Claimant's PIN and vehicle odometer readings were easily accessible to others without Claimant informing them, the Organization argues that the Carrier has failed to meet its burden of proving that Claimant made unauthorized purchases of unleaded fuel. According to the Organization, the Carrier wrongly presumed that Claimant made unauthorized purchases, and utterly failed to provide corroborating proof to support its documentary evidence. Because of the serious nature of the Carrier's claims of wrongdoing, and because Claimant had almost 33 years of seniority with an unblemished record, the Organization submits that it was incumbent upon the Carrier to develop clear and convincing evidence of guilt, which it failed to do.

Findings:

The Organization made a fundamental procedural error by submitting its appeal of the Carrier's denial of Claimant's claim to the wrong individual, Dominic Ring, instead of Carolyn Will, whom the Carrier had designated as the individual to whom the Organization should direct appeals. This error, however, was more than canceled out by the Carrier's failure to provide Claimant with a fair and impartial hearing. Due process is an essential element of disciplinary and dismissal proceedings. Rule 45, Hearings, provides in pertinent part that employees shall not be

disciplined or dismissed without first being given a "fair and impartial hearing." In the instant case, R.L. Matthews was accuser, witness and "judge" - the individual who assessed the veracity and weight of his own testimony and made the final determination of Claimant's guilt on behalf of the Carrier. Such multiple roles are totally inconsistent with due process.

On the merits, the Carrier satisfied its burden of proving that Claimant made inappropriate purchases of unleaded fuel with the Carrier's fuel card and using his PIN. The documents from the audit provided overwhelming circumstantial evidence of Claimant's guilt. The Organization argues that, because other employees had access to Claimant's Social Security number, fuel card, and semi odometer readings, other employees could have made the unauthorized purchases. In addition, the Organization points to a practice, condoned by the Carrier, of having Claimant fuel other persons' vehicles using his PIN and fuel card. The Organization's arguments *might be persuasive if there had been only isolated instances of unleaded fuel purchases*. It is inconceivable, however, that so many unleaded fuel purchases could have been made by anyone other than Claimant, for his own personal account, because they were made within a few minutes of the purchase of presumably legitimate diesel fuel purchases and identical odometer readings were given for both purchases. In addition, particularly compelling evidence was the fact that, while Claimant was away on extended vacations, no unauthorized purchases of unleaded fuel were made.

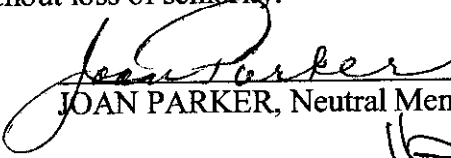
Because Claimant was denied due process, however, his dismissal must be overturned, and he shall be reinstated without back pay, but with seniority. Claimant is hereby placed on notice that any additional unauthorized use of his fuel card and PIN will subject him to immediate dismissal. Such unauthorized use would be a serious offense for which an employee

PLB 6621
Awd 33

would be subject to dismissal.

Award:

The claim is granted in part. The Carrier shall reinstate Claimant without back pay, and without loss of seniority.


JOAN PARKER, Neutral Member


CARRIER MEMBER

DATED: 04-7-04


ORGANIZATION MEMBER

DATED: 4-7-04