

**PUBLIC LAW BOARD NO. 6621**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES  
DIVISION – IBT RAIL CONFERENCE**

**And**

**UNION PACIFIC RAILROAD COMPANY**

**Case No 49**

\* \* \* \*

**Statement of Claim:** It is the claim of the System Committee of the Brotherhood that:

1. The dismissal of Tie Handler Operator E. A. Thomas for his alleged absence from service on July 1 through 7 and July 11 through 16, 2003 and unauthorized use of the CLC card was without just and sufficient cause and based on unproven charges.
2. Tie Handler Operator E. A. Thomas shall now be reinstated to service with seniority and all other rights unimpaired and compensated for all wage loss suffered.

**Facts**

Claimant E. A. Thomas, with seniority dating from July 8, 1996, was working as a Tie Handler Operator when the incidents involved here occurred.

By letter dated July 17, 2003, Claimant was directed to report to an investigation to be conducted in connection with his failure to report to work on July 1-7, 11-16, 2003; his use of his CLC card at the Best Western Inn in Oakland, California; his charging of meals from various restaurants to his hotel room; and his representation that Union

Pacific would pay the charges. After three postponements, at the request of the Organization, the hearing was held on January 22, 2004. Claimant did not appear.

Following the investigation, it was determined that Claimant had lied to MTM Andrew Gonzalez when he requested time off from work in order to care for a sick relative out of state. The evidence revealed that, in fact, he had stayed in state, and using his CLC card, checked into the Best Western Inn in Oakland. He charged various meals to his hotel room and stated that Union Pacific would cover the charges. Based on these findings, the Carrier's hearing officer found that Claimant violated Rule 1.6 (Dishonesty), 1.9 (Respect of Railroad property), 1.15 (Duty-Reporting or Absence), and 1.25 (Credit or Property). Level 5 discipline was assessed, and Claimant was dismissed from service.

On March 4, 2004, the Organization filed a claim, alleging that the Carrier had violated Rules 1 and 45 of the Agreement between the parties by failing to present substantial, credible and authentic evidence on which to base a finding of guilt. The claim was denied by letter dated April 21, 2004. The Organization appealed by letter dated May 5, 2004, and the Carrier rejected the appeal by letter dated June 21, 2004. The matter was discussed in conference on October 5, 2004, but agreement was not reached. Consequently, the case has come before this Board for review.

#### **Contentions of the Carrier**

The Carrier contends that Claimant received a fair and impartial hearing and that no procedural defect occurred in the handling of the claim on the property. The Carrier emphasizes that the investigation went forward in Claimant's absence only after several postponements spanning a period of five months. Claimant never contacted either the

Carrier or the Organization which, in the Carrier's view, reflected his "attitude of flagrant indifference towards protecting his employment relationship...." (Carrier Exh. D).

The Carrier further argues that the evidence submitted at the hearing substantiates the charges against Claimant. It denies that there was any violation of Claimant's Sixth Amendments rights as a result of its failure to call every possible witness who knew of Claimant's activities on the dates in question. The Carrier asserts that it called those witnesses who were able to present essential facts in proving Claimant's guilt. If the Organization wanted other witnesses present at the investigation, it had the right to call them. It elected not to do so.

The Carrier further submits that it offered ample evidence demonstrating that Claimant violated all of the rules cited in the letter of discipline. The credible testimony and documentary evidence in the Record reveal that Claimant lied when he asked for time off to travel out of state to care for a sick family member. Rather than doing what he alleged, he went to a hotel and charged lodging and food to the Carrier. He acted dishonestly, damaged the Carrier's reputation with the hotel, and, in effect, took an unauthorized vacation financed by Union Pacific. In the Carrier's view, the transcript demonstrates that it met its burden of proof with substantial evidence of guilt.

It is the Carrier's additional position that the serious nature of Claimant's offense fully supports his dismissal. In this regard, the Carrier contends that once it has presented substantial evidence at the hearing, an arbitral panel lacks the authority to overturn the level of discipline assessed. Moreover, Claimant's grossly dishonest behavior justified his discharge. The Carrier acted in accordance with its UPGRADE policy, which has been consistently upheld in board decisions. In the instant case, Claimant was already at

an assessment of Level 3, pursuant to a reinstatement agreement, and his behavior was assessed at a Level 5 for his current violations. The Carrier submits that its application of discipline in this case was neither arbitrary nor capricious and that the claim, therefore, should be denied.

**Contentions of the Organization**

The Organization contends that during the investigation, the Carrier admitted several documents into evidence, but did not produce witnesses who could testify as to the accuracy of those documents. Therefore, those documents should have been excluded. Furthermore, the Carrier did not offer all of the witnesses who allegedly had direct knowledge of Claimant's activities on the days in question. Citing the Sixth Amendment to the United States Constitution, which guarantees the right of an accused to be confronted with the witnesses against him, the Organization submits that in this case, the fundamental rights of confrontation and cross-examination have been violated.

In the Organization's view, there was a serious breach of due process in this case and violations of Rules 1 and 45. The hearing went forward without Claimant being present. That procedural error was compounded by (1) the Carrier's failure to present every witness who was known to possess essential facts relative to the case and (2) the introduction of documents that were not substantiated by witnesses.

Given these procedural mistakes, the Organization asserts that Claimant was denied a fair and impartial hearing. Additionally, inasmuch as the Carrier relied on unsubstantiated documents, it did not meet its burden of proof. For these reasons, the Organization contends that the level 5 discipline cannot stand.

Opinion

The Organization contends that Claimant was denied a fair and impartial hearing. The Board disagrees. First, Claimant was afforded ample opportunity to present himself and defend his behavior. He was sent proper notice of the charges against him and given time to prepare for his hearing. At the Organization's request, the hearing was rescheduled on three separate occasions, spanning a period of five months. Claimant never contacted either his Organization or the Carrier or provided a reason for his absence. In fact, his representative had no idea as to his whereabouts or whether he could even be produced in the future--- facts which strongly suggest that Claimant was totally unconcerned about his relationship with his employer.

Second, while the Organization argues that Claimant's Sixth Amendment rights were abridged, this argument lacks merit. The Sixth Amendment is enforceable against government, not private organizations. More important to this proceeding is the fact Claimant was never denied the right to confront witnesses in violation of Rule 45. The Carrier called those witnesses who had information relevant to the charges and who were necessary in establishing the facts underlying Claimant's alleged offenses. The Carrier was not required to call every person conceivably involved in the incidents at issue. Certainly, the Organization was free to call those witnesses whom it believed were necessary to Claimant's defense, but it did not do so. Moreover, neither the Organization nor Claimant requested that the Carrier call particular witnesses. Likewise, they did not ask for an additional postponement in order to summon further witnesses.

Rule 45 permits the Organization to call witnesses. The fact that neither it nor Claimant chose to exercise this right does not mean that the Carrier violated Rule 45.

In fact, the Organization did not cite this alleged defect until after the hearing. The Organization cannot seek to overcome its own procedural deficiencies by questioning the quality or quantity of the Carrier's witnesses after the fact.

The Board further finds that the Carrier presented substantial evidence to conclude that Claimant violated the rules cited in the letter of discipline. MTM Gonzalez testified credibly that Claimant requested time off to care for a sick relative out of state. In making this request, however, Claimant lied in violation of Rule 1.6(4), 1.9, 1.15, and 1.25. *Receipts and bills of Claimant's Oakland hotel stay and restaurant charges were presented as evidence at the hearing. Requests for payment made to the Carrier from various restaurants patronized by Claimant were also offered into evidence. This documentation leaves no doubt that Claimant lied to his manager, used his CLC card for unauthorized purposes, made misrepresentations to the hotel and various restaurants as to who was paying for his food and lodging, and tarnished the Carrier's reputation. The Organization's contention that the bills and receipts presented by the Carrier were inaccurate was speculative and not based on any hard evidence. The Organization bore the burden of demonstrating the inaccuracy of the Carrier's evidence inasmuch as it argued that the documentation was not adequately substantiated, but the Organization failed to support its argument with any testimony or evidence. In the absence of any reasonable basis to discredit the Carrier's evidence, it must be accepted as reliable and credible.*


The serious nature of the Claimant's offenses fully supports the level of discipline that the Carrier assessed. Claimant's conduct reflected gross dishonesty and a total disregard for the trust his employer placed in him. There is no evidence that the Carrier

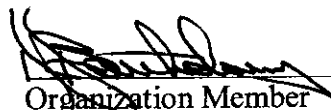
acted with malice or in an arbitrary fashion. Claimant invented a reason for missing work and then took an unauthorized vacation with his employer's credit card. Under any circumstances, such conduct warranted dismissal. Moreover, Claimant's discharge was consistent with the Carrier's UPGRADE disciplinary policy.

Award

The claim is denied.

  
Joan Parker, Neutral Member

  
Carrier Member  
Dated: 12-16-05

  
Organization Member  
Dated: 12-16-05