

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD 6302

NMB NO. 188

AWARD NO. 180

PARTIES TO DISPUTE

CARRIER

Union Pacific Railroad

Carrier's File

1528851

AND

ORGANIZATION

Brotherhood of Maintenance of Way Employees
Division of International Brotherhood of Teamsters

System File

D-0948U-212

STATEMENT OF CLAIM

1. The dismissal of Flange Oiler Maintainer Patrick J. Broyles for his alleged violation of Rule 1.6 (Dishonest) in connection with charges " . . . that information received on October 14, 2009, revealed that while employed as Flange Oiler Maintainer, at Sandpoint, Idaho, near milepost 76, Spokane Subdivision, between approximately 0001 hours and 2359 hours, between January 1, 2009, and October 20, 2009, you allegedly failed to properly use your Company issued Business and Travel Visa Card according to Company guidelines and policies, resulting in unauthorized purchases, and defrauding the Company", was arbitrary, excessive and in violation of the Agreement.
2. As a consequence of Part 1 above, Flange Oiler Maintainer P. J. Broyles shall receive the remedy provided in Rule 48(h).

STATEMENT OF BACKGROUND

Claimant commenced his employment with Carrier sometime prior to August of 2007, first as a Welder and then as a Flange Oiler Maintainer establishing and holding seniority within the Track Sub-department on the Spokane Subdivision. On August 6, 2007, Claimant was issued a Company Business and Travel Visa Credit Card (BT card), at which time he signed an Employment Acknowledgement Letter and on August 20, 2007 he signed a duplicate Employment Acknowledgement Letter wherein, among

PLB NO. 6302
AWARD NO. 180

other terms and instructions regarding the use of said card, Claimant indicated he understood that unauthorized use of the card or violating the terms of the card agreement might result in disciplinary action up to and including termination of his employment. The record evidence reflects that when an employee is on a "headquartered assignment" they are not entitled to meal allowances unless they are stationed away from their headquarters overnight and stay in a motel. Thus, an employee may use their Company issued BT credit card to pay for meals they are legitimately entitled to receive whenever they meet the requirement of being stationed away from their headquarters.

By happenstance, on October 14, 2009, Claimant contacted Manager of Track Maintenance, Marc Rubino by telephone in Spokane, Washington and asked him to retrieve his expenses he left on the printer (copy machine) and to then give the expense printout to employee, Steve Fields. In so doing, Rubino casually looked over Claimant's September, 2009 expense report and noticed that he had used his Company issued BT credit card to pay for numerous meals from eating establishments located in the Sandpoint, Idaho area during the period of time Claimant was headquartered at Sandpoint. Rubino called Claimant on his cell phone and queried him as to the reason why he was charging meals while assigned to his headquarters and Claimant responded he had by accident, used the Company credit card as opposed to using his personal credit card. Not satisfied with Claimant's response since he had "wrongly" used the Company BT credit card between ten (10) and twelve (12) times, Rubino asked Claimant if there wasn't a difference between his personal credit card and the Company's credit card to which Claimant responded, he had been stupid and just used the wrong card. On October 19, 2009 after thinking about Claimant's misuse of his Company credit card and wondering whether the misuse was confined just to Claimant's September expense report, he left a message on Claimant's cell phone asking him to meet him the following day, on October 20th at the Sandpoint depot and to bring with him his expense reports for the months of January through October. At the meeting, Rubino and Claimant reviewed Claimant's expense reports covering the period beginning January 31, 2009 and ending October 9, 2009. After noticing a number of inappropriate and unauthorized expenses that Claimant had charged on the Company's credit card just in review of the expense reports through June or July, Rubino asked Claimant if he understood what he had been doing to which Claimant acknowledged, yes he did, that he was being stupid and he would be willing to pay back the money. In further explanation, after Rubino asked Claimant to produce both his personal credit card and the Company's BT credit card to compare their differences in appearance, the personal credit card being white in color and the Company's credit card being brown in color with the picture of a Union Pacific train on the card, Claimant informed Rubino that he first mistakenly used the Company's credit card to pay for a meal and when he discerned he got away with using the card for unauthorized expenses, he began knowingly using the Company's BT credit card a little bit at a time and then it just got worse as time went on because he knew he could get away with making such unauthorized use of the card. In acknowledging he knew he had been doing the wrong

thing, Claimant told Rubino he was willing to do anything to keep his job including the offer to pay back the money to the Company.

Based on the foregoing circumstances, Carrier summoned Claimant for a formal investigation charging him with having violated General Code of Operating Rules, (GCOR) effective April 3, 2005, specifically, Rule 1.6 (Conduct ,(Dishonest). The investigation was held on November 10, 2009 as scheduled and by letter dated November 25, 2009, Carrier informed Claimant that upon careful review and consideration of all the testimony rendered at the hearing as reported in the hearing transcript, it was found, predicated on more than a substantial degree of evidence presented, that sustaining the charge against him for his violation of Rule 1.6.4 was warranted. Carrier further informed Claimant that based on this finding, he was being assessed with a Level 5 discipline as set forth in its UPGRADE Discipline Policy and dismissed from its service. Thereafter, the Organization appealed Claimant's dismissal from Carrier's employ and as the Parties were unable to reach a resolution in the handling of this claim on the property, the matter comes now before this Board for final determination.

At the hearing, Rubino conceded that it was possible that some of the expenses claimed by Claimant during the nearly nine (9) month period reviewed were, in fact, appropriate.

At the hearing Claimant confirmed the following:

- ***Between January 26, 2009 and February 22, 2009, he was headquartered in Spokane, Washington.***
- ***Between February 23, 2009 and May 17, 2009, he was headquartered in Sandpoint, Idaho.***
- ***Between May 18, 2009 and June 18, 2009, he was headquartered in Spokane, Washington.***
- ***Between June 23, 2009 and October 20, 2009, he was headquartered in Sandpoint, Idaho.***

When questioned about meal charges in connection with the following specific dates he submitted on his expense reports to the Carrier in the period of February 23, 2009 to May 17, 2009 while headquartered at Sandpoint, Idaho, Claimant acknowledged the following:

March 23, 2009 –dinner charge, was appropriate worked overtime

April 15, 2009 – lunch charge, was not appropriate

April 16, 2009 – lunch charge, was not appropriate

April 28, 2009 – lunch charge, was not appropriate

April 29, 2009 – dinner charge, was appropriate worked overtime

April 30, 2009 – dinner charge, was appropriate worked overtime

May 5, 2009 – lunch charge, was not appropriate

May 7, 2009 – dinner charge, was appropriate worked overtime

May 8, 2009 – meal charge, was not appropriate

Of these nine (9) charges which does not cover all the instances of charges submitted by Claimant during this period, Claimant attested to five (5) of the meals as not being appropriately charged on the Company's business and travel credit card.

Similarly, Claimant was questioned about meal charges he submitted for the second period of time he was assigned to Headquarters at Sandpoint, Idaho, again, not all inclusive of the charges he submitted; Claimant responded thusly when asked about the following dates:

June 26, 2009 – lunch charge, was appropriate as was away from H.Q.

July 22, 2009 – lunch charge, was not appropriate

***July 23, 2009 – lunch charge, was not appropriate / dinner charge
may have been appropriate, as could not recall if worked OT***

***July 25, 2009 – meal charge may have been appropriate, as unable to recall
if worked OT***

July 28, 2009 – lunch charge, not appropriate

August 19, 2009 – breakfast charge, not appropriate

August 20, 2009 – breakfast charge, not appropriate

September 3, 2009 – breakfast charge, not appropriate

Of these eight (8) charges, Claimant admitted that five (5) of the meal charges had not been appropriately charged on the Company's business and travel credit card.

At the hearing, Claimant provided another explanation as to the reason why he inappropriately charged meals for breakfast, lunch and dinner which apparently was the real reason and that was, that he and his family (one young son and a pregnant wife) had fallen on difficult economic times and had no food at home and no money for eating meals, so he charged a multitude of meals on the Company's credit card knowing full well it was wrong but he did so for survival reasons, that is, just to get through the work day. Claimant conceded that his charging such meals on the Company credit card were acts of dishonesty but it was not his intention to be dishonest nor to defraud the Company. In his testimony, Claimant offered to repay the Company for what he owed as a result of the inappropriate meal charges to its credit card and the Organization's representative explained the method of reimbursing the Company could be accomplished by deducting a certain monetary sum out of every forthcoming pay check.

ORGANIZATION'S POSITION

The Organization raised two (2) procedural challenges, to wit, 1. that Carrier violated Rule 48 of the controlling 2001 Collective Bargaining Agreement by withholding Claimant out of service prior to the date it commenced the formal investigation hearing and, 2. Carrier failed to level a precise charge against Claimant prior to the opening of the Hearing, both of which had the effect of denying Claimant his due process right to a fair and impartial hearing.

As to the merits, the Organization submits the burden rests with Carrier to support its accusation that Claimant committed acts of dishonesty with clear and convincing evidence of alleged intentional misconduct, as the offense charged implies an element of moral turpitude if not criminal liability.

CARRIER'S POSITION

Given the state of the record evidence, we find it unnecessary to restate in summary fashion the Carrier's position.

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.

PLB NO. 6302
AWARD NO. 180

Upon a comprehensive review of the record evidence in its entirety, we deem the Organization's two (2) procedural challenges to be inapplicable and therefore non-meritorious.

As to the merits of the claim, we are in general agreement with the Organization's position that, given the nature of the alleged offense committed, specifically commission of acts by Claimant to defraud the Company, the standard of proof incumbent upon Carrier here is one of clear and convincing evidence as opposed to meeting the lowest standard of proof generally required, of preponderance of the evidence. In meeting this higher standard of proof of clear and convincing evidence, we find we need not look beyond Claimant's own testimony to find that this standard of proof was, in fact, met. Claimant's admission against self interest that he charged a multitude of meals on the Company's credit card knowing full well he was in violation of the use of the Company's credit card is all we need to know to uphold Carrier's action of assessing Claimant a Level 5 discipline in accord with its UPGRADE Discipline Policy and dismissing Claimant from its service, notwithstanding the fact Claimant had, in his two (2) years of employment maintained a pristine work record.

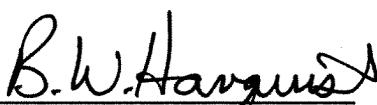
We are persuaded the Organization progressed this claim in the hopes that the Board would act in a merciful way and reduce the disciplinary action of dismissal once Claimant divulged the real reason for his actions which was, that it was a matter of economic survival for both himself and his young family. The Board reminds the Organization that we are in the business of dispensing justice and not mercy. In any event, the past history of arbitral precedent and past practice in the railway industry does not permit, lo actually bars the Board to inject mercy in its decisions. Rather, the application of mercy resides with the Parties in the handling of claims on the property. Once the Parties relieve themselves of the sovereign power to impose their own mutually acceptable solution to a claim by leaving the decision to the Board, the Board is constrained to decide the claim on its individual merits and, unfortunately, any excuse proffered by a claimant in defense of admitted misconduct must be rejected, even one as heart rendering as the one Claimant revealed to the Carrier's Hearing Officer and deciding official and to this Board directly. Accordingly, we find nothing improper regarding the quantum of discipline administered by the Carrier in this case as we deem such disciplinary assessment as highly commensurate with the nature of the misconduct engaged in by the Claimant herein.

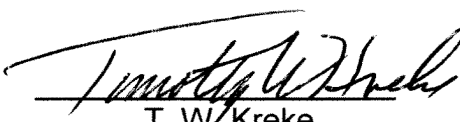
Based on the foregoing stated Findings, the Board rules to deny the instant claim in its entirety.

AWARD

Claim Denied


George Edward Larney
Neutral Member & Chairman


B. W. Hanquist
Carrier Member


T. W. Kreke
Employee Member

Chicago, Illinois
Date 10/25/10

LABOR MEMBER'S DISSENT TO
AWARD 180 OF PUBLIC LAW BOARD NO. 6302
(Referee Larney)

The Organization progressed this dispute to the Board seeking to correct an injustice. That injustice was the arbitrary, unwarranted and excessive discipline of dismissal imposed upon the Claimant. The Organization fully expected the discipline to be overturned. However, it did also note that if the Majority determined discipline was appropriate then the ultimate penalty of dismissal was extreme under the circumstances involved in the dispute. The Organization has every right to expect the Majority to consider the quantum of discipline imposed in a case. The Majority erred when it considered the Organization's position in this regard a plea for leniency or mercy. Therefore, I must dissent.

Respectfully submitted,

A handwritten signature in black ink, reading "Timothy W. Kreke". The signature is fluid and cursive, with a long horizontal stroke at the beginning and a stylized "K" and "e" at the end.

Timothy W. Kreke
Labor Member