

PUBLIC LAW BOARD NO. 6089

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES)
and) Case No. 4
UNION PACIFIC RAILROAD COMPANY) Award No. 8

Hearing Date: April 6, 1998

- (1) The dismissal of Track Machine Operator L. Tom was in violation of the Agreement, based on unproven charges, and an abuse of discretion (Organization File D-262; Carrier File 1047660D)
- (2) All charges must be dropped and cleared from Claimant Tom's record, the discipline must be canceled and Claimant must be compensated for all time unjustly withheld from service subsequent to and including November 24, 1996.

Public Law Board No. 6089, 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 November 6, 1996, Carrier sent a notice to Claimant to report for an investigation on November 14, 1996. The notice charged Claimant with dishonesty in claiming mileage for going home to Gallup, New Mexico on the weekends of October 10 and 17, 1996, whereas his home was in Grand Island, Nebraska.

The hearing was held as scheduled and Carrier subsequently notified Claimant that he had been found guilty of the charge and

had been dismissed from service. The date of such notice is in dispute.

The Organization contends that the notice of charges was inadequate because Claimant did not receive it until the day before the hearing. Furthermore, the Organization argues, the hearing officer was not fair and impartial, as evidenced by his handling of the offer of written statements by the Claimant during the hearing. Finally, the Organization contends that the decision was not issued until December 5, 1996, twenty-one days after the hearing. The Organization urges that this violated the Agreement's requirement that the decision be issued no later than twenty days after the hearing.

On the merits, the Organization contends that Carrier failed to prove the charge by substantial evidence. The Organization urges that Claimant did not change his residence from Gallup, New Mexico, to Grand Island, Nebraska. Rather, the Organization maintains, Claimant secured a temporary apartment in Grand Island, Nebraska, because he had been informed that the gang would be working in that vicinity for up to six months and an apartment was cheaper than staying in a motel.

Carrier contends that it afforded Claimant a fair hearing. Carrier argues that the notice was timely and that claimant had sufficient time to secure representation and secure the attendance of witnesses. Carrier argues that the hearing officer conducted the hearing fairly and impartially. In Carrier's view, the hearing officer properly questioned the origin of the proffered statements, but, in any event, admitted them into the record. Finally, Carrier contends that it made the decision in a timely manner. Carrier urges that the December 5 date on the decision was a typographical error and that the decision actually was made and mailed on December 4. Carrier maintains that Postal Service receipts prove the date the decision was mailed.

On the merits, Carrier argues that it proved the charge by substantial evidence. Carrier contends that in connection with two prior disciplinary hearings, Claimant admitted that he had moved to Grand Island, Nebraska. Accordingly, in Carrier's view, when Claimant claimed mileage for travel to Gallup, New Mexico, he did so fraudulently and stole from the company.

We address the procedural issues first. We find that Carrier complied with Rule 48(c) in that the notice was provided to Claimant in a timely manner. Unlike Case No. 3, Award No. 7, where the notice was mailed only three days before the hearing, the notice in the instant case was mailed eight days before the hearing. This is more than a reasonable amount of time for the notice to be delivered to Claimant, and for Claimant to secure representation and secure necessary witnesses. That Claimant did not actually receive it until the day before the hearing does not

change this conclusion. Claimant did not indicate that he had claimed his mail earlier and that no notice was present. Claimant cannot avoid the notice by failing to pick up his mail. Moreover, Claimant did receive the notice in time to attend the hearing. (Indeed, Carrier delayed the start of the hearing to facilitate Claimant's attendance.) Claimant did secure representation and there is no evidence of any witnesses whose attendance he was unable to secure because of the timeliness of the notice.

We have reviewed the transcript carefully and have found that Claimant was afforded a fair and impartial hearing. The hearing officer's questioning of the origin of the statements proffered by the Claimant does not indicate pre-judgment or bias of any type.

The timeliness of the decision turns on whether it was issued on December 4 or December 5. The December 5 date on the decision is not conclusive if, as Carrier contends, it was a typographical error. Carrier introduced U.S. Postal Service receipts tending to show that the decision was mailed on December 4, 1996. The Organization contends that the receipts could have been for items other than the decision in this case. However, if the decision was mailed after December 4, the envelopes in which it was mailed would contain postmarks after December 4. Those envelopes would be in the possession of Claimant and the Organization. No envelopes with belated postmarks were proffered. Therefore, there is no reason to disbelieve Carrier's statement that the postal receipts entered in the record were the receipts for the decision sent to Claimant and the Organization.

Accordingly, we turn to the merits of the dispute. Carrier had the burden to prove that Claimant no longer resided in Gallup, New Mexico, at the time he claimed mileage for the trips. Carrier relies on three major pieces of evidence in contending that it carried its burden of proof.

First, Carrier points to Claimant's testimony in a hearing concerning his alleged absence without authority on August 25, 1996. In Case No. 2, Award No. 6, we declined Claimant's claim challenging the thirty day suspension he received for this offense. In that hearing, when asked where he was on August 25th, Claimant replied, "I was at home. I found me a place in Grand Island, so I just stay home." Furthermore, when asked what he did the evening of August 24, Claimant replied, "Went home. Stayed home." When asked, "Where are you living at?", he replied, "Grand Island."

Claimant's answers could reflect that the apartment in Grand Island had become his permanent residence, but they also could reflect that the apartment in Grand Island was his temporary living quarters. The remainder of the transcript of

investigation reflects that Claimant was referring to the apartment in Grand Island as his temporary living quarters. Claimant testified that he was confused as to whether he was expected to work on August 25th. He explained why he was the only member of the gang who did not show up for work on August 25th, stating that the other employees stayed at the same motel but he decided to rent an apartment because the gang was to be in the Grand Island area for six months.

In Case No. 2, Award No. 6, we rejected Claimant's contention that he was confused as to whether he had to work on August 25. We held that he had the responsibility, if he was confused, to seek clarification from supervision and he failed to do so. However, Claimant's testimony at the hearing on the August 25 alleged violation reveals that it is at least as likely that he was referring to the apartment in Grand Island as a temporary residence, comparable to a motel, as it was that he was referring to it as his new permanent residence. The Claimant's testimony at the investigation on the August 25 incident is not substantial evidence proving the charge.

Second, Carrier relies on testimony from the Track Supervisor in the instant investigation. When asked what problems he had had with Claimant's address in the prior investigations, the Track Supervisor responded:

"I was told, per conversation with him, when I received a page on Sunday, October 27th, that that's where his address was at if I needed to contact him, was at - - his address was at 235 North Grace, in Grand Island, Nebraska. Because there was a possibility that I may have to go over there and see him to do some paperwork. And then, with the other investigations, we were mailing papers to one address, and we were trying to contact him at another address."

The Track Supervisor's testimony essentially is that Claimant told him that if the Track Supervisor needed to see him to handle paperwork related to other investigations, Claimant would be available at the apartment in Grand Island. This statement is at least equally consistent with the Grand Island apartment being a temporary residence as it is with it being a new permanent residence. The Track Supervisor's testimony is not substantial evidence in support of the charge.

Finally, Carrier points to Claimant's testimony in the hearing on the instant charge. Specifically, when questioned by the First Vice Chairman, Claimant testified as follows:

Q: If the weather wouldn't be bad while you were staying in Grand Island, would you continue to go home on weekends?

A: Yes.

Q: Do you have a residence, a home in Gallup?

A: No. I live out in the country, right by (inaudible).

Q: You don't have a telephone then?

A: No.

We fail to see how this testimony establishes that Claimant fraudulently sought mileage for travel to Gallup, New Mexico. Claimant's statement that he did not have a home in Gallup but rather lived out in the country does not indicate that his permanent residence had changed to Grand Island. Indeed, the potentially critical part of his answer was not transcribed because it was inaudible. Read in context, however, i.e. in light of the Claimant's immediately preceding answer that he continued to go home on weekends after getting the apartment in Grand Island, it is most likely that Claimant was indicating that he did not live in the city of Gallup proper but instead in the nearby countryside. Furthermore, we see no contrary inference from Claimant's statement that he did not have a telephone in New Mexico, as there is no evidence that he had a phone in Grand Island. The evidence suggests that he had no phone at either location.

Finally, we observe that the Organization offered evidence that tended to show that Claimant continued to maintain his permanent residence in New Mexico. Some of the evidence, such as Claimant's driver's license from New Mexico, was ambiguous. Claimant could have moved permanently to Grand Island but delayed transferring his driver's license to Nebraska. Other evidence, however, was not so ambiguous. For example, Claimant testified without contradiction that he continued to have his pay check directly deposited in a Gallup bank. If Claimant's testimony was not accurate, presumably Carrier's records would have reflected the inaccuracy and Carrier would have brought forth that information. Carrier's failure to contradict Claimant's testimony further undermined its case that Claimant fraudulently claimed mileage to Gallup, New Mexico.

Accordingly, upon review of the record as a whole, we are unable to find substantial evidence in support of Carrier's finding of guilt. Therefore, the claim must be sustained. In sustaining the claim, we note that we also sustained the claim in Case No. 3, Award No. 7. This award and Award No. 7 should be read together. Although each claim seeks compensation for Claimant beginning with the date of his dismissal and continuing until his reinstatement to service, Claimant is entitled to be compensated only once.

AWARD


Claim sustained.

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


D.A. Ring,
Carrier Member


R.B. Wehrli
Employee Member

Dated at Chicago, Illinois, September 23, 1998.