PUBLIC LAW BOARD NO. 6102

Award No. 5
Case No. 5

PARTIES TO DISPUTE: Brotherhood of Maintenance of Way Employes
and
Burlington Northern Santa Fe Railway
(Former St Louis - San Francisco Railway Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:
1. The Carrier violated the Agreement when on February 1, 1996, the Carrier dismissed Mr. L. J. Loman for alleged theft of Carrier property.
2. As a consequence of the Carrier's violation referred to above, Claimant should be reinstated to service, paid for all time lost, and the discipline shall be removed from his record." [Carrier's File MWC 96-04-23AA. Organization's File B-1326-3].

FINDINGS AND OPINION:

Upon the whole record and all the evidence, the Board finds that the Carrier and Employees ("Parties") herein are respectively carrier and employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted by agreement and has jurisdiction over the dispute herein.

The Claimant, Mr. L. J. Loman, was employed as a Traveling Maintenance of Way Mechanic and, at the time of his dismissal from the Carrier's service, had been employed for more than 23 years.

On November 3, 1995, at 11:45 a.m., the Claimant was removed from service by Supervisor of Work Equipment S. E. Logan, and was required to relinquish all Carrier property in his possession. Such property included a telephone credit card, which had been issued the Claimant to permit him to make long distance calls which were charged to a Carrier account with the telephone company.

After 11:45 a.m. on November 3, 1995, the Claimant admittedly made four (4) long distance calls, using the card number and personal identification number (PIN), which he had memorized by long usage. As the result, on February 1, 1996, he was dismissed from the Carrier's service. The Parties' Agreement permits an employee to be disciplined without an investigation; however, if an investigation is timely requested, it must be afforded, and a precise statement of the charges must be provided in writing.

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The Organization's General Chairman requested an investigation, which was held on February 23, 1996, after one mutually agreed-upon postponement. A timely appeal was filed by the Organization's General Chairman, the appeal was denied, and has been progressed to this Board for disposition.

The Carrier argues that the Claimant's dismissal was warranted because he used the Carrier's credit without authority, for personal business, after being removed from service and required to relinquish the telephone credit card.

The Claimant's primary defenses were raised during the course of the investigation, and will be addressed herein.

Supervisor Logan stated that he told the Claimant at the time he required relinquishment of the telephone credit card, that he was not to use the card thereafter. The Claimant disputes that he was told not to use the card, but he willingly surrendered the card upon request. We need not resolve this disputed testimony. Even if he were not told not to use the card, its surrender implicitly suggests that its use thereafter would be prohibited. There would be no need to call for its surrender if its continued use were intended.

Several of Carrier's rules were cited in the letter of dismissal, and were read into the investigation record, rules pertaining to honesty, compliance with supervisors' instructions, care of railroad property and its personal use, and use of the employer's credit. The Claimant's representative implied in his line of questioning Supervisor Logan, that since the Claimant was dismissed on November 3, 1995, he was no longer an employee of the Carrier and, therefore, no longer subject to its rules. Supervisor Logan's concurrence during his testimony that the Claimant was dismissed on November 3, and no longer an employee, seemingly lends credence to this defensive posture.

Both the Claimant and his Supervisor are mistaken, however. The record indicates that the Claimant was removed from service on November 3, 1995, when required to surrender the telephone credit card, but had received no written notification of his dismissal from service. Such written notification followed a requested investigation, and was not issued until December 13, 1995. But even if, for the sake of argument, he had been dismissed on November 3, the Claimant still had an employment relationship with the Carrier since he retained the right to appeal his dismissal. Indeed, on the same day, November 3, the Organization's General Chairman requested an investigation on the cause for Claimant's removal from service, and after his dismissal on that first charge, an appeal was progressed to this Board, in Case No. 4, resulting in Award No. 4.

The Carrier presented undisputed evidence during the course of the investigation, in the form of a billing from the telephone company, that three long distance calls were made

from the Claimant's residence telephone, and one was made from another city to his residence number, after the time the telephone credit card was recovered from the Claimant. In defense, the Claimant pointed out that two of the calls were to the Carrier's payroll accounting department; hence they might be considered calls about Carrier business. Even so, the Claimant was no longer authorized to use the card after his surrender of the card, notwithstanding that he still had an employment relationship.

A more serious question arises in connection with the other two calls. One was made almost immediately after his removal from service to the Union's offices in Springfield, Missouri, for 22 minutes and 30 seconds, for a charge of $5.20. The Claimant attempted to characterize this call as company business, "In a roundabout way." While this call might be employment-related, clearly a Carrier-issued credit card should not be used for the transaction of union matters. Without minimizing the importance of an employee's relationship with his collective bargaining representative, there is a clear line of demarcation with respect to his stewardship of his employer's resources.

The Claimant stated that he had used the credit card from force of habit, that he had memorized the numbers and having used the card for several years as a routine matter. The Board finds no merit in this defense. The Claimant's personal record indicates that he was censured less than a month previously for misuse of this telephone credit card. Such censure should have been fresh on his mind. We further note that in making a long distance call from one's home, the task of dialing directly is considerably simpler than using a credit card, with its additional access numbers and personal identification numbers.

The Claimant offered reimbursement for the credit card telephone calls after he was dismissed for the misuse of the card. This offer comes a bit late. One may conclude that no offer of reimbursement would have been voluntarily made if the Claimant's misuse had not been detected.

The Claimant's best defensive posture was his medical condition, and that was offered by way of extenuation. He was characterized as suffering from severe headaches, stress, forgetfulness, and incoherency. He stated he had a brain tumor which was inoperable, and instead had a shunt inserted into his skull to relieve intracranial pressure. Supervisor Logan was aware of this medical condition. The Board notes, however, that it was not so severe as to impede the Claimant's ability to perform his regular work schedule, which included driving a Carrier truck and performing mechanical work independently of direct supervision.

If this case stood alone, in view of the Claimant's 23 years of service, a lengthy period devoid of any disciplinary entries in his record (from 1977 until 1995), and the extenuating medical problem referred to above, the Board would be disposed to reduce this permanent dismissal to a lengthy suspension without pay for time lost.

This case does not stand alone, however. The Board takes notice that the Claimant was censured only two weeks earlier for misuse of the telephone credit card, censured again only eleven days earlier for failure to comply with certain rules and policies, and dismissed for theft of Carrier property after his removal from service on November 3, 1995. This pattern of conduct precludes any modification of the penalty of dismissal from the Carrier's service.

The Board finds there was compliance with Discipline Rule 91 of the Parties' Agreement, and substantial evidence was adduced at the investigation to prove the charge of alleged misuse of the telephone credit card issued him for Carrier business use only.

AWARD

Claim denied.

Robert J. Irvin, Referee

May 12, 1998
Date

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