

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6302

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

UNION PACIFIC RAILROAD COMPANY

)
) Case No. 106
)
) Award No. 101
)

Martin H. Malin, Chairman & Neutral Member
D. D. Bartholomay, Employee Member
D. K. Peitzmeier, Carrier Member

Hearing Date: August 8, 2006

STATEMENT OF CLAIM:

1. The dismissal of Mr. Charles D. Anderson for his alleged dishonesty in connection with the use of the UP VISA Procurement Card ending August 31, 2004, was without just and sufficient cause, in violation of the Agreement and based on unproven charges (System File W-0548-154/1428453).
2. The Agreement was further violated when the Manager Labor Relations failed to timely disallow the April 20, 2005 claim letter in accordance with Rule 49(a)(1).
3. As a consequence of the violations referred to in Parts (1) and/or (2) above, Mr. Charles D. Anderson shall now be returned to service with seniority and all other rights unimpaired, compensated for all wage loss suffered and have his record cleared of the charges.

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.

Claimant was employed as a Manager Track Maintenance, a position not covered by the Agreement. On January 11, 2005, Carrier dismissed Claimant from service. By letter dated February 1, 2005, Claimant advised Carrier that he had vacated an exempt position and wished to exercise his seniority as an Agreement-covered employee pursuant to Agreement Rule 22(c)(2). By letter dated February 8, 2005, Carrier notified Claimant to appear for an investigation on

February 15, 2005. The notice alleged that Claimant exhibited unethical and possibly dishonest behavior in using his position and his Visa Procurement Card for personal gain, by receiving gratuities which resulted in Carrier being overcharged for railroad material that in some cases Carrier did not receive during a period ending August 31, 2004. Claimant was advised that he was withheld from service pending investigation. On February 11, 2005, the Organization filed a claim alleging that Carrier had violated the Agreement by not allowing Claimant to exercise his seniority rights after he vacated a non-Agreement position. We denied this claim in Case No. 97, Award No. 100. The hearing on the February 8, 2005, charges was held as scheduled. On February 25, 2004, Claimant was notified that he had been found guilty of the charges and dismissed from service. On April 20, 2005, the Organization filed a claim challenging Claimant's dismissal, the claim before this Board in the instant case. The Manager Labor Relations denied the claim by letter dated July 18, 2005.

The Organization contends that the claim must be sustained because Carrier's denial was issued more than sixty days following the filing of the claim. The Organization relies on Rule 49(a)(1). Carrier responds that the instant claim is a duplicate of the claim that we denied in Case No. 97, Award No. 100. Thus, in Carrier's view, its untimely denial is irrelevant because the claim is not proper. Carrier further urges that even if its denial was untimely, its late denial tolled its liability for the procedural violation as of the date of the denial. Carrier argues that the procedural violation does not entitle Claimant to be restored to service.

Initially, we address Carrier's argument that the instant claim is an improper duplicate of the claim that came before us in Case No. 97, Award No. 100. That claim alleged a violation of Rule 22(c)(2) when Carrier refused to allow Claimant to exercise his seniority to an Agreement position following his dismissal from his non-Agreement position. The claim was filed after notice of investigation had been issued but before the hearing was held. Carrier denied the claim after the hearing was held and Claimant had been dismissed from any Agreement position. Carrier's denial cited the notice, hearing and dismissal.

On April 20, 2005, the Organization filed the instant claim asking Carrier "to reconsider the "decision to dismiss Mr. C. D. Anderson . . ." The claim quoted Rule 22 in its entirety and further claimed that Claimant did not receive a fair and impartial hearing. It further alleged that Claimant was the victim of discriminatory discipline, argued that Carrier had the burden of proving the charges and challenged Carrier to support its decision with specific evidence contained in the hearing transcript.

The Organization appealed the denial of its first claim to the Director Labor Relations, Non-Ops on May 16, 2005. The appeal reiterated the Organization's reliance on Rule 22 but also alleged that "Carrier is admitting to holding a hearing in this case simply as a formality. However, this was not a fair and impartial hearing. Obviously the Carrier simply went through the motions to make it appear that they afforded Claimant Anderson a fair and impartial hearing . . ." The Director Labor Relations denied the appeal. In so doing, he addressed not only the grounds for appeal alleged by the Organization but also the Organization's attack on the dismissal following the February 15 hearing. However, Carrier did not formally deny the claim

in the instant case until July 18, 2005.

From the above review, it is apparent that the second claim is not duplicative of the first one. Rather, the first claim attacked Carrier's failure to allow Claimant to exercise his seniority after he had been dismissed from his MTM position. It could not attack Claimant's dismissal because his hearing had yet to be held. The instant claim attacked Claimant's dismissal. Although it reiterated the arguments that had been raised in the first claim, it also went beyond those arguments to focus on the dismissal. The second claim did not duplicate the first claim.

We observe that Claimant is one of a number of managers who were victimized by the same group of con artists and, as a result, were dismissed from their managerial positions, sought to exercise seniority to Agreement positions, were noticed for formal investigations and dismissed from their Agreement positions following their hearings. Four such individuals were before us in Case No. 90, Award No. 87 and Case No. 91, Award No. 88, and before Public Law Board 6402 in Case No. 60, Award No. 39 and Case No. 61, Award No. 40. The Organization's arguments largely rehash arguments considered and rejected in those cases. However, unlike those cases, where the Organization presented a single claim on behalf of each employee, in the instant case, the Organization chose to divide a single claim into two separate claims.

We have no idea why the Organization chose to do this. There is no explanation in the record and we are at a loss to think of one. The Organization's actions created confusion which appears to have contributed to Carrier's delay in responding formally to the claim in the instant case.

The Organization argues that the Agreement mandates that we sustain the claim as presented, i.e. reinstate Claimant to service with compensation for all lost wages, because of Carrier's tardy denial. Carrier argues that at most we should award Claimant damages for lost wages between the date he was withheld from service and the date of Carrier's denial. Both parties cite authority for their positions. What is clear is that the Awards are in conflict as to whether, as a general matter, a tardy denial results in a monetary award or in sustaining the claim as presented. *Compare, e.g.* Third Division Award No. 26239 (supporting Carrier's position) *with, e.g.* Public Law Board No. 4544, Award No. 133 (supporting the Organization's position).

We need not choose between these conflicting lines of precedent as a general matter. Rather, we resolve the issue solely as it relates to the peculiar circumstances presented in the instant case. Specifically, we find that although Carrier's formal denial was tardy by several weeks, it was not nonexistent. Furthermore, in the prior month, Carrier had communicated its rejection of the bases for the claim, albeit in its denial of the Organization's appeal from Carrier's denial of the first claim. Thus, although Carrier technically violated the Agreement with its untimely denial, the Organization was on notice that its position had been considered and rejected. Most significantly, as indicated above, Carrier's delay in issuing its formal denial was caused, in part, by the confusion resulting from the Organization's inexplicable decision to divide a single claim into two separate claims. Under the circumstances, it would be inappropriate to allow the Organization to reap the benefit of the confusion it sowed by sustaining the claim as

presented with an Award of reinstatement with compensation for all lost wages. Instead, we find that the appropriate remedy under the circumstances presented is to award payment of lost wages for the period between the date Claimant was first held out of service and the date of Carrier's denial of the claim. Any additional remedy is dependent on the substantive merits of the claim.

The Organization contends that the notice of charges and hearing were untimely because they occurred more than thirty days after the incidents under investigation. It also contends that the discipline was inconsistent with Claimant's right under Rule 22(c)(2) to exercise seniority and that the hearing was not fair and impartial because, having already dismissed Claimant from service, it had prejudged Claimant's guilt.

The Organization's attacks on the timeliness of the notice and hearing, the alleged violation of Rule 22 and the fairness of the hearing reiterate arguments that we have consistently rejected in all of our prior awards arising out of the scams in which numerous MTMS were caught up. We reaffirm those prior holdings.

The record reflects that Claimant had a subordinate employee place numerous orders for sprayable lubricant using the subordinate's Visa Procurement Card which were unauthorized and which resulted in Carrier being charged prices ranging from \$50.00 to \$90.00 per gallon for material available through Carrier's store department for an average of \$21.90 per gallon. The record further reflects that Claimant received gratuities consisting of hats and jackets and two Global Position System devices. The record also reflects numerous charges to the subordinate's Visa Procurement card for which there were no invoices or other documentation, suggesting that the goods were paid for but never received.

Claimant denied knowing that the purchases were unauthorized, denied knowing that Carrier was being overcharged and maintained that he had the subordinate order the lubricant because it performed better than what was available through the store department. Claimant further maintained that all goods ordered were received.

Carrier did not credit Claimant's denials or explanations. There is considerable evidence in the record that supports Carrier's decision. Besides Claimant's receipt of the prohibited gratuities, there is evidence of deliberate manipulation of the orders to avoid detection. Specifically, there is evidence of "parcelling," i.e., dividing purchases into irregular amounts to avoid exceeding single transaction limits on the Visa card. Furthermore, it is a reasonable inference that Claimant had the lubricant ordered on the subordinate's Visa card to avoid detection. Claimant testified that he approved the subordinate's Visa purchases but any Visa purchases made on Claimant's Visa card would have been subject to approval by Claimant's supervisor. We conclude that the finding of guilt made on the property is supported by substantial evidence.

We next consider the severity of the penalty. We recognize that Claimant had seniority from 1970. However, in our prior Awards, we denied the claims of similarly situated employees who had long service records. As we observed in those cases:

[T]he Board has no authority to grant leniency. The Board may only disturb the penalty if it is arbitrary, capricious or excessive. Given the very serious nature of the offense and the magnitude of the offense, we are unable to find that the penalty was arbitrary, capricious or excessive. Accordingly, we lack authority to disturb it in any way.

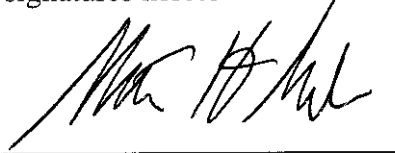
Those words apply equally in the instant case. The claim will be sustained only to the extent that Carrier must compensate Claimant for time held out of service prior to July 18, 2005, because of its tardy denial of the claim.

AWARD

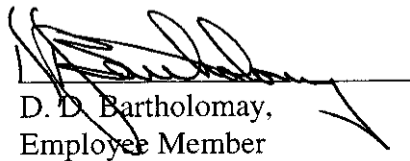
Claim sustained in accordance with the Findings.

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. K. Peitzmeier,
Carrier Member

D. D. Bartholomay,
Employee Member

Dated at Chicago, Illinois, December 18, 2006