

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6302

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

UNION PACIFIC RAILROAD COMPANY

)

) Case No. 104

)

) Award No. 103

)

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. Timothy M. Hecker for his alleged dishonesty in connection with the use of the UP VISA Procurement Card ending September 30, 2004, was without just and sufficient cause, in violation of the Agreement and based on unproven charges (System File W-0548-152/1428451).
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. Timothy M. Hecker shall now be returned to service with seniority and all other rights unimpaired and he shall be compensated for all wage loss.

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 7, 2005, Carrier dismissed Claimant from service. By letter dated January 9, 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 January 15, 2005, Carrier notified Claimant to appear for an investigation on February 1, 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 September 30, 2004. It further alleged that Claimant was dishonest when interviewed by Railroad Police and Corporate Audit on October 22, 2004. Claimant was advised that he was withheld from service pending investigation. On February 4, 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. 96, Award No. 102. The hearing on the January 15, 2005, charges was postponed to and held on February 10, 2005. On February 24, 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. 94, Award No. 102. 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. 94, Award No. 102. 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. T. M. Hecker . . ." 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 13, 2005. The appeal reiterated the Organization's reliance on Rule 22 but also alleged that "Carrier is admitting that a 'hearing' was held just to appease previous wards (sic) with no intention of conducting what would be considered a fair and impartial hearing. In other words, the Carrier admittedly went through the motions just to address what might later be procedural concerns." The appeal further argued that the hearing was not timely because it was held more than thirty days after the incidents giving rise to Claimant's dismissal. 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 following Carrier's knowledge of the alleged offenses. 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 violated numerous rules and policies with respect to his use of his Visa Procurement Card. He purchased items that he should have ordered from Carrier's Stores Department. His purchases were at prices greatly above the price obtainable through the Stores Department. He received gratuities consisting of a jacket and several gift cards to department stores and home improvement stores. He told the Regional Director of Police and the Corporate Auditor that a particular charge to his Visa Procurement card was for items he had never ordered but they secured a tape recording of Claimant confirming the order to the vendor.

The crucial issue, in our view, is whether Carrier proved Claimant's dishonest intent by substantial evidence. Claimant testified that he ordered some of the products to test them to see if they would be superior to material already being used. In this regard, his testimony was corroborated by the Director Track Maintenance, Claimant's immediate superior, who testified that he encouraged Claimant to try new products. Claimant further testified that he continued to order these products because they worked well. In this regard, his testimony was corroborated by a Track Inspector who testified that the products were easier to use and made his job inspecting switches easier to perform. On the other hand, Claimant never took any steps to recommend the products to Carrier's Stores Department to approve for future purchases.

There is no evidence that Claimant personally benefitted from any of the improper purchases. Claimant testified that he accepted the gift cards and the jacket to use as rewards to give his subordinates. He maintained that he understood from the DTM that this was proper because they were valued under \$50.00. (None of the gift cards was for more than \$35.00.) Claimant testified that he gave one or two of the gift cards to subordinates at a safety recognition dinner in January 2005 and that he received the others after the dinner and kept them in his desk

drawer to use later as safety rewards to his subordinate employees. Claimant's testimony in this regard is corroborated by the Regional Director or Police who testified that Claimant produced the jacket and remaining gift cards in a box. Carrier argues that Claimant produced no evidence that he gave any subordinate employee a gift card, but this argument fails to recognize that it is Carrier that has the burden of proof. Claimant told the Regional Director of Police of the safety award dinner and of his giving the gift cards as recognition awards. Carrier could have investigated further by questioning the employees who attended the dinner to determine whether any had received gift cards as awards but apparently failed to do so. Claimant's testimony stands un rebutted.

Claimant also maintained that the DTM approved of his receipt of the gift cards and use of them as awards as long as they were valued under \$50.00. The DTM did testify that he approved of awards under \$50.00 but it is not clear whether he approved of acceptance of gratuities from vendors as long as they were under \$50.00 and used as awards. In any event, the crucial question would be whether Claimant honestly, albeit erroneously, believed that his taking gratuities under \$50 and using them to reward subordinate employees was permissible.

Claimant did tell the Regional Director of Police and the Corporate Auditor that his VISA Procurement card was charged for items from Selectra Labs which he never ordered. The Regional Director of Police, however, obtained from the vendor a tape recording of Claimant confirming the order with the vendor's sales representative. Claimant's furnishing such false information to Carrier's Police could support an inference of dishonest intent.

The evidence thus was conflicting with respect to Claimant's intent. Typically, when faced with conflicting evidence of this nature, we defer to the findings made on the property. In the instant case, however, we are unable to accord those findings such deference. The record reveals that the hearing officer erroneously precluded Claimant from introducing evidence concerning his intent. The hearing officer objected to Claimant's questioning of witnesses and when Claimant offered that his questions were intended to illustrate his state of mind, the hearing officer ruled that Claimant's state of mind was irrelevant to the caption of the investigation. In support of his explanation of his statements to the Regional Director of Police that he had never ordered items from Selectra, Claimant sought to introduce documentation of a medical or mental condition that adversely affected his memory. The hearing officer refused to accept the exhibit, ruling that it was irrelevant to the investigation. When Claimant explained, "Memory has a lot to do with a person being dishonest . . .", the hearing officer responded, "Not to my understanding."

The hearing officer was clearly in error. Intent is a critical element of any charge of dishonesty and state of mind and state of memory are plainly relevant to the question of intent. The hearing officer's erroneous evidentiary rulings have denied this Board a complete record on which to determine whether Carrier proved Claimant's dishonest intent. In light of the closeness of the evidence in the record and the hearing officer's erroneously limiting the record, we are unable to say that Carrier proved Claimant's dishonest intent by substantial evidence.

Claimant had 27 years of service at the time of his dismissal. In prior awards, we have held that the lengthy tenure of other claimants who were caught up in this scam did not mitigate against the severity of their offenses. We reasoned:

[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.

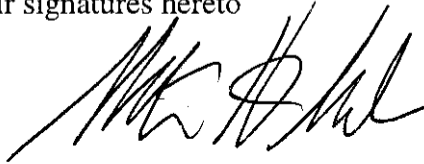
In all of the other cases, however, Carrier proved the claimants' dishonest intent and Carrier proved that they personally benefitted from the scam. Carrier failed to prove either in the instant case. In the absence of proof of personal gain and dishonest intent, we hold that the penalty of dismissal was excessive. Claimant shall be returned to service with seniority unimpaired but without compensation for time held out of service except that Carrier shall compensate Claimant for time held out of service prior to July 18, 2005, because of its tardy denial of the claim.

AWARD

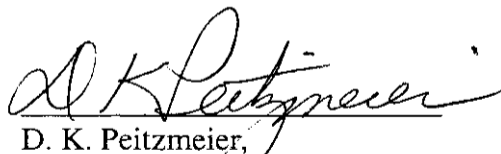
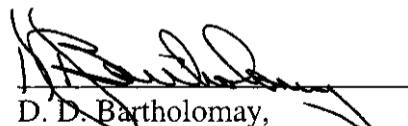
Claim sustained in accordance with the Findings.

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