

PUBLIC LAW BOARD NO. 6302

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES)
and) Case No. 140
UNION PACIFIC RAILROAD COMPANY) Award No. 125
)

Martin H. Malin, Chairman & Neutral Member
T. W. Kreke, Employee Member
D. A. Ring, Carrier Member

STATEMENT OF CLAIM:

- (1) The discipline assessment of dismissal for a violation of Rule 1.6 in connection with Claimant Z. A. Lange's failure to comply with the proper procedures in the handling and usage of a Union Pacific Visa card is not acceptable.
- (2) As a consequence of the violation referred to in Part (1) above, the Organization requested that the dismissal, as upheld by Mr. W. Rex Fennwald be reversed and Mr. Lange be reinstated with seniority unimpaired. They further requested that Mr. Lange be made whole as if there had been no discipline issued and no suspension from service. Also they requested that his record be expunged of any mention of this matter and that Mr. Lange be paid for all hours that he would have worked absent the suspension, including overtime and he shall be compensated for his time not paid on the day of the hearing on October 19, 2006. The Organization alleged a violation of Rule 48(a) of the Agreement.

Public Law Board No. 6302 upon the whole record and all of 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 October 10, 2006, Claimant was directed to report for an investigation on October 19, 2006, concerning his alleged failure to comply with proper procedures with respect to this BTE Visa card, in violation of Rule 1.6. The hearing was held as scheduled. On November 8, 2006,

Claimant was advised that he had been found guilty of the charge and dismissed from service.

The record reflects Claimant was issued a Business Travel and Expense (BTE) card to be used for lodging and meal expenses while traveling on Carrier business. The bill came directly to Carrier but Claimant received a monthly statement and was to account to Carrier with receipts supporting the purchases made on the card.

There is no dispute that from May 15, 2006 - May 29, 2006, Claimant used his BTE card to charge personal expenses. He also charged numerous meals, even though he was receiving per diem and therefore not entitled to charge those meals. There is no question that Claimant violated Carrier policies and was subject to discipline for doing so. However, the penalty of dismissal was supported by a finding that Claimant was dishonest and thus the critical question is whether Carrier proved, by substantial evidence, Claimant's dishonest intent.

Claimant testified that, while traveling on Carrier business, his wallet, containing all of his cash, was stolen from his jeep at the Portland Holiday Inn and the only thing he had after the theft was his day planner in which he had his BTE card and railroad identification cards. Consequently, he used the BTE card to charge meals and personal purchases, intending to repay the amounts after he returned home.

Claimant's explanation was not credited on the property. As an appellate body that does not observe the witnesses testify, we are in a comparatively poor position to evaluate witness credibility. Accordingly, we defer to the credibility determinations made on the property, as long as they are reasonable.

If the record was limited to Claimant's testimony about the theft of his wallet, the need to use the BTE card and his intent to repay the charges, we would defer to the decision made on the property not to credit the testimony and deny the claim. However, the record contains much more evidence which convinces us that this is one of the rare instances in which the on-property decision not to credit a witness's testimony was not reasonable.

It appears that Claimant's checkbook produces duplicate checks whenever he writes a check. The Organization offered into evidence the duplicate of check number 1088, dated 6-29-08, payable to U.S. Bank in the amount of \$160.00. The Organization also offered checks numbered 1087 and 1089 to establish that the June 29 date on check 1088 was in sequence. The hearing officer examined the other checks and decided there was no need to admit them into the record, stating that he accepted the date on check 1088 at face value. The Organization also offered into evidence Claimant's BTE statement for May 2006. Claimant testified that one charge on the statement of \$49.40 was to fuel a Carrier vehicle and that he subtracted that charge from the total on the statement and rounded off to get the \$160.00 amount. The Organization also offered into evidence a copy of a handwritten letter dated 6-29-06, from Claimant "To Whom It May Concern" explaining that he was enclosing a check for \$160.00 to cover personal expenses that he charged to his BTE card and giving his card number and employee identification number. Claimant testified that he enclosed the letter with the check and mailed both to U.S. Bank, the

card issuer.

Claimant testified that he notified a Track Supervisor in the Portland area of the theft of his wallet and his use of the BTE card for personal expenses and sought advice on how to pay for the charges. Although the Track Supervisor did not recall the conversation about paying for the charges, he did corroborate Claimant's story about the loss of his wallet. Moreover, when Claimant testified that after learning that U.S. Bank had never credited his payment, he stopped payment on the check, the hearing officer asked Claimant to get documentation of the stop payment order and gave him about an hour to do so. Claimant called his bank and a copy of the stop payment order was faxed to the hearing room and entered into the record.

Carrier made much of the fact that U.S. Bank had no record of receiving Claimant's payment or crediting it to his BTE account. Yet, it is certainly plausible that the payment was mishandled by the Postal Service or by U.S. Bank. That U.S. Bank did not credit the payment to Claimant's BTE account does not establish that Claimant did not send the payment. We find it particularly significant that the check and letter are dated prior to any questioning by Carrier of Claimant's BTE account. There is simply no reason to believe that Claimant was fabricating a defense when he wrote the check and letter.

We have combed the record carefully and in fine detail. We are unable to find any basis for discounting the documentary evidence that the Organization provided. Indeed, we note that in its initial claim and in its appeal, the Organization stressed the documentary evidence of Claimant's attempts to repay the charges before any question about his account was raised. Nowhere, during handling on the property, did Carrier address this evidence or provide a reason for discounting it. We conclude that Carrier failed to prove Claimant's dishonest intent by substantial evidence.¹

Claimant, however, was not blameless. He admittedly used the BTE card in violation of Carrier's policies. Furthermore, although he was questioned several times by his managers about his BTE account, Claimant did not follow up by *inquiring into the account status*. Also, presumably he received periodic statements on his checking account which showed that the check to U.S. Bank had not been cashed but he failed to follow up. Claimant's conduct displays poor judgment and negligence but not dishonesty. We conclude that the appropriate resolution to this claim is to award that Carrier reinstate Claimant with seniority unimpaired but without compensation for time out of service.

¹The record also contains a charge on June 19 at a Safeway in LaGrande, Oregon and a charge on July 26 at a Texaco in Walla Walla, Washington. Claimant testified that he never received a statement reflecting those charges, that he did not make those charges and that he had no knowledge of the charges. Carrier was unable, using its records of Claimant's assignments, to establish that Claimant was within the geographic vicinity of the locations where the charges were made on the dates they were made. These two charges do not provide substantial evidence of Claimant's dishonest intent.

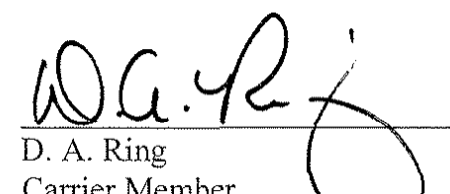
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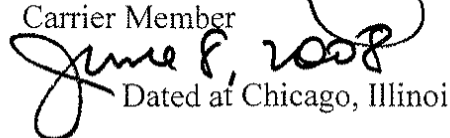
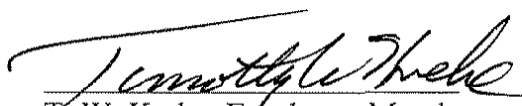
Claim sustained in accordance with the Findings.

ORDER

The Board having determined that an award favorable to Claimant be issued, Carrier is ordered to implement the award within thirty days from the date two members affix their signatures hereto



Martin H. Malin, Chairman

D. A. Ring
Carrier Member

June F. 2008

T. W. Kreke, Employee Member
Employee Member

Dated at Chicago, Illinois, May 31, 2008