

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6302
AWARD NO. 217, (Case No. 227)**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
DIVISION - IBT RAIL CONFERENCE**

vs

UNION PACIFIC RAILROAD COMPANY

William R. Miller, Chairman & Neutral Member
K. D. Evanski, Employee Member
P. Jeyaram, Carrier Member

Hearing Date: September 19, 2012

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

- 1. The discipline (Level 5 dismissal) imposed on Mr. G. Carrington by letter dated April 18, 2011 for alleged violation of General Code of Operating Rule 1.6 Conduct, Part 4 Dishonest in connection with allegations that he fraudulently reported round trip miles on March 1, 2011 was without just cause, arbitrary, unwarranted and in violation of the Agreement (System File J-1148U-351/1554614).**
- 2. As a consequence of the Carrier's violation referred to in Part 1 above, the Carrier must remove this discipline from Mr. Carrington's record and compensate him for all losses, including wages, benefits, seniority rights, and any other losses suffered as a result of the Carrier's improper discipline."**

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.

On March 7, 2011, Carrier notified Claimant to appear for a formal Investigation on March 16, 2011, that was postponed until April 5, 2011, concerning in pertinent part the following charge:

"...to develop the facts and place responsibility, if any, in connection with the charge that:

On February 22, 2011, at approximately 6:00 a.m., a System Gang Supervisor

allegedly witnessed you, at Portland International Airport located in Portland, Oregon, in line to board a Southwest Airline flight destined to Las Vegas, Nevada. Upon your return to work on March 1, 2011. It is alleged that you fraudulently reported round trip mileage per Rule 35 Section 6 of your current collective bargaining agreement.

This information was brought to our attention on March 3, 2011. Your alleged actions indicate possible violations of Rule 1.6 (4) (Conduct (Dishonest), as contained in the General Code of Operating Rules, Sixth Edition, effective April 7, 2010."

On April 18, 2011, Claimant was notified that he had been found guilty as charged and was assessed a Level 5 discipline and dismissed from service.

It is the Organization's position that Claimant's Investigation was held outside the contractually mandated time limits as set forth in Rule 48 (a) and (b) as it was unilaterally postponed by the Carrier. It emphasizes that formal Hearings are to be held within 30 calendar days from the date of the occurrence or when the Carrier has first knowledge of the occurrence and that formal Hearing may only be postponed or time limits extended by mutual agreement between the parties. It argued that Carrier's violation requires the claim be sustained in full without review of the merits of the case.

Turning to the merits the Organization argued that the Claimant admitted to making an error when he submitted a reimbursement form, but he did not admit to being dishonest and in fact he made genuine efforts to correct the mistake. It concluded that the Carrier denied the Claimant his "due process" rights and it did not meet its burden of proof and it requested that the discipline be rescinded and the claim sustained as presented.

The position of the Carrier in response to the Organization's argument that the Hearing was untimely was expressed in its letter of September 22, 2011, as follows:

"...The Organization's allegation is without merit. As noted in the initial Notice of Investigation, dated March 7, 2011, (Transcript Exhibit "A"), the Carrier first became aware of the Claimant's alleged dishonesty on March 3, 2011, and the hearing was scheduled to be held on March 16, 2011, well within the 30-day timeframe provided for in Rule 48. However, as the Organization is well aware, circumstances change and as such, hearings are sometime needed to be postponed by either party. In this instance, the Organization was sent a "postponement" letter on March 8, 2011 indicating the hearing needed to be postponed until April 5, 2011, (Transcript Exhibit "B"). While not specifically indicated in the

postponement letter, the Carrier Officer realized that he would not be in the country during the timeframe originally scheduled for the hearing. Again postponements occur on an occasional basis and those postponements frequently cause the hearing to be held past the normal 30-day timeframe and this instance was no exception. However, it must be noted that even though the Carrier sent the postponement letter a full twenty-eight (28) days prior to the new scheduled hearing date, the Organization failed to advise the Carrier that this new date was not acceptable or that the postponement would allegedly be in violation of the Agreement and as such, the hearing was held as rescheduled. The Organization clearly "laid behind the log" in an attempt to claim an alleged "procedural violation" by contending that it did not agree to the extension of the hearing date...."

The Carrier further asserted that in this instance the Claimant was not harmed by the alleged procedural violation. Turning to the merits it argued that Claimant requested compensation from the Carrier for 4,390 miles even though he did not travel that distance by automobile, but by airplane which according to it was a calculated dishonest behavior to gain monies not entitled to. It closed by asking that the discipline not be disturbed and the claim remain denied.

The Board has been presented a procedural question that must be addressed before the merits of the case can be considered. The Organization argued that the Investigation was held in a untimely manner because the Carrier improperly and unilaterally postponed the Investigation by letter dated March 8, 2011. It pointed out that it objected to the Carrier's unilateral postponement during the formal Investigation (See Transcript pages 12 and 13) and to the fact that the postponement resulted in the Carrier failing to hold the Hearing within the prescribed time limits.

As previously stated the Carrier responded to the unilateral postponement issue by arguing that the postponement letter was sent 28 days prior to the new scheduled Hearing date and the Organization failed to advise the Carrier that the new date was unacceptable. It asserted that if the Organization had voiced its postponement concerns the Carrier would have made appropriate accommodations. It further stated there was no evidence that Claimant was prejudiced or harmed in any manner as a result of the postponement and there is arbitral precedence for the principle that compliance with the spirit of procedural requirements has often been held to suffice where the employee was not adversely affected by a failure of total compliance with the requirements. Additionally, it argued that various Awards have decided that where there is an admission of guilt by Claimant, that will justify a finding of guilt and procedural matters need not be addressed.

The Organization rebutted the Carrier's position by arguing that time limits must be strictly enforced to protect the integrity of the Agreement and it disagreed with the Carrier's assertion that Claimant had admitted guilt and instead argued the Claimant admitted to submitting a reimbursement form, but repeatedly maintained that it was in error.

Controlling in this instance is **Rule 48 - Discipline and Grievances** of the Agreement which, in pertinent part, states:

"(a) Except as provided in Paragraphs (k), (l) and (m) of this provision, an employee who has been in service more than sixty (60) calendar days whose application has not been disapproved, will not be dismissed or otherwise disciplined until after being accorded a fair and impartial hearing. Formal hearing under this rule, will be held within (30) calendar days from the date of the occurrence to be investigated or from the date the Company has knowledge of the occurrence to be investigated, except as provided hereinafter.

(b) Formal Hearing may be postponed or time limits referred to herein extended by mutual agreement between management and the employee or his representative."
(Underlining Board's emphasis)

The record substantiated that the Carrier had first knowledge of the Claimant's alleged dishonesty on March 3, 2011, when Claimant was interviewed by Supervisor Rolow. By letter of March 7th the Hearing was then scheduled for March 16, 2011, which was within the 30 day timeframe provided for in Rule 48. On March 8th the Hearing was postponed by the Carrier until April 5, 2011, with no indication as to why it was being postponed.

Third Division Award No. 22258 dealt with a like situation. In that case the Investigation was originally scheduled within the required time limits after which the Carrier initiated a unilateral postponement. There was no opposition registered by the Claimant and/or Organization to that postponement at the time they were effectuated. That Board stated in pertinent part:

"...Carrier is mistaken in its contention that failure of Claimant to protest the postponement when it was instituted made Claimant a party to such deferral. The action was a unilateral one by Carrier and was timely protested at hearings.

The Board declines Carrier's request to examine the merits of the charges on which Carrier acted as a way of determining whether deprivation of this contract rule should be ignored because truth and justice nevertheless allegedly prevailed. The rights embodied in Rule 24(a) are not dependent on such post hoc

facts and should not be judged by them. They are mandatory in themselves. Their violation nullifies the process which has followed, because Rule 24(a) is a condition precedent for such process."

In the instant case the Organization protested the unilateral postponement at the onset of the Hearing asserting that Investigation was untimely. The Organization made a timely objection and there is no showing of acquiescence on its part.

In another case, Third Division Award No. 23459 that Board dealt with the same issue presented in the subject dispute. It determined in pertinent part the following:

"This Board has held, in Award Nos. 22258 and 22898, that the rule in question is to be strictly enforced, and is not a mere guideline. The language of Rule 24(a) is clear, unambiguous and mandatory upon all parties. Investigations must be held within seven calendar days of the alleged offense, unless an extension is mutually agreed upon by the parties. Carrier's unilateral postponement of the investigation from April 19 to April 24 violated this rule. See also Third Division Award Nos. 17145, 19275, 21996 and 22682.

In view of this time limit violation, we must sustain the claim as presented without reaching the merits of this case." (Underlining Board's emphasis)

Review of the various Carrier Awards cited during the handling of this case reveals that they are not on point whereas the aforementioned Awards and their citations are directly on target. Additionally, it is noted that in P.L.B. No. 6302, Award No. 206, this Board addressed a time limits extension involving the same parties. In that case the issue was whether or not the Organization had granted an extension for the handling of the dispute. It was decided there was no mutual agreement for extension and because of that it was determined in pertinent part:

"The Board has determined that this dispute is governed by the precedent concerning Rule 49(a)(3) that requires that the time limits for handling of claims must be strictly enforced in accordance with the parties' Agreement. Countless Boards have held that when the Agreement clearly sets forth time limit requirements with which to render a decision initially or upon appeal it will be strictly enforced so as to protect the integrity of the Agreement without further review of any other issues...."

The same logic expressed in Award No. 206 is applicable in this case because Rule 48(b) specifically requires that the time for the holding of a formal Hearing may only be extended by mutual agreement. There was no extension agreed to for the holding of Claimant's Hearing.

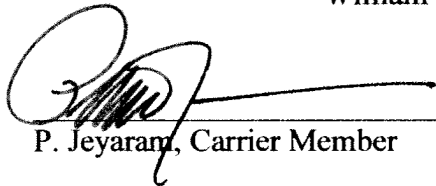
The Board always prefers to settle disputes on their merits, however, in this case to protect the integrity of the Agreement and the fidelity of the parties' agreed to language the Board is compelled to not address the merits of the claim as it is evident that the Carrier violated the time limits for the holding of the Investigation as it unilaterally postponed the Investigation beyond the required 30 day time limit period despite the fact that Rule 48(b) requires mandatory agreement for an extension. The Board finds and holds that the dismissal is rescinded and the Claimant is to be reinstated with seniority intact and all benefits unimpaired and made whole for all loss of monies in accordance with Part 2 of the Statement of Claim. The Board also exercises its discretion to forewarn the Claimant that he needs to be diligent to adhere to all Carrier Rules and directives upon reinstatement.

AWARD

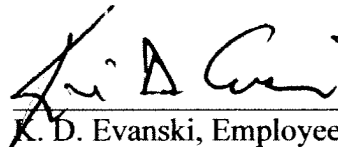
Claim sustained in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed.



William R. Miller, Chairman



P. Jeyaram, Carrier Member



K. D. Evanski, Employee Member

Award Date: Dec 17, 2012