

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6302

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

UNION PACIFIC RAILROAD COMPANY

)
) Case No. 27
)
) Award No. 25
)

Martin H. Malin, Chairman & Neutral Member
D. D. Bartholomay, Employee Member
D. A. Ring, Carrier Member

Hearing Date: November 7, 2001

STATEMENT OF CLAIM:

1. The dismissal of Mr. T. D. Atwood for alleged violation of Rule 1.6 for his alleged insubordination, theft and dishonesty in connection with "... your failure to remit the overpayment of \$7233.95 of money inadvertently paid to you by the Company" was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File D-252/1031035).
2. As a consequence of the violation referred to in Part (1) above, the Claimant shall be reinstated to service with seniority and all other rights unimpaired, his record shall be cleared on the charges leveled against him and he shall be compensated for all wage loss suffered beginning July 8, 1996 and continuing until he is returned to service.

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 May 20, 1996, Carrier notified Claimant to appear for an investigation on May 29, 1996, concerning his alleged insubordination, theft and dishonesty in connection with his failure

to remit an alleged overpayment. The hearing was postponed to and held on June 24, 1996. On July 8, 1996, Claimant was notified that he had been found guilty of the charges and dismissed from service.

The facts in the instant case are somewhat lengthy and complicated. Carrier had previously dismissed Claimant from service, but on September 26, 1995, the National Railroad Adjustment Board Third Division sustained Claimant's claim and ordered him reinstated to service and made whole for all wage loss. On November 22, 1995, Carrier issued four vouchers to Claimant totaling the amount that Carrier maintained was due. However, Carrier neglected to withhold from the payments an amount necessary to repay the Railroad Retirement Board for unemployment compensation Claimant had received while he was out of service. On November 29, 1995, the Senior Manager Payroll Accounting wrote Claimant advising him of the error and requesting that Claimant repay \$7,233.95. Claimant did not repay the money.

On December 26, 1995, the Manager Timekeeping wrote Claimant instructing him to repay the money. Claimant did not comply and on February 1, 1996, Carrier notified Claimant to report for an investigation. The hearing was held on February 13, 1996. Claimant maintained that he had reason to question the amount because it did not agree with W-2 forms he had received from the Railroad Retirement Board. Claimant testified that he had requested documentation of the benefits he had received from Carrier and the Railroad Retirement Board but had not received it. Claimant further testified that his attorney had advised him that the Railroad Retirement Board had been listed as a creditor when Claimant filed for bankruptcy and that, consequently, any debt to the Railroad Retirement Board had been discharged in bankruptcy. Claimant also maintained that Carrier still owed him money because he had not been paid the full amount of his lost wages.

On March 4, 1996, Carrier notified Claimant that he had been found guilty of failure to follow instructions and assessed discipline at UPGRADE Level 2. Carrier has explained that it did not find Claimant guilty of insubordination, theft or dishonesty because there may have been confusion on Claimant's part as to whether he owed Carrier the money. The Organization filed a claim over the discipline and ultimately Carrier removed the Level 2 discipline.

On May 6, 1996, the Manager Track Maintenance wrote Claimant addressing the matters that Claimant had raised in the February 13 hearing. The letter enclosed a form from the Railroad Retirement Board accounting for the benefits it had paid to Claimant. The letter also quoted from an opinion by Carrier's Law Department that the debt to the Railroad Retirement Board could not be discharged in bankruptcy because Section 507(a)(8) of the Bankruptcy Code exempted such debts from discharge. The letter further explained to Claimant that his claimed underpayment of back pay was being pursued through an interpretation by the Third Division to its prior award and that Claimant's obligation to repay the money that should have been withheld to reimburse the Railroad Retirement Board was independent of that proceeding. The letter instructed Claimant to remit the money within ten calendar days. Claimant failed to do so.

The Organization contends that Carrier's dismissal of Claimant amounts to double

jeopardy for the same offense, i.e. his failure to remit the money, and was handled in an untimely manner. The Board cannot agree. The February 13 investigation was based on Claimant's failure to remit the money pursuant to the Manager Timekeeping's directive. Claimant offered three lines of defense: He had not been given an accounting for the benefits he allegedly received; any debt to the Railroad Retirement Board had been discharged in bankruptcy; and he was still owed money by Carrier. Carrier credited Claimant's testimony that he believed he had cause to question the requests for repayment and did not find Claimant guilty of theft, dishonesty or insubordination. Although it found Claimant guilty of failing to follow instructions, it ultimately exonerated him of even that charge during claim handling.

The instant case, however, involves discipline imposed after the MTM addressed the issues that Claimant had raised in the February 13 hearing. Claimant's state of mind, and thus his liability for violating Rule 1.6, may well be different after receiving the MTM's May 6 letter from his state of mind as of February 13. Thus, although the two cases are related, the instant case involves a clearly distinct separate offense from the February 13 hearing. Consequently, we find that there was no double jeopardy and that the instant charges were timely filed against Claimant.

After a thorough review of the record, however, we find that Carrier failed to prove the charges by substantial evidence. Among the evidence introduced at the hearing was an opinion letter from Claimant's bankruptcy attorney advising that the debt to the Railroad Retirement Board had been discharged in bankruptcy. The letter opined that the request for repayment of Claimant's unemployment benefits had been discharged in his bankruptcy proceeding and that any attempt to collect the debt violated an order of the bankruptcy court. Thus, Claimant's refusal to follow the MTM's direction to remit the money was based on his belief that he did not owe the money, a belief backed by the opinion of the attorney who represented him in the bankruptcy proceeding. A refusal to return property that a person in good faith believes he had a right to retain is not theft. Furthermore, absent any evidence that Claimant's counsel's advice was a sham, Claimant's failure to remit the money cannot amount to dishonesty.

There remains the question of whether Claimant's failure to remit the money amounted to insubordination. We find that it did not. The facts of the instant case are highly unusual, perhaps unique. This is not the typical case where an employee refuses to comply with a directive that he believes violates the rules. In such a circumstance the employee must "obey now and grieve later," and failure to comply with the directive renders the employee vulnerable to discipline for insubordination.

The instant case involves two parties engaged in a good faith legal dispute over ownership of property. Each party was acting on advice of counsel. There is no evidence that Claimant's counsel's advice was a sham or otherwise procured in bad faith. Under these exceptional circumstances, we cannot say that Claimant's refusal to return the property amounted to insubordination. Our award is based on and addresses only the peculiar circumstances presented in this case.

AWARD

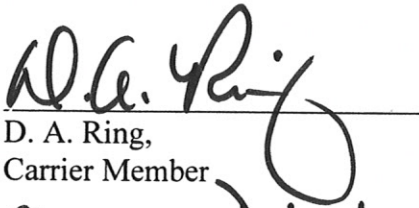
Claim sustained.

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.

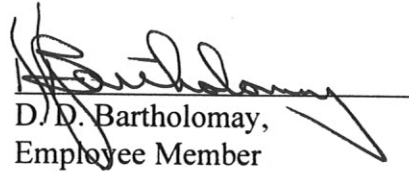


Martin H. Malin, Chairman



D. A. Ring,
Carrier Member

CARRIER Dissents



D. D. Bartholomay,
Employee Member

Dated at Chicago, Illinois, June 28, 2002.

CARRIER'S DISSENT TO AWARD 25 OF PUBLIC LAW BOARD 6302 REFEREE MALIN

Carrier cannot concur with the conclusion of the Referee in sustaining the claim of Mr. Atwood finding that he was not insubordinate when he refused to reimburse the Carrier the amount of the overpayment after several attempts of recollection. In this Award the Referee rationalizes that:

"There remains the question of whether Claimant's failure to remit the money amounted to insubordination. We find that it did not. The facts of the instant case are highly unusual, perhaps unique. This is not the typical case where an employee refuses to comply with a directive that he believes violates the rules. In such a circumstance the employee must "obey now and grieve later," and failure to comply with the directive renders the employee vulnerable to discipline for insubordination.

The instant case involves two parties engaged in a good faith legal dispute over ownership of property. Each party was acting on advice of counsel. There is no evidence that Claimant's counsel advice was a sham or otherwise procured in bad faith. Under these exceptional circumstances, we cannot say that Claimant's refusal to return the property amounted to insubordination. Our award is based and addresses only the peculiar circumstances presented in this case."

In this award the Carrier avers the Board has exceeded its jurisdiction and the Claimant had a remedy with ample opportunity and time to respond to the Carrier's request for the overpayment if he felt that he did not owe the money. The Board and the Carrier cannot contemplate what Claimant's action or inaction was once he was notified in the notice of charges that the Carrier Manager had checked out the letter of his attorney. The Carrier's legal opinion was that a tax was not subject to bankruptcy laws and therefore Claimant was not privileged to avoid his obligation to return the over payment. Carrier ended up having to reimburse the Railroad Retirement Board of the overpayment.

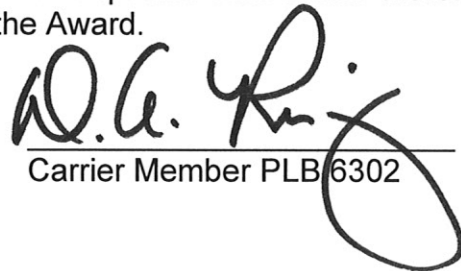
Claimant had two (2) remedies available to him in this case. First, he could have paid back the money immediately as he was advised within a week of the improper payment and then had the Organization file a grievance on his behalf. This would have been the simplest thing to do and is the old principle of "obey now grieve later". Or, he could have had his attorney seek an injunction against the Carrier in court and the matter would have been resolved on that basis. He did neither. Since he did not pursue it in court or present an additional opinion from his attorney the Board is only surmising what the intent of the Claimant was.

Claimant should have continued to pursue this in a legal forum -- which he did not, Therefore, the only recourse for the Board was to determine the Claimant was insubordinate when he did not comply with the instruction to repay the money. Also, as the record revealed there were two (2) separate investigations. Carrier did act on the opinion letter from the Claimant's attorney presented in the first investigation. The Carrier Manager

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had the Claimant's letter from his attorney checked out. When Claimant was advised that Carrier did not agree with the letter the Claimant had ample opportunity to rebut the advice of the Carrier's legal counsel. He did not rebut the Carrier's advice through another opinion from his attorney or otherwise. His action or inaction speaks louder than words. Claimant's not repaying the money owed the Railroad Retirement Board should have been considered to be insubordination.

For all of these reasons the Award should not have been sustained. The only redeeming thing in this award is that it only addresses this specific case and is therefore not establishing precedent. The Carrier dissents to the Award.


Carrier Member PLB 6302

July 16, 2002