PUBLIC LAW BOARD NO. 7660
CASE NO. 19

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

PARTIES TO DISPUTE: and

UNION PACIFIC RAILROAD COMPANY
[Former Chicago and North Western Transportation Company]

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The dismissal of Claimant M. Whitaker for violation of Information Security Policy #1, General Code of Operating Rules (GCOR). Rule 1.6(4) in connection with allegations that he used Union Pacific computers for his own personal use, that he allowed other employees to use his computer ID, that he attempted to access prohibited internet sites and that he was dishonest with the Corporate Audit Team was based on unproven charges, unjust, unwarranted and in violation of the Agreement (System File J-1319C-501/1595461 CNW).

2. As a consequence of the Carrier's violation referred to in Part 1 above, Claimant '… must be compensated all lost time, be made whole all losses including months of service credit with the Railroad Retirement Board, holiday pay, credit for days worked leading up to the holidays, days credited for insurance and have any reference to the investigation removed from his personnel record as outlined in Rule 19(d) of the effective Agreement.'

FINDINGS:

Upon the whole record, after hearing, this Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted under Public Law 89-456 and has jurisdiction of the parties and the subject matter.

Claimant, a 34 year employee, was working as a Track Supervisor on Gang 3641 at the Lake Street Station in Chicago during the time period in issue. A Notice of Investigation dated October 16, 2013 was issued on charges that he used UP computers for his own personal use and allowed others to use the computer under his user name and ID. A Notice on a corrected charge, dated October 17, 2013 and mailed at 7:00 p.m., adds that this conduct is considered theft of time, that Claimant attempted to access prohibited sites on the internet, and was dishonest in his interview with Corporate Audit when he failed to disclose his use of Facebook until after he was presented with the evidence. Both Notices instruct Claimant to attend a hearing on October 18, 2013 at 10:00 a.m. Neither has a signed receipt prior to the commencement of the Investigation on October 18, 2013. Neither was sent to the General Chairman. The October 25, 2013 Notice of Discipline finds Claimant guilty of the charges and in violation of Information Security Policy #1 and Rule 1.6 Conduct (4) (Dishonesty), and assesses him a Level 5 dismissal. The instant appeal resulted.

At the commencement of the October 18, 2013 Investigation, Organization Vice Chairman Rankin made several procedural objections based upon the language of Rule 19(A), which provides, in pertinent part:

> Any employee who has been in service in excess of sixty (60) calendar days shall not be discipline nor dismissed without a fair and impartial hearing. He may, however, be held out of service pending such hearing. At the hearing, the employee may be assisted by …. a duly accredited representative … of the Brotherhood. The hearing shall be held within ten (10) calendar days of the alleged offense or within ten (10) calendar days of the date the Carrier has knowledge of the occurrence to be investigated. Decision shall be rendered within ten (10) calendar days after completion of hearing. Prior to the hearing the employee shall be notified in writing of the precise charge against him, with copy to the General Chairman, after which he shall be allowed reasonable time for the purpose of having witnesses and representative of his choice present at the hearing. Two working days shall, under ordinary circumstances, be considered reasonable time. The investigation shall be postponed for good and sufficient reasons on request of either party.

Rankin objected to the existence of multiple defects including the fact that the charge letter refer to incidents in September, outside the 10 day time limit; the General Chairman was never notified in writing of the Investigation or the charges as required; the charge letter was vague; and the October 17 letter does not allow 2 working days to prepare a defense for a hearing being held at 10 a.m. on October 18. Rankin stated that the first time he saw an email with a copy of the charge letter was approximately 10 hours before the start time of the hearing. He requested a ruling from the Hearing Officer on his request to terminate the hearing, indicating that Labor Relations should be contacted concerning this issue. After being unable to reach Labor Relations, both the Vice

Chairman and Claimant responded affirmatively to the Hearing Officer's question about whether they were ready to proceed, and declined the offer of additional time to review the paperwork.

Evidence adduced at the hearing reveals that for more than a decade, Claimant's duties included overseeing a computer room where employees were able to access the internet to fill out reports or complete training. From the beginning he was informed that it was acceptable to use his own login information to sign into all the computers to allow employees who did not have access information to use the computers. He admitted doing so, and his Director acknowledged knowing that employees share their user IDs to get on the computer.

Claimant was called into an interview with Corporate Audit on October 10, 2013, and was not informed what it was all about, despite his repeated questioning and obvious confusion about why he was there. The interview was recorded and transcribed, and was placed into the record at the investigation. It became apparent that Corporate Audit had been investigating computer actions taken under his user ID, and produced many records indicating both non work related use on company time and attempts to gain access to inappropriate websites, repeatedly questioning Claimant about such actions. While Claimant admitted going on his Facebook account and checking the news and weather for minimal amounts of time during the workday, he denied knowing anything about, or performing, other actions he was questioned about or specific websites. Claimant

explained that he was not very computer savvy, and would often sign on and leave the computers running when he went out to perform work on the tracks, and there were other employees that had the keys to the trailer where the computers were located. At the conclusion of the interview, Claimant was informed that he was being removed from service pending investigation. Claimant's Director, who was present during the interview, opined that he was a hard-working employee, who attempted to answer all of the questions as best he could during the Corporate Audit interview, and appeared to be honest in his responses.

Carrier argues that Claimant was given and fair and impartial hearing in compliance with Rule 19(A). It notes that all time limits were met (as it did not have specific evidence of a violation until after the Corporate Audit interview); that the failure to send a copy of the charges to the General Chairman was an oversight; and that there was no prejudice to the timing of holding the hearing, since both Claimant and the Vice Chairman were present, had knowledge of the charges, indicated they were ready to proceed, and were given the opportunity to take whatever time was necessary to review the paperwork. Carrier asserts that the Organization waived any entitlement to rely on the 2 day notice provision under the facts of this case, relying on Special Board of Adjustment No. 924, Award 9.

With respect to the merits, Carrier maintains that there is substantial evidence in the record to support the charges, since Claimant admitted allowing other employees to

use his personal login information to access the computer in direct conflict with the directive in Paragraph 1 of the Information Security Policy, which Claimant was familiar with. It further points out that Claimant also admitted that he used the computer for his personal, non-work related use, during hours when he received pay (even overtime), amounting to theft of time, which, in and of itself, supports the dismissal penalty.

The Organization initially contends that the claim must be sustained on procedural grounds, since Carrier committed a number of violations of the clear due process requirements contained in Rule 19(A). With respect to the notice of investigation, the Organization notes that it was admitted that the General Chairman was never served a copy of either written notice of charges, which is a specific requirement contained in Rule 19(A), and neither Claimant nor the Organization received notice with a reasonable time to prepare a defense. It points out that Rankin was contacted by Director Klein by telephone at 6:00 p.m. on October 17 and informed that there would be a formal hearing convened the next morning at 10:00 a.m. which accounts for their presence, and he opened an email with a copy of the charges about 6 hours later, but neither was served with written notice of the charges until after the conclusion of the hearing and they did not have the required 2 days to prepare. The Organization asserts that it raised these issues at the commencement of the hearing, requesting that the investigation be terminated, but that the objection was overruled, and that their decision to participate in the hearing does not waive their entitlement to these procedural due process rights, which

must be strictly construed and require sustaining the claim, citing Public Law Board No. 1844, Awards 28, 58, 62 and 79; Public Law Board No. 2960 Awards 3 and 72; Special Board of Adjustment No. 924, Award 20.

In the event the Board decides to address the merits, the Organization argues that Carrier failed to prove that Claimant violated the cited Rule and Policy. It maintains that Claimant was directed to sign into the computers with his login and ID and permit others access under his information, had done so for over a decade without question, the practice was well known to his Director, and Claimant had no understanding that he was doing anything wrong by following these instructions. With respect to the charge of dishonesty, the Organization asserts that there is no proof that Claimant "stole" time by spending hours browsing inappropriate websites or did anything more than access his Facebook account or view the news and weather for minimal periods, and that the only tie to Claimant was his user login information, which was admittedly accessed by other employees. It also points out that there is no evidence that Claimant was dishonest during his interview with Corporate Audit, as attested to by his Director who was present. Finally, the Organization contends that the imposition of a Level 5 dismissal to Claimant, a 37 year hard-working employee, for occasionally checking his Facebook page or the news and weather was arbitrary, inappropriate and unwarranted, and must be overturned.

Initially the Board will address the Rule 19(A) argument presented by the Organization. It appears to be undisputed that there were at least two procedural errors in the serving of notice in this case. First, the General Chairman was never sent a copy of either of the written charges. The evidence is that this was an administrative error that should not have occurred. Second, there is no proof that either Claimant or the Organization received written notification of the charges against him with a reasonable time to prepare his defense of the charges. The Vice Chairman was notified of the investigation by telephone at 6:00 p.m. the night before, and saw an email of the charges just hours before the hearing. Rule 19(A) states that two working days shall be considered reasonable time under ordinary circumstances. There was no showing by Carrier of extraordinary circumstances. See, e.g. Public Law Board No. 2960, Award 72. However, we find no merit to the Organization's assertion that the charges are untimely since they involve conduct that is alleged to have occurred in September, more than 10 days prior to the hearing, since we accept Carrier's position that it did not have sufficient evidence of the violations until after the Corporate Audit interview of October 10. Nor do we agree that the corrected charge letter is vague.

The issue raised in this case is whether the Organization can waive such procedural due process rights, and whether it did so in this case. While the Organization has cited precedent supporting the argument that the clear time limits in Rule 19(A) should be strictly construed and enforced, see, e.g. Public Law Board No. 1844, Awards

62 and 79; Public Law Board No. 2960 Award 3; Special Board of Adjustment No. 924, Award 20, Carrier has presented an on property award from 1983 indicating that the two working days notice provision of Rule 19(A) is not to be viewed as mandatory, and can be waived. See, Special Board of Adjustment No. 924, Award 9. In that case, the Board found that the allegation involving a threat to the life of an official was not "ordinary circumstances," and that rejection of the offer to postpone the investigation to permit two days plus additional time to prepare constituted a waiver.

In this case the facts surrounding the timing of the notice given to Claimant and the Organization are more troubling. First, whether or not the two day notice provision can be waived by subsequent conduct, the agreement to proceed in this case was made after the Hearing Officer informed the Organization that he was instructed by Labor Relations to proceed with the investigation and to overrule the objection and request to terminate the hearing. The additional time offered to the Organization and Claimant was for them to review the written documents and materials being presented, which they declined. Further, in this case, the required written notice of the charges was not delivered to Claimant or the Organization until after the investigation was concluded on October 18, 2013. While the substance of the October 16 charge is similar in overall subject matter to the corrected charge contained in the October 17 notice (improper internet use), there is no doubt that the notice sent at 7 pm the night before the investigation not only expanded the allegations of misconduct by Claimant to include theft of time, attempts to

access prohibited sites, and dishonesty in his interview with Corporate Audit, but changed the charged violations from the Security & Acceptable Use Policy #2 to the Information Security Policy #1 and Rule 1.6(4) (Dishonesty). The fact that Claimant and his representative appeared at the hearing was due to the telephone notice they received the evening before, not as a result of actual receipt of written charges. Additionally, in this case, the General Chairman was not served with notice of either of the charge letters at any time, despite the requirement in Rule 19(A) that he be so served.

It is the opinion of the Board that, by not requesting a postponement and agreeing to proceed with the investigation on October 18, 2013 (while noting that this fact does not "undo the violation of the … rule that has occurred"), under the specific facts of this case, the Organization did not waive its entitlement to rely upon the procedural due process rights contained in Rule 19(A). There are many reasons why the Organization and Claimant may wish to continue an investigation when both are present (which is not always easy to arrange on short notice) and can testify about the charged conduct, rather than requesting a postponement in order to preserve any due process time limit arguments that may exist.

The specific time limits contained in Rule 19 (a) - 10 days from Carrier knowledge of the occurrence for the holding of the hearing and 10 days for decision after completion of the hearing - which are the subject matter of the strict construction cases relied upon

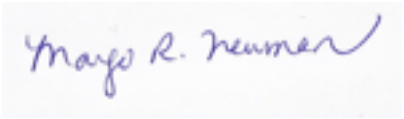
by the Organization, are not the same as the language relating to the service of notice of charges prior to the hearing - "… be allowed reasonable time for the purpose of having witnesses and representative of his choice present at the hearing… Two working days shall, under ordinary circumstances, be considered reasonable time…" The notice provisions are specifically designed to permit an employee adequate time to arrange to be in attendance with a representative of his choosing and to present a defense to the specific charges. The failure to comply with that type of "notice" provision can be ameliorated by permitting more time for the protection of the contractual right it was designed to address.

That being said, this Board concludes that this case should be decided on the merits, and that the Carrier failed to sustain in burden of proving the charges against the Claimant. The evidence is uncontroverted that Claimant was directed to permit others to access the computers using his login information, despite the language of the Information Security Policy, and that supervision was aware that this practice was going on for many years without objection. All Corporate Audit was able to determine was that Claimant's login information was used for non-work related purposes during company time as well as to access inappropriate websites, and not that Claimant himself was the one engaging in that activity. At best, Claimant admitted to logging on to his Facebook account and checking the news and weather for a short period of time during his workday. This cannot be said to amount to theft of time as alleged.

Neither is there any evidence that Claimant was dishonest in responding to questions during his Corporate Audit interview. His Director, who knew Claimant and his work ethic for many years and was present during the interview, confirmed that Claimant attempted to answer the questions to the best of his ability and appeared to be honest in his responses. A review of the transcript of that interview leads us to the same conclusion. Carrier's determination that Claimant merited a Level 5 dismissal under these facts, when coupled with the obvious procedural errors, was arbitrary and unsupported by the record. The discipline shall be set aside, and Claimant made whole in all respects.

AWARD:

The claim is sustained.



Margo R. Newman
Neutral Chairperson

Dated: May 28, 2016

K. N. Novak
Carrier Member

Andrew Mulford
Employee Member

PUBLIC LAW BOARD NO. 7660
CASE NO. 82

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

PARTIES TO DISPUTE: and

UNION PACIFIC RAILROAD COMPANY

REQUEST FOR INTERPRETATION OF PLB 7660, AWARD 19

PLB 7660, Award 19 was adopted on May 28, 2016. It held, in pertinent part:

"……. The discipline shall be set aside, and Claimant made whole in all respects. The claim is sustained."

The original claim requested the following remedy.

"As a consequence of the Carrier's violation referred to in Part 1 above, Claimant '… must be compensated all lost time, be made whole all losses including months of service credit with the Railroad Retirement Board, holiday, credit for insurance and have any reference to the investigation removed from his personnel record as outlined in Rule 19(D) of the effective Agreement.'"

A dispute arose over the implementation of the Award. It is undisputed that Claimant was returned to service and provided a payment for back pay calculated at his correct straight time rate based on 40 hours/week, and given Railroad Retirement Board (RRB) credits. The Organization's position is that Carrier's calculation of the losses suffered by Claimant was not accurate, and should include lost overtime, health care

deductions made from his back pay, the early withdrawal penalties incurred as a result of withdrawals made from Claimant's 401(k) as well as lost future interest and principle, losses associated with the diminishment of his credit score, mortgage and other bill payment issues resulting from his inability to make required payments including meeting his child support obligations, and inaccurate RRB credits.

Carrier argues that Claimant was given all of the money and benefits to which he was entitled "as outlined in Rule 19(D) of the effective Agreement," which was what was requested by the Organization in its claim. It points to the pertinent language of Rule 19, Discipline, as follows:

> D. If the charge against the employee is not sustained it shall be stricken from the record. If the employee has been removed from position held, reinstatement shall be made with all rights unimpaired and **payment allowed for the assigned working hours actually lost while out of service of the Company, at not less than the rate of pay of position formerly held, less earnings in outside employment**, or for the difference in rate of pay earned, if in service. An employee who has earnings from outside employment may deduct from those earnings actual necessary expenses in securing and performing work. (emphasis added)

Since Claimant had no outside earnings, Carrier records reveal deductions for RRB benefits paid to Claimant during his termination, his Health & Welfare co-pay contributions, taxes and other RRB-related expenses. It also shows payment for RRB credits made, and processed over time.

Carrier points out that Rule 23, Work Week, defines the "assigned work week" as 40 hours per week (A), and that any work beyond the regular assignment is considered "unassigned" and can be given to other employees who have worked less than 40 hours that week (L). It notes that payment at the straight time rate of pay for 40 hours per week complies with the Rule 19(D) requirement of payment for "the assigned working hours

actually lost," and that overtime is never part of such payment. Carrier asserts that its healthcare cost sharing deduction results from the language of the National Health Care and Welfare Plan, which provides retroactive coverage for an employee who is awarded full back pay as if he had not been dismissed, and that Claimant could submit medical expenses incurred during that period for coverage. It also highlights that this is what was part of the remedial request made by the Organization in its claim - "credit for insurance."

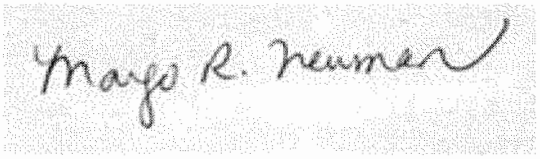
With respect to the other "losses attributable to Claimant's dismissal" for which the Organization is seeking compensation - penalties and other losses associated with early withdrawal from Claimant's 401(k), losses attributable to his inability to pay his bills and other financial obligations, and reduction in his credit score - Carrier contends that they are not contemplated by Rule 19(D), which is clear, were never requested in the Organization's Statement of Claim, are not able to be measured or quantified, and have never previously been requested or paid by Carrier.

Based upon a careful reading of the record, including documentation of the calculations made for back pay, and the arguments of the parties regarding items deducted and amounts not included, the Board concludes that Carrier has fully complied with the remedial direction in Award 19. We find the language of Rule 19(D) to be clear and unambiguous with respect to how back pay is to be calculated - "payment allowed for the assigned working hours actually lost while out of service of the Company, at not less than the rate of pay of position formerly held." Based upon the definition of assigned work week in Rule 23 as being 40 hours/week, and the fact that overtime is not guaranteed as part of the regular assignment, there is no contractual basis for any compensation for Claimant at the overtime or double time rate under the agreement.

There is no dispute that Carrier made the calculations based upon Claimant's appropriate straight time rate of pay.

In the original claim that was sustained in Award 19, the Organization requested that Claimant be made whole for months of service credit with the RRB and "days credited for insurance." It has presented no evidence to dispute the fact that Claimant was given service credit with the RRB and, once his Health and Welfare contributions were deducted and made under the terms of the National Plan, that he was eligible to submit claims for any medical expenses incurred during the period he was off work between October 11, 2013 and June 29, 2016. None of the additional unquantifiable losses the Organization seeks on Claimant's behalf were part of its initial claim, nor are they contemplated by Rule 19(D), which represents the agreement of the parties concerning the appropriate method of calculating a full make whole remedy in a suspension or dismissal case.

Under such circumstances, we deny the Organization's request for additional compensation on Claimant's behalf and find that Carrier fully complied with its contractual obligations in effectuating the remedy in Award 19.



Margo R. Newman
Neutral Chairperson

Dated: 2/18/2018

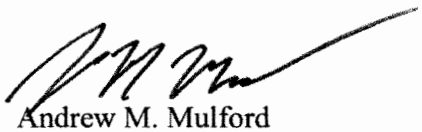
K. N. Novak
Carrier Member

Andrew Mulford
Employee Member

LABOR MEMBER'S DISSENT
TO
INTERPRETATION TO AWARD 19 (CASE NO. 82)
OF PUBLIC LAW BOARD NO. 7660
(Referee Newman)

In this instance, the Majority erred when it determined that Award 19 did not entitle Claimant to the remedy requested by the Organization. As set forth in the Organization's initial claim letter, dated November 21, 2013, the Organization plainly and unambiguously requested that as a consequence of the Carrier's improper termination of Claimant that an element of his relief should be to "*be made whole for all losses*" suffered. The Organization progressed this remedy during its presentation to the Board. Moreover, when a favorable award was rendered by the Board we believed that our requested relief included that Claimant would *be made whole for all losses*. The Organization also presented documentary evidence which established Claimant's identifiable and specific losses suffered as a consequence of his improper dismissal. Based on these facts, it is plainly clear that the Majority is in error regarding its Interpretation to Award 19 as Claimant has not been *made whole for all losses*. Accordingly, I respectfully dissent.

Respectfully submitted,



Andrew M. Mulford
Labor Member