

**NATIONAL MEDIATION BOARD**

**PUBLIC LAW BOARD NO. 6402**

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES )  
and ) Case No. 142  
UNION PACIFIC RAILROAD COMPANY ) Award No. 119  
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Martin H. Malin, Chairman & Neutral Member  
T. W. Kreke, Employee Member  
B. W. Hanquist, Carrier Member

Hearing Date: December 17, 2008

**STATEMENT OF CLAIM:**

1. The dismissal of System Track Foreman John R. Nixon for violation of GCOR Rule 1.6 (4) (Conduct (Dishonest)) in connection with unauthorized purchases of fuel is unjust, unwarranted, based on unproven charges and in violation of the Agreement (System File MW-08-29/1496063 MPR).
2. As a consequence of the violation outlined in Part (1) above, we are now requesting that the charges be dropped and that Mr. Nixon have his personal record cleared of all charges. Also that he be reinstated with all back pay, seniority unimpaired and all other rights due to him by the collective bargaining agreement.

**FINDINGS:**

Public Law Board No. 6402 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 December 17, 2007, Claimant was notified to report for a formal investigation on December 20, 2007, concerning his alleged unauthorized purchases of fuel by being dishonest. The hearing was postponed to and held on January 5, 2008. On January 23, 2008, Claimant was advised that he had been found guilty of the charge and had been dismissed from service.

The Organization contends that Carrier violated Rule 21(a)(1) which requires that Carrier "make every effort to schedule and hold a formal investigation under this rule within thirty (30)

calendar days from the date of the occurrence to be investigated except as herein provided or from the date the Carrier has knowledge of the occurrence to be investigated.” The critical issue is what is meant by “the date the Carrier has knowledge of the occurrence to be investigated.”

The record reflects that in late March, the Truck Driver gave the ARASA Track Supervisor a receipt from use of the Carrier credit card assigned to the grapple truck for the purchase of mid-grade gasoline and advised that Claimant had used the credit card to purchase fuel for his personal vehicle. The Supervisor questioned Claimant about the purchase and Claimant admitted the purchase and maintained that the purchase was appropriate because Claimant had used his personal vehicle for Carrier business.

The Supervisor passed the information along to the Manager Track Programs. The MTP contacted GE Capital Fleet Services to obtain the transaction logs so that he could verify what fuel purchases had been made with Claimant’s employee ID. He did not complete the audit through GE Capital until the end of November.


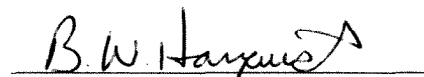

In the Organization’s view, the date Carrier had knowledge of the occurrence to be investigated occurred in March when one of the fuel purchases came to light and Claimant admitted to making the purchase for his personal vehicle. We are unable to agree. Had Carrier acted at that point, a notice of investigation would have been premature. Verification of the purchase at issue and conduct of an audit to determine whether the purchase was a one-time event or part of a larger pattern of conduct were prudent and reasonable steps to take. We conclude that Carrier’s first knowledge of the extent of the misuse of the fuel card did not arise until the audit from GE Capital was completed in November. Accordingly, we hold that the charges were timely.

At issue was whether Carrier proved Claimant’s dishonest intent. Claimant testified that he used the fuel card to purchase gasoline for his personal vehicle because he was using his personal vehicle for Carrier business and that the Supervisor authorized him to do so. However, every other witness disputed Claimant’s testimony. The Supervisor and MTP denied ever authorizing Claimant to use the fuel card to purchase gasoline for his personal vehicle. The Truck Driver testified that he did not give Claimant the fuel card to use. The Truck Driver’s testimony supports an inference that Claimant simply took the fuel card from the truck which further supports an inference that Claimant took the fuel card without authorization. Considering the record as a whole, we conclude that the finding on the property that Claimant acted without authorization and with dishonest intent is supported by substantial evidence.

The offense of dishonesty is gravely serious and generally supports a penalty of dismissal. The instant case is aggravated because Claimant’s disciplinary record at the time of the offense already stood at UPGRADE Level 3. Under the circumstances, the penalty of dismissal was not arbitrary, capricious or excessive.

**AWARD**

Claim denied.

  
Martin H. Malin, Chairman  
B. W. Hanquist  
Carrier Member 3-23-09  
T. W. Kreke  
Employee Member 3-23-09

Dated at Chicago, Illinois, February 26, 2009