

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6816

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

UNION PACIFIC RAILROAD COMPANY

)
) Case No. 1
)
) Award No. 1
)

Martin H. Malin, Chairman & Neutral Member
D. D. Bartholomay, Employee Member
M. D. Philips, Carrier Member

Hearing Date: February 16, 2005

STATEMENT OF CLAIM:

1. The discipline (withheld from service followed by a Level 5 dismissal with subsequent reinstatement without pay for time held out of service) imposed upon Mr. J. D. Bagley for alleged violation of Union Pacific Rule 1.6 effective April 2, 2000 and the section concerning "Driving Allowance" within the letter of Vice President Engineering Wimmer dated July 1, 1999, in connection with weekend travel allowance reimbursement for the weekend of March 21, 2003 to March 23, 2003, was without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement (System File W-0348-154/1376064).
2. As a consequence of the violations referred to in Part (1) above, Mr. J. D. Bagley shall now be compensated for all wage loss suffered and have his record cleared of this incident.

FINDINGS:

Public Law Board No. 6816, 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 April 10, 2003, Carrier notified Claimant to report for a formal investigation on May 1, 2003, concerning his alleged violation of Rule 1.6, in connection with alleged dishonesty by claiming weekend mileage travel allowance for the weekend of March 21 - 23, 2003, when he actually flew home. Claimant was withheld from service pending investigation. The hearing was held as scheduled. On May 20, 2003, Carrier notified Claimant that he had been found guilty of the charge and dismissed from service, but further informed Claimant that, based on Claimant's length of service and because the time off he had served had served its purpose, he

was reinstated immediately and returned to his former assignment.

There is no dispute that Claimant flew home on the weekend on March 21 - 23, 2003, and that he claimed mileage reimbursement as if he had driven. There also is no question that Claimant was not entitled to mileage reimbursement. As PLB 6302, Award No. 32 held, "The Agreement is clear that an employee is not entitled to automobile mileage if he flies home." Under the controlling Agreement, an employee is entitled to a Carrier-paid airline ticket home once every three weeks. The Agreement does not allow an employee who flies home to claim automobile mileage instead. The record reflects that Claimant had been flying home for several years and claiming highway mileage.

The critical issue is whether Claimant's request for mileage reimbursement was dishonest as well as erroneous. The record reflects that Claimant had been living in Colorado when he inherited property in Florida. Claimant moved to Florida, which was outside the Carrier's system. The question arose as to how Claimant would be reimbursed for travel home. Claimant and his then-supervisor, Manager Bridge Maintenance D. A. Adams, telephoned Director Labor Relations D. A. Ring. There is no dispute that during the conversation, Mr. Ring advised that a mileage allowance would be calculated from Claimant's job assignment to the point on Carrier's system that was closest to his home, i.e. New Orleans, Louisiana. Claimant maintained that Mr. Ring advised them that Claimant could fly home and submit for mileage to New Orleans. Claimant testified that he interpreted the Agreement rule, in light of the conversation with Mr. Ring, to mean that he had the option of claiming highway mileage to New Orleans when he flew home or every three weeks having Carrier provide him with a plane ticket home.

Mr. Adams testified initially as follows:

And there was a conversation between Jay and I on a conference call phone to Dominic Ring about what he could charge for mileage. And the information that we got was that he could charge to the closest railroad property is what they told us on it, which was, at that time, New Orleans. . . .

And as far as Jay flying, he flew, I knew he flew once in a while. But Jay didn't go home - - when he worked for me, he didn't go home all the time. He never went home all the time. There was probably other - - there was other people who probably knew that he was flying on it.

Subsequently, Mr. Adams testified as follows:

Q: Okay, When you had your conversation with Mr. Ring that you referred to, do you remember when that was?

A: I really can't. I know it wasn't - - it was - - it wasn't too long after Jay moved, when he did actually move to Florida. But, I couldn't tell you exactly when it was. It was - - we just got on a speaker phone and had a conversation is all we

had.

Q: Okay. And at that point in time, did you ask Mr. Ring? You asked him, you already stated, and I want to make sure I'm correct on this, where he could claim mileage to.

A: From and to.

Q: Um hum.

A: Yes.

Q: Okay.

A: That was the - - that was the reason. That was the reason for the conversation because I didn't know how they could do that.

Q: Okay.

A: For sure.

Q: And during that conversation, did Mr. Ring go through the entire Rule with you?

A: I don't recall if he did. Now, if he did, I don't recall it.

A report from one of the two Carrier Senior Special Agents who investigated this matter states that the two Special Agents interviewed Mr. Adams on April 10, 2003. The report relates:

MR. ADAMS stated that he and MR. BAGLEY made a joint telephone call to DOMINIC RING in the UP labor relations department to clear up the matter and to make sure that MR. BAGLEY was following the rules in his mileage claims. MR. ADAMS stated that during the call, MR. RING informed them that MR. BAGLEY could claim mileage from the worksite to the location nearest his home on the UP system, which in most cases would be New Orleans, LA. MR. ADAMS stated that he could not say for sure if they discussed whether or not MR. BAGLEY could fly and still claim mileage. MR. ADAMS stated that he thought they mentioned it, but just could not be sure. MR. ADAMS stated that he was very sure that MR. RING understood and knew that MR. BAGLEY would be flying part of the time. . . . MR. ADAMS stated that the entire management chain of command above MR. BAGLEY had known he was flying and claiming mileage for a number of years. MR. ADAMS stated that 3 supervisors/managers and 2 directors, including the General Director, were aware of this situation. . . .

In his testimony, Mr. Adams related that he knew, as of the time of the hearing, that an employee was not allowed to fly home and claim mileage but at the time that he was supervising Claimant,

her was not aware of that restriction.

Manager Bridge Maintenance D. E. Shaw was Claimant's supervisor at the time of the hearing. Mr. Shaw testified that Claimant turned in his own time and travel reimbursement requests and that Mr. Shaw was unaware of any circumstances related to Claimant's travel allowances. He also testified that he never discussed Claimant's travel arrangements with Claimant.

Mr. Shaw was interviewed by Carrier's Special Agents on two occasions. The Special Agent reported that on April 7, 2003,

MR. SHAW advised that it was his understanding, from the previous manager, a MR. DAVID ADAMS, that this type of mileage claim was allowed and the (sic) MR. BAGLEY had been given permission to drive to Kansas City and fly home to Florida while still claiming mileage to the furthest point on the UP system. MR. SHAW advised several times that he had given MR. BAGLEY permission to fly and still claim mileage to the furthest point on the UP system, based on the practice that MR. ADAMS had allowed. . . .

The Special Agent reported that on April 10, 2003,

MR. SHAW began the interview by telling us that he had been thinking since speaking with SSA TRIOLA and myself on April 7, 2003, and he then stated "I didn't tell him he could fly and I didn't tell him he couldn't fly. The subject never really came up (referring to the statement made on April 7, 2003, see Investigation/interview of JAMES BAGLEY)." MR. SHAW stated that he didn't think of this until after he removed MR. BAGLEY from service and SSA TRIOLA and I had left Marysville. MR. SHAW went on to say that MR. BAGLEY had always been an honest and good employee and he felt that he was not trying to defraud anyone, but simply was not aware of the policy. MR. SHAW stated that MR. BAGLEY had received a letter from his former director MIKE FREEMAN some time ago, challenging his mileage. MR. SHAW stated that MR. BAGLEY had contacted him about it and he told him not to worry about it, since the mileage from jobsite to New Orleans, LA had been approved by DOMINIC RING in Labor Relations in Omaha, as he had understood from DAVID ADAMS. MR. SHAW went on to say that he had supervised MR. BAGLEY from sometime in late March 2002 and that he had never had to contend with a situation like this prior to that. He stated that most of his employees are "division" employees who live within 100 to 200 miles of the jobsite. . . . MR. SHAW stated that he didn't know for sure, but assumed that MR. BAGLEY was flying home part of the time and MR. SHAW further stated that he himself did not know/understand that a person had to actually travel the claimed mileage by motor vehicle conveyance as opposed to flying or a combination of travel modes such as car/plane combination. MR. SHAW

concluded the interview by saying that he was under the impression that the entire travel arrangements and mileage claims were legitimate because it had all been worked out with labor relations in Omaha prior to MR. BAGLEY'S transfer to his crew.

By memo dated May 1, 2002, Director Bridge Maintenance M. P. Freeman wrote to Claimant:

We have been reviewing expenses for the past several months and have noted that your mileage expense has been rather high. Knowing that your residence is in Florida, the fact as to whether or not you are actually driving to your home has come into question. Please be advised that you must only claim mileage permitted under Section 6 of Rule 36 (copy enclosed). Please ensure that any expenses claimed are in strict compliance with the enclosed documents or subsequent action by the Railroad may be necessary.

We note that the memo's reference to Section 6 appears to be a mistake. The relevant portion of the rule is Section 7. In any event, Claimant testified that when he received the memo, he inquired of his supervisor Mr. Shaw who advised him not to worry about it. As related above, Mr. Shaw's statement to the Special Agent corroborates Claimant's testimony in this regard.

The record thus reflects that Claimant consistently maintained that he had the permission or approval of his supervisors to fly home and claim highway mileage to New Orleans, and traced this permission back to a telephone conversation he had with Mr. Adams and Mr. Ring. Mr. Adams' statement during his interview with the Special Agents appears to corroborate Claimant's contentions. In his testimony during the hearing, Mr. Adams maintained that he could not remember Mr. Ring going through the entire rule on weekend travel home but also stated that at the time he supervised Claimant he did not understand that an employee was prohibited from flying home and claiming mileage reimbursement. Mr. Adams' testimony does not refute Claimant's version of events and, at least to the extent that Mr. Adams believed at the time that it was proper to fly home and claim mileage reimbursement, his testimony corroborates, albeit weakly, Claimant's version.

Mr. Shaw testified that he knew nothing at all about the circumstances concerning Claimant's travel and mileage claims, but his statements to the Special Agents reveal otherwise. His April 7, 2003 statement corroborates Claimant's contention that he had Mr. Shaw's permission to fly home and claim mileage. His April 10 statement backed off the April 7 statement somewhat but still corroborated Claimant's position that his flying home and claiming mileage was authorized. Furthermore, it is undisputed that when Claimant received the May 1, 2002, memo from Mr. Freeman, he raised it with Mr. Shaw who told him not to worry about it.

Conspicuously absent from the record is any evidence from Mr. Ring. The record does not reveal any reason why the Hearing Officer did not call Mr. Ring as a witness. Frankly, the Board is totally baffled by his failure to do so.

Carrier offers two lines of analysis to compensate for the absence of testimony from Mr. Ring. First, Carrier observes that Mr. Ring was a member of PLB 6302 and signed Award No. 32. In Carrier's view, this demonstrates that Mr. Ring was aware of the rule governing travel home on weekends and, Carrier argues, it is inconceivable that Mr. Ring would have told Claimant that he could fly home and submit for auto mileage reimbursement. Carrier's speculation as to how Mr. Ring may have testified, however, cannot substitute for Mr. Ring's testimony. This Board may only decide the case based on the record developed on the property. It may not surmise what the record would have contained had Mr. Ring been called as a witness.

Second, Carrier submits a written statement from Mr. Ring attesting to his telephone conversation with Claimant and Mr. Adams. The written statement paints a very different picture from the one Claimant painted. However, the Board is confined to considering the evidence presented at the investigation. It may not consider the written statement submitted long after the conclusion of the hearing.

Confined to the record, as we must be, we are compelled to conclude that Carrier failed to prove by substantial evidence that Claimant's mileage reimbursement claims were dishonest, as opposed to simply erroneous. Accordingly, the claim must be sustained.

AWARD

Claim sustained.

ORDER

The Board, having determined that an award favorable to Claimant be made, hereby orders the Carrier to make the award effective within thirty (30) days following the date two members of the Board affix their signatures hereto


Martin H. Malin, Chairman


M. D. Philips,
Carrier Member


D. D. Bartholomay,
Employee Member 5-12-05

Dated at Chicago, Illinois, April 30, 2005