Award No. 34
Case No. 34

PUBLIC LAW BOARD NO. 7120

PARTIES TO DISPUTE: (BROTHERHOOD OF MAINTENANCE OF WAY
(EMPLOYES DIVISION
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(CSX TRANSPORTATION, INC.

STATEMENT OF CHARGE:

By letter dated August 14, 2008, R. D. Schramm, Manager/Facilities, directed James E. Shockey III ("the Claimant") to attend a formal hearing on August 27, 2008, in the Manager/Facilities's Office in Cumberland, Maryland, "to determine the facts in connection with information that had been received due to unauthorized use of a Visa Procard issued to you by CSX Transportation on dates during the month of June, 2008." The letter stated that the Claimant was "charged with dishonesty, unauthorized use of a Visa Procard and conduct unbecoming a CSXT employee as well as in possible violation of CSX Traansportation Operating Rules General Regulations GR-2 (formerly referred to as CSX Transportation Operating Rule 501)." The letter further stated that the Claimant was "being withheld from service pending the outcome of this investigation." At the Carrier's request the hearing was postponed until September 3, 2008.

FINDINGS:

Public Law Board No. 7120, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as

approved June 21, 1934.

The Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Claimant began his employment with the Carrier on or about July 23, 2001. At all times pertinent to this matter he held the position of Bridge and Buildings Foreman in the carpenter craft. As part of his duties as a carpenter he would have to purchase materials from time to time. To facilitate such purchases the Carrier provided the Claimant a credit card at its expense called a Visa Procard. The Claimant was required to provide the Carrier with a receipt for all credit card purposes. If the Claimant was missing a receipt, he was required to fill out a simple one-page form called Missing Procard Receipt with spaces on which to enter Merchant Name, Date of Purchase, Total Amount of Purchase, and a description of All Items Purchased. The Claimant then had to check the appropriate box to show the "Reason missing receipt" : "Lost receipt, No receipt received, or Other, please explain." The Claimant would then have to sign his name to the form on a line for Cardholder Signature. Above the signature line was the statement, "By signing this form, I acknowledge that the purchase described above was for business use." The Carrier would pay the credit card bill directly each month.

In 2008 the Claimant's direct supervisor was R. D. Schramm, Manager/Facilities. Mr. Schramm was required to check the Claimant's credit card statement each month. According to Mr. Schramm's testimony, not challenged at the hearing, the Claimant turns the credit card statement and his receipts in to Mr. Schramm each month within a week

after the date on the statement. In examining the statement dated July 17, 2008, Manager Schramm saw a purchase on June 20, 2008, in the amount of $188.62 from Martin's Food. The receipt for the purchase listed many items of food including Pepsi, rice, chips, crackers, spaghetti, sausage, etc. – a total of 77 items at the cost of $188.62.

Manager Schramm found three other questionable items on the July 17, 2008, statement. All were purchases at Blankenship's Country Store: a June 17, 2008, purchase for $50.12, a June 23, 2008, purchase in the amount of $36.86, and a June 25, 2008, purchase for $15.93. Mr. Schramm testified that the Claimant did not give him the receipts for these purchases; that he got them off of the Claimant's desk. The June 23 receipt for $36.86 showed that it was for the purchase of beer, Ricardi Raz, and cigarettes.

Mr. Schramm found a Missing Procard Receipt for the June 17, 2008, purchase for $50.12. On the lines for listing "All items purchased," the Claimant put a question mark. The Claimant also filled out a Missing Procard Receipt form for the June 25, 2008, purchase for $15.93, inserting a question mark on this form also for "All items purchased." On both forms the Claimant checked "Lost Receipt" as the "Reason missing receipt."

As a result of finding non-business purchases on the July 17, 2008, statement, Mr. Schramm decided to check over the Claimant's credit card statements for previous months. He determined that the following purchases listed on the credit card statements were for non-business use: (1) a purchase dated February 17, 2008, for $4.41 at

Blankenship's Country Store for which a Missing Procard Receipt form for the purchase of "batteries" was submitted; (2) a purchase dated February 28, 2008, in the amount of $34.89, at Blankenship's Country Store for a which a Missing Procard Receipt showing a purchase of a "lock-set" was turned in; (3) a purchase dated March 18, 2008, at Blankenship's Country Store in the amount of $14.05 for which a Missing Procard Receipt for "items for shop" was provided; (4) a purchase dated March 19, 2008, at Blankenship's Country Store in the amount of $12.14 for which a Missing Procard Receipt for "lock&key" was submitted; (4) a purchase dated April 3, 2008, at Blankenship's Country Store in the amount of $8.03 for which a Missing Procard Receipt for "screws" was turned in.

Mr. Schramm visited the Blankenship's Country Store to investigate whether that store sold the items that he believed to be questionable. He did not see any such items. He described the store as "more of a convenience store . . . including drinks, cigarettes." According to Mr. Schramm, he spoke to a person named Sheila who works at the store and who told him that items such as screws and shop items are not sold there. Mr. Schramm identified a written statement he received signed by Sheila C., Blankenship's Country Store, on which were listed the transactions for the purchases of the batteries, lock-set, items for shop, lock & key, and screws in which she wrote, "These items are not available in this store."

On questioning by the Organization's representative Mr. Schramm testified as follows. In the charge letter he did not mention when the information regarding the

Claimant's purchases came to his attention because "I wasn't sure of all the dates. I didn't receive the statement until July 17th, 18th. That's why." He is aware that under Rule 25 of the Agreement the Carrier is required to accuse the employee within 20 days from the date management had knowledge of the employee's involvement. He is also aware that under a side letter the Carrier was provided an additional ten days, thereby increasing the amount of time to bring an accusation to 30 days.

Mr. Schramm acknowledged that in the past he or supervision required the Claimant to purchase food for himself or other employees at Blankenship's store or Martin's Food Store in regard to safety feeds. This was in the past, Mr. Schramm testified, but not in 2008. Mr. Schramm testified that he provided the Claimant with the Missing Procard Receipt forms. Items identified on the form, Mr. Schramm stated, "needed to be in connection with his [the Claimant's] Bid In position." So long as the item had something to do with carpentry work, Mr. Schramm testified, it was acceptable.

Mr. Schramm was asked why he did not find the allegedly questionable purchases for February, March, and April at the time that they were made if, as he stated, he checked the receipts every month. He answered, "I just took for granted that was . . . what he was buying and I didn't really know what that store sold." The Claimant, Mr. Schramm stated, never gave him any reason to believe that what he was documenting wasn't truthful.

The Claimant acknowledged that he charged the June 23, 2008, purchase of the beer, Ricardi RAZ, and cigarettes in the amount of $36.86 to his Procard. He was asked,

"Do you know of any reason why you would make those charges in the line of work?" and answered, "No." He stated that he did not recall what the Missing Procard Receipts for $50.12 and $15.93 were for. He was not aware, the Claimant testified, that the items he listed on his receipts as being purchased at Blankenship's store—the batteries, screws, lock-set, shop items, and lock & key—were not available for purchase at that store. Asked whether he ever recalled purchasing a lock-set or lock and key at Blankenship's Country Store, the Claimant stated, "I don't recall"

The Claimant testified that in a conversation he had with Mr. Schramm about items purchased for which he did not have receipts, Mr. Schramm told him to put down something that would be related to his job. According to the Claimant, he understood that so long as the purchases pertained to something relating to his (the Claimant's) job, that was acceptable to Mr. Schramm. He has had the Visa Procard issued to him by the Carrier for close to four years, the Claimant stated. In the past, the Claimant testified, he was required by CSX supervision to purchase food for other CSX employees and placed the charges on his Visa Procard. He purchased the food at Blankenship's Country Store or Martin's Food. He has not made any such food purchases in 2008, the Claimant stated.

In a closing statement the Claimant stated, "I have made some bad purchases accidentally and I certainly was not trying to swipe my career away."

Following the hearing, G. Wilhite, Division Engineer, notified the Claimant by letter dated September 19, 2008, that review of the record showed that the charges against

him had been proven by substantial evidence. It was his decision, the letter stated, that due to the seriousness of the charges the discipline assessed against the Claimant was immediate dismissal from the service of CSX Transportation.

At the hearing the Organization contended that the charge letter was not sent to the Claimant within the time requirements of Rule 25 and Side Letter No. 32 . Rule 25 provides in pertinent part, ". . . The hearing shall be scheduled to begin within twenty (20) days from the date management had knowledge of the employee's involvement." The time period for scheduling was increased to 30 days in a side letter dated November 11, 1999 (called Side Letter 32), which, in relevant part, stated, ". . . The hearing shall be scheduled to begin within thirty (30) days from the date management had knowledge of the employee's involvement **and such hearing shall not begin in less than ten (10) days from the date of the notice.**"

Although the pertinent provision could be interpreted to mean that the hearing must begin within 30 days from the date of management's knowledge of the employee's involvement, neither party reads the provision that way. Based on what was stated at the hearing, the Board believes that both parties are in agreement that the provision means that the charge letter scheduling the hearing must be mailed or delivered to the employee within 30 days of management's knowledge of the employee's involvement.

That interpretation is supported by the language at the end of the sentence in the side letter which states that the hearing shall not begin in less than ten days from the date of the notice. If a hearing had to begin within 30 days from the date of knowledge but

not less than ten days from the date of the notice, that would mean that notice had to be mailed or delivered to the employee no later than 20 days from the date of knowledge in order to meet both the 30-day and the ten-day requirements. Limiting the Carrier to 20 days' notice, however, would defeat the whole purpose of the side letter, which was to allow the Carrier an additional ten-days' time to provide notice.

In addition, the change of the wording from the first part of the sentence ("The hearing shall be scheduled . . . ") to the last part ("such hearing shall not begin") in the side letter indicates that the first part was concerned with the act of scheduling a hearing, as opposed to the time of beginning the hearing. Thus the first part states that the hearing shall be scheduled within 30 days from the date of management's knowledge, meaning that the act of scheduling must occur within the 30-day time period. The second part deals with when the hearing shall begin, namely, not less than ten days from the date of notice. The words "to begin" in the first part of the sentence are merely descriptive of the purpose of the scheduling.

In the present case, Mr. Schramm testified that normally the Claimant "turns his statements with his receipts in" within a week after issue of the statement. (Tr. 8). There is no testimony or other evidence in the record that Mr. Schramm or any other supervisor or manager of the Claimant received a copy of the receipt for any of the June, 2008, purchases prior to the statement date of July 17, 2008, covering those purchases. There is thus substantial evidence in the record that Manager Schramm received both the

statement for the June purchases and the receipts for those purchases on or after July 17, 2008. Those documents provided knowledge to management of possible improper use of his company credit card by the Claimant. There is no evidence of any prior notice to management of possibly improper purchases by the Claimant with his Procard in June, 2008. The charge letter was dated and mailed to the Claimant on August 14, 2008, which was less than 30 days from the date that management first had knowledge of the June purchases by the Claimant. The Board finds therefore that the charge letter containing the notice of scheduled hearing complied with the contractual time requirements for scheduling a hearing and that this matter is properly before the Board for determination on the merits.

In his closing statement the Claimant stated that he made some bad purchases accidentally. The evidence, however, is not consistent with accidental improper purchases. The July 17, 2008, statement showed a purchase for $188.62 on June 20, 2008, from Martin's Food. Even if the Claimant had originally accidentally used his company credit card for the purchase, intending, for example, to use a personal credit card instead, he should have been alerted to his mistake when he saw a $188 purchase on his company credit card from a food store.

Another red flag for the Claimant should have been the long receipt from Martin's Food for the June 20th transaction, showing purchases of 77 food items in the amount of $188.62 that he turned into Mr. Schramm together with his July 17 statement. A

reasonable person would have realized his mistake at that time and have taken steps to correct it. The Claimant, however, did nothing between the time he received his statement on or about July 18, 2008, and his receipt of the charge letter dated August 14, 2008 to indicate he had made a mistake in the June charges that he submitted. This was more than sufficient time for the Claimant to have taken corrective action had the purchase been "accidental", as the Claimant contends.

What the Board has stated with regard to the $188 purchase from Martin's Food applies to the purchase of alcohol and cigarettes from Blankenship's Country Store in the amount of $36.86 on June 23, 2008. If the purchase had been accidental, one would have expected some effort to correct the mistaken purchase prior to receipt of the charge letter dated August 14, 2008.

Nor is the evidence consistent with an act of unilateral "borrowing" of the money with the intent to pay it back because the Claimant was low of funds at the time the purchases were made. There is no evidence in the record of any attempt on the part of the Claimant between the time of the purchases on June 20, and 23, 2008, respectively and the receipt of the charge letter dated August 14, 2008, to pay the money back. The approximately seven-week period between date of purchase and date of receipt of charges was more than ample time to make arrangements to pay back the money owed.

The fact that the Claimant could not account for the two additional purchases in the amount of $50.12 and $15.93 from Blankenship's Country Store in June, 2008, is

more evidence that he was acting with intention and not by accident. The evidence indicates that Blankenship's does not sell any products that would be needed by the Claimant in connection with his job. Nor was he required to buy food for employees in conjunction with his job at any time in 2008. And if the purchases were by mistake, a reasonable person acting honestly would have discovered the mistake and taken corrective action before receiving the charge letter. Similarly, if the purchases were made with the intent to pay the company back, there should have been some effort to pay the money back long before the charge letter was received by the Claimant.

The record establishes by substantial evidence that the Claimant used his company Visa Procard to misappropriate more than $200 from the Carrier in June, 2008. The Claimant provided no explanation for the June, 2008, purchases in issue that would permit a reasonable person to believe that they were made by mistake or with the intent to pay back the company at a later date. Under these circumstances the Carrier was entitled to conclude that the Claimant acted intentionally. Intentional misappropriation by an employee of money or goods in excess of $200 from his employer breaches the trust

necessary for a proper employer/employee relationship and is generally considered just cause for discharge. The Board will not disturb the Carrier's dismissal action in this case. See Third Division Awards Nos. 33387, 37548, and 26780. Contrast Third Division Award No. 37598 where dismissal of the claimant was reversed because of the absence of fraudulent intent.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant not be made.

Sinclair Kossoff, Referee & Neutral Member

Chicago, Illinois
May 4, 2009