

BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 924

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION
IBT RAIL CONFERENCE**

and

**UNION PACIFIC RAILROAD COMPANY
(FORMER CHICAGO & NORTHWESTERN TRANSPORTATION COMPANY)**

Case No. 267

Award No. 243

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

1. The dismissal of Mr. M.E. Lubbs for his alleged:

'... unethical conduct and were dishonest when you used your position, as well as, your Union Pacific Visa Procurement Card in violation of Carrier Policies. You purchased products that were not allowed under the Policy resulting in Union Pacific Railroad being substantially overcharged for railroad material received over the course of a period ending September 30, 2004. You also used your Union Pacific Visa Procurement Card for personal gain by receiving gratuities (merchandise).

These actions indicated a violation of Union Pacific Visa Purchasing Card Policy, especially: 1. Overview – Section 1 – General Information, 2. Policies – Section 3 – What Can Not Be Bought, 3. Procedures – Section 2 – Using Purchasing Card; the Carrier's Statement of Policy Concerning Business Conduct and Ethics; Rule 1.13 – Reporting and Complying with Instructions; Rule 1.9 – Respect of Railroad Property; Rule 1.19 – Care of Property; Rule 1.26 – Gratuities; Rule 1.6 – Part 4 (Dishonest) and System Special Instructions Item 10-A, 1.6 Conduct.'

was without just and sufficient cause and in violation of the Agreement (System File 3KB-6877D/1418911D).

2. As a consequence of the violation referred to in Part (1) above, Mr. M.E. Lubbs shall now be allowed the remedy prescribed in Rule 19D."

FINDINGS:

At the time of the events leading up to this claim, the Claimant was employed by the Carrier as a Manager of Track Maintenance, a management non-Agreement position.

The Claimant was discharged from the Carrier's service on charges that he abused his authority and misused his Visa Procurement Card in violation of Carrier Rules. After the Claimant's discharge, the Claimant attempted to exercise seniority. By letter dated January 21, 2005, the Claimant was directed to appear for a formal investigation and hearing on charges that the Claimant had been dishonest, engaged in unethical conduct, and violated Carrier Rules and Policies by allegedly misusing his Visa Procurement Card. After a postponement, the hearing was conducted on February 2, 2005. By letter dated February 10, 2005, the Claimant was informed that as a result of the investigation, he had been found guilty as charged and was being assessed Level 5 discipline, which is dismissal from the Carrier's service. The Organization thereafter filed an appeal, challenging the Carrier's decision to dismiss the Claimant. The Carrier denied the claim.

The Carrier initially contends that the Claimant's own admissions during the investigation were enough to prove that the Claimant was guilty as charged. The Carrier emphasizes that the Claimant admitted to knowing the proper channels and the proper place to order the products, and he admitted that he ordered materials from the Florida companies. The Claimant further admitted that he knew the products that he improperly purchased from the Florida companies were more expensive than if purchased from the store house. The Carrier emphasizes that the Claimant also admitted to accepting gratuities from the Florida companies; no matter how the Organization attempts to

characterize the "hat or two," these items still are considered gifts.

Pointing to the Organization's argument that the products that the Claimant ordered from the Florida companies were of superior quality compared to the products offered in the store house, the Carrier insists that the product quality is not at issue here. The Carrier maintains that the issue is whether the Claimant went outside his authority and outside the proper channels in procuring and using these items. The Carrier insists that the Claimant did so, and that he violated Carrier Rules and misused his Carrier-supplied card. The Claimant admittedly knew what was required of him, but he did not comply with those requirements. The Carrier asserts that on this record, it has presented substantial evidence of the Claimant's guilt, and the instant claim therefore should be denied in its entirety.

The Carrier then contends that there is no specific requirement in the Agreement that a hearing be offered in the case of an employee who is dismissed when occupying a non-Agreement position. The Carrier asserts that the Claimant was not entitled to a hearing because he was occupying a non-Agreement position as a manager. Moreover, as a dismissed employee, the Claimant has no rights under the Agreement and cannot now claim that he was not given rights under the Agreement when he was not covered by the Agreement. The Carrier insists that any procedural argument made by the Organization is without merit.

The Carrier nevertheless argues that it did not commit any procedural violations in handling this matter. The Carrier asserts that it did not violate Rule 19 because the Notice of Investigation was sent within the ten-day time limit, which was triggered in this

case when the Claimant attempted to exercise his seniority. The Carrier points out that the Claimant attempted to exercise his former seniority in the Maintenance of Way craft on January 17, 2005, and the Notice of Investigation was sent on January 21, 2005. The Carrier insists that there is no merit to the Organization's assertion of a time-limit violation.

The Carrier goes on to argue that there is no merit to the Organization's contention that the Carrier unilaterally postponed the hearing in violation of the Agreement. The Carrier asserts that it included the postponement notice with the Notice of Investigation, and this practice is proper under the Agreement. The Carrier maintains that the Claimant was in no way harmed by the postponement, so this procedural objection is without merit. The Carrier further insists that the Notice of Investigation was adequate in that it gave the Claimant sufficient information about the charges so that he would be able to prepare an adequate defense. The Carrier emphasizes that the Claimant and his Organization representative were ready to defend against the charges at the hearing. Similarly, the Carrier contends that there is no merit to the Organization's assertion that the hearing officer behaved in an inappropriate manner. The Carrier maintains that there was no evidence of bias or impropriety on the part of the hearing officer or the witnesses.

The Carrier emphasizes that the Claimant need not have been given a hearing in connection with his attempt to exercise seniority after being dismissed from the Carrier's service. The Carrier nevertheless asserts that there were no procedural violations, and the instant claim should be denied.

The Carrier goes on to argue that the Board's role is to verify whether substantial

evidence was adduced at the hearing to support a finding of guilt. Once the Board establishes that the Carrier has presented such substantial evidence, the Board lacks authority to overturn the level of discipline assessed. The Carrier asserts that although the discipline may seem harsh, the discipline cannot be overturned unless it is found to be arbitrary, capricious, or an abuse of Carrier discretion.

The Carrier insists that the discipline at issue was not arbitrary or capricious. The Carrier emphasizes that the Claimant committed serious rule violations and accordingly was assessed Level 5 discipline. The Carrier admittedly committed these serious rule violations, and his dismissal was completely warranted. The Carrier maintains that the Claimant's dishonest conduct cannot be rewarded. The Claimant stole from the Carrier and betrayed the trust placed in him as a manager. Moreover, the Carrier points out that the Claimant's actions could have resulted in great harm in that he used unapproved and untested materials. Such misconduct may be disciplined only by dismissal from the Carrier's service.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Organization initially contends that the Carrier committed procedural violations in connection with its handling of this matter, and thereby violated Rule 19A of the Agreement, by failing to timely issue the Notice of Investigation and by unilaterally postponing the investigation. The Organization emphasizes that there was no request for a postponement, nor was there any assertion that additional time was needed to conduct the investigation and secure the presence of witnesses or representatives.

Moreover, the Organization insists that there was no evidence to support the Carrier's assertion that the postponement was in accordance with accepted past practice on the property.

The Organization additionally asserts that the Carrier committed further procedural violations by failing to issue a precise letter of charge and by the fact that the hearing officer held a conference with two Carrier witnesses just prior to the investigation.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The parties being unable to resolve their dispute, this matter came before this Board.

This Board has reviewed the procedural arguments raised by the Organization, and we find them to be without merit. With respect to the issue as to whether or not the notice was issued within ten days, the record contains awards that state that the time limits begin to toll when the Claimant attempts to exercise his seniority. In this case, the Claimant attempted to exercise his seniority within ten days of the issuance of the Notice of Hearing. This Board finds that the notice was adequate and that the hearing officer conducted the hearing fairly and that the Claimant was guaranteed all of his due process rights.

This Board has reviewed the evidence and testimony in this case, and we find that there is sufficient evidence in the record to support the finding that the Claimant improperly abused his authority and misused his VISA procurement card in violation of

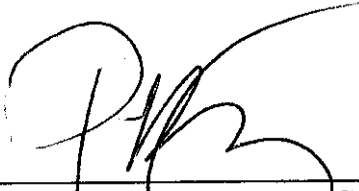
the Carrier's rules. The Claimant admittedly purchased products that were not allowed under the policy and was substantially overcharged for some of the material. In addition, the Claimant admitted that he received personal gratuities for making the purchases that were not proper.

Once this Board has determined that there is sufficient evidence in the record to support the guilty finding, we next turn our attention to the type of discipline imposed. This Board will not set aside a Carrier's imposition of discipline unless we find its actions to have been unreasonable, arbitrary, or capricious.

The Claimant in this case has been employed by the Carrier since 1972. It is unfortunate that the Claimant engaged in this dishonest activity because that type of activity does justify his removal, even after such lengthy service with the Carrier. This Board has stated in the past that honesty is a crucial element of employment on the railroad. In this case, the Claimant held a management position and abused his authority and misused the Carrier VISA card for his own gain. This Board cannot find that the Carrier acted unreasonably, arbitrarily, or capriciously when it terminated the Claimant's employment in this case. Therefore, the claim will be denied.

AWARD:

The claim is denied.



PETER R. MEYERS
Neutral Member



ORGANIZATION MEMBER

DATED: 5-30-06



CARRIER MEMBER


DATED: 5-30-06

LABOR MEMBER'S DISSENT
TO
AWARD 243 OF SPECIAL BOARD OF ADJUSTMENT NO. 924

(Referee Meyers)

It seems ironic that the parties to an agreement would spend the time, energy and expense negotiating rules by which they will be governed only to have one of the parties then argue in this forum that it need not be governed thereby. To complicate matters, the majority simply ignored the provision of Rule 19A that requires an investigation shall be postponed for good and sufficient reasons on request of either party. No request was made by the Carrier to postpone the investigation. It unilaterally postponed the investigation which was challenged at the start of the investigation, in the on-property correspondence and in the Organization's submission to this Board. However, the majority simply ignored the Organization's position. Therefore, this dissent is required.

Respectfully submitted,


D.D. Bartholomay
Employee Member