

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6302
AWARD NO. 205, (Case No. 211)**

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

vs

UNION PACIFIC RAILROAD COMPANY

William R. Miller, Chairman & Neutral Member
K. D. Evanski, Employee Member
P. Jeyaram, Carrier Member

Hearing Date: April 10, 2012

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

- 1. The dismissal of Mr. K. M. Evans for violation of General Code of Operating Rule 1.6 (Dishonesty) in connection with paying himself for time not worked on January 16, 18, 23 and 28, 2010 and reported transversal of required tracks on some or all of these days is based on unproven charges, unjust, unwarranted and in violation of the Agreement (System File J-1048U-255/1536546).**
- 2. As a consequence of the violation referred to in Part 1 above, Mr. Evans shall have any mention of this incident removed from his personal record and be compensated for all time that he was unjustly withheld from service."**

FINDINGS:

Public Law Board No. 6302, 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 February 11, 2010, Carrier notified Claimant to appear for a formal Investigation on February 15, 2011, which was mutually postponed until February 26, 2010, concerning in pertinent part the following charge:

"...to develop the facts and place responsibility, if any, that while employed as Track Inspector on Gang 5280, at Lexington, Nebraska, you allegedly paid yourself for time not worked January 16, 2010, January 18, 2010, January 23, 2010 and January 28, 2010, and reported transversal of track on required documents without performing transversal of required tracks on some or all o these days.

The investigation on these allegations was completed on January 28, 2010, and, if substantiated, would constitute a violation of Rule 1.6 (Dishonesty), as contained in the General Code of Operating Rules, effective April 3, 2005. Please be advised that if you are found to be in violation of this alleged charge, the discipline assessment may be a Level 5, and under the Carrier's UPGRADE Discipline Policy may result in a permanent dismissal."

On March 11, 2010, Claimant was found guilty as charged and was assessed a Level 5 discipline and dismissed from the service of the Carrier.

It is the position of the Organization that the Claimant was denied his right to a "fair and impartial" Hearing because the Carrier had pre-determined the guilt of the Claimant and the charges were not precise in violation of Rule 48(a) and (c) making it impossible to defend. The pre-determination of guilt was exhibited by a review of the transcript which reveals that the Hearing was conducted as a formality required by the Agreement rather than an objective inquiry of pursuit of truth. It noted that a majority of the Investigation focused on a date (January 10, 2010) that was never indicated in the Notice of Investigation. Additionally, it asserted that the Hearing Officer who was at the Hearing should have rendered the discipline because he could better judge questions of credibility and factual determination rather than an absent Carrier official. It stated that on the procedural errors alone the discipline should be set aside and the claim sustained without even reviewing the merits. It further argued that on the merits the Carrier failed to meet its burden of proof. It stated that a close examination of the record reveals that the Carrier attempted with its on-property correspondence to make its case against the Claimant rather than at the Investigation which is evident by the fact that it admitted evidence about the dates of January 16, 18, 23, and 28, 2010, in its on-property correspondence while there was no investigative inquiry into those dates during the formal Hearing. It concluded by requesting that the discipline of the Claimant who had 31 years of unblemished service be rescinded and the claim sustained as presented.

It is the Carrier's position that the testimony of the transcript showed the Claimant paid himself for time not worked on January 16, 18, 23, and 28, 2010, and reported transversal of track on required documents without actually performing transversal of required tracks on some or all of those days. It argued that it was incumbent on the Claimant to report his time correctly, however, he did not report his time worked correctly and he falsified that time. It asserted that his excuse for the inaccurate reports would have been more credible if it had been one incident, but four or more separate incidences diminish any believability and that substantial evidence and compelling witness testimony established Claimant's guilt. It further asserted that the assessed Level 5 discipline was reasonable and consistent with established Carrier Rules and Policies and lastly there were no procedural errors or affirmative defenses that would warrant the voiding of the discipline. It closed by asking that the claim remain denied.

The Board has thoroughly reviewed the record and will first address the Organization's alleged procedural arguments. Examination of the transcript fails to substantiate that the Claimant was pre-judged nor was he subjected to "double jeopardy" because he had been disqualified from his position of Track Inspector prior to the Hearing. Additionally, the Organization asserted that the Carrier did not provide a precise Notice as required by Rule 48(c) because the primary issue investigated during the Hearing was the alleged actions the Claimant committed on January 10, 2010, despite the fact that it was not referenced in the Carrier's February 11, 2010 Notice of Investigation. The Board agrees with the Organization that the discussion of the January 10th date was inappropriate, however, because the Dismissal Letter made no reference to that date there is no proof that the Claimant was harmed because of that discussion. Lastly, the Organization argued that the Claimant was denied a "fair and impartial" Hearing because the Claimant was not judged by the Hearing Officer who had the advantage of being at the Hearing and able to judge credibility. Again, the Board agrees with the Organization that questions of credibility and factual determination are best made by a Hearing Officer rather than an absent Carrier Officer, but there are many Awards which have ruled that it is desirable to have a third party who had no direct involvement with the investigative process, therefore, the Board has determined that each case must be measured on its individual merits. The Board determines that in this instance there is no proof that the Claimant was denied his "due process" Agreement rights.

The Organization is correct that the bulk of the questioning and testimony focused on January 10, 2010, which was not referenced in the Notice of Investigation and will not be considered in the resolution of this dispute. Subsequently, Claimant was found guilty for falsification of payroll documents for January 16, 18, 23 and 28, 2010, however, review of the transcript reveals little if any questioning concerning the dates of January 18, 23 and 28th. The Carrier's denial letters of June 15 and August 6, 2010, set forth a detailed explanation as to why the Claimant was allegedly guilty of the charges, but those arguments and articulation of the allegations were not presented during the Hearing. The Carrier had an obligation to present those allegations during the Hearing at which time the Claimant and Organization could have presented an alternative theory or cross-examined Carrier witnesses rather than after the close of the Investigation. As previously stated the Carrier's rendition of what transpired on January 18, 23 and 28, 2010, were not made during the Hearing, to the extent of its denial letters, and the allegations made in both letters will not be considered. The Board makes no comments on the accuracy of that analysis, but instead has determined that it was untimely. Review of the transcript also substantiates that the Carrier charges had a rambling exploratory nature to them which was exemplified by the testimony of D. J. Miller, Director of Track Maintenance, who on page 29 testified in pertinent part:

"A -what I've got here is a summary of some dates in question that we have some

questions on where there were some overtime reported, January 6- 16th, I'm sorry, the 17th, 19th, 24th and 29th. Now some of these dates are probably absolutely- there's no issue and some of there may be. So I- the reason- this is just one area of the investigation that we thought was appropriate to get to the bottom of what- what these times changes might pertain to."

On the same page of the transcript the Director of Track Maintenance went on to testify as follows:

"A ...and on the 28th, there was two hours of overtime where the inspection records indicated 4:58 p.m., which may be totally legitimate in that case."

Review of the transcript reveals that absent the lengthy discussion of the January 10, 2010, there was sufficient testimony presented to examine the dates of January 16 and 18, 2010. Director of Track Maintenance D. J. Miller testified on pages 29 - 30 and 41 that on January 16, 2010, he personally observed Claimant's assigned hy-rail vehicle at the depot at Lexington at 4:45 p.m. and his personal vehicle gone. It was not disputed that the Claimant's working hours were 0700 to 1530. The Track Inspection and Defect Report entered by the Claimant for tracks he inspected on that date show that he entered his report at 4:32:54 p.m., reporting mainline, yard tracks, and switches inspected, mainline track traversed, and track defects noted. The testimony also indicates that the Claimant possessed on-track authority from 0733 to 1216 hours and he reported eight hours of straight time and three hours of overtime. Claimant's track inspection was completed at 4:32:54 p.m. and his time worked was entered at 16:32:36 hours which does not add up to 11 hours of work on January 16th.

Examination of January 18, 2010, reveals that the Claimant reported he worked eight hours at straight time and one hour overtime. Claimant entered his Track Inspection and Defect Report at 1:10:18 p.m., reporting mainline tracks inspected, mainline track traversed, and mainline track defects noted. The testimony also indicated the Claimant only possessed on-track authority from 0730 to 1232 Hours with no explanation from the Claimant as to what he did after 1232.

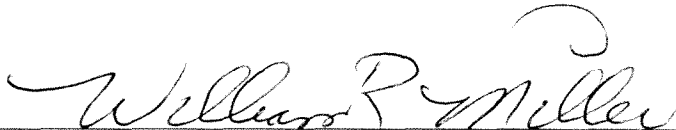
Substantial evidence was adduced at the Investigation that the Carrier met its burden of proof that the Claimant was guilty as charged for the dates of January 16 and 18, 2010, however, the Board is not persuaded that he was guilty of falsification of payroll for January 23 and 28, 2010.

The only issue remaining is whether the discipline was appropriate. At the time of the incident the Claimant had 31 years of unblemished service. The Board does not excuse or condone the Claimant's behavior, however, due to longevity of service with a clear work record the Board finds and holds that the dismissal is reduced to a lengthy suspension which is

corrective in nature and in accordance with the Carrier's UPGRADE Discipline Policy. Claimant will be reinstated to service with seniority intact and all benefits unimpaired with no back-pay. The Board also forewarns the Claimant that he needs to follow all instructions and directives upon reinstatement.

AWARD

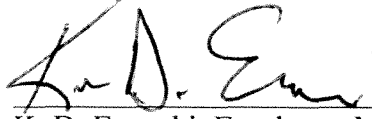
Claim partially sustained in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed.



William R. Miller, Chairman



P. Jeyaram, Carrier Member



K. D. Evanski, Employee Member

Award Date: June 18, 2012