

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6302
AWARD NO. 206, (Case No. 212)**

**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. P. C. Peterson for the violation of General Code of Operating Rules 1.6 (Conduct), Rule 1.10 (Games, Reading or Electronic Devices) and Rule 1.13 (Reporting and Complying With Instruction) in connection with failure to perform his duties protecting contractors working in the foul of the mainline tracks and overseeing pile driving operations to protect Union Pacific Track Structure on February 12, 2010 is based on unproven charges, unjust, unwarranted and in violation of the Agreement (System File J-1048U-256/1536833).**
- 2. As a consequence of the violation referred to in Part 1 above, Mr. Peterson shall have any mention of this incident removed from his personal record and be compensated for all time lost 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 19, 2010, Carrier notified Claimant to appear for a formal Investigation on March 3, 2010, concerning in pertinent part the following charge:

"...to develop the facts and place responsibility, if any, that while employed as Track Patrol Foreman at South Salt Lake City, Utah, near Milepost 739.46, Provo Subdivision, at approximately 1300 hours on February 12, 2010, you allegedly failed to perform your duties of protecting contractors working in

the foul of mainline tracks and overseeing pile driving operations to protect Union Pacific's track structure.

These allegations, if substantiated would constitute a violation of Rule 1.6 (Conduct), Rule 1.10 (Games, Reading or Electronic Devices) and Rule 1.13 (Reporting and Complying with Instructions) as contained in the General Code of Operating Rules, effective April 3, 2005, and the System Special Instructions, effective June 22, 2009. 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 permanent dismissal."

On March 9, 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 and the fact that the Carrier disqualified the Claimant on February 19, 2010, from the position of Track Patrol Foreman, the same day it issued disciplinary charges. It further argued that the Hearing Officer acted improperly in allowing hearsay testimony and failed to have all employees with direct knowledge of the incident present for cross-examination. Additionally, it asserted that the Hearing Officer should have rendered the discipline because he could better judge questions of credibility and fact rather than an absent Carrier official. Lastly, it argued that the Carrier's declination of the appeal was untimely. 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 Claimant's admission that he was sleeping does not establish a rule violation in this instance, because the Carrier had not cited any Rule that prohibited such conduct. It concluded by requesting that the discipline of the Claimant who had 14 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 Claimant was a Foreman on February 12, 2010. Track Supervisor T. S. Payne testified that on the aforementioned date he had been notified by two Foremen (Gunther and Fordham) they could not make contact with the Claimant by radio, cell phone, or Nextel communication. According to it Payne also attempted to contact the Claimant with the same result, therefore, Payne went to where the Claimant was working to see if he was okay. Upon arrival at the work site, Mr. Payne found the Claimant slumped over, asleep inside his vehicle. Payne took pictures of the Claimant

and had to physically shake him before he awakened. In addition, the Claimant had a lap top computer open inside the vehicle. Payne testified he had previously instructed all Foremen in his charge including the Claimant not to be using those devices while performing safety sensitive duties. It argued that the Claimant did not deny that he had fallen asleep and he had a Joint Track and Time Permit in effect at the time of the incident. He testified that he had worked the night shift the previous week and it had just caught up with him and he did not believe he was "careless of safety to himself and others" as the other two Foremen and the POC (Point of Contact) contact person were providing protection. It further asserted that the charges were proven, the Level 5 discipline was reasonable and consistent with established Carrier Rules and Policies and lastly there were no procedural errors or affirmative defenses that could warrant the voiding of the discipline. Lastly, it argued that there was no time limit violation as the parties had agreed to a time limit extension. 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 those arguments does not persuade the Board that the Claimant was denied his right to a "fair and impartial" Hearing, however, the question of whether or not the Carrier's declination of the second level appeal was untimely or not needs to be addressed in depth.

The timeline for the handling of this case is as follows:

- * Charges filed -- February 19, 2010.
- * Formal Investigation held -- March 3, 2010.
- * Claimant dismissed on March 9, 2010.
- * Organization filed a claim and appealed discipline to first level Officer -- May 3, 2010.
- * Carrier first level Officer denied claim -- June 23, 2010.
- * Organization rejected first level declination and advised that Officer his decision would be appealed -- June 28, 2010.
- * Organization appealed claim to highest designated Officer -- August 20, 2010.
- * Highest level designated Officer denied appeal -- Letter dated July 2, 2010, which was a typographical error as it could not have been written prior to the Organization's appeal, additionally, the letter was postmarked October 20, 2010, **and sent on the 61st day** (Rule 49 - Time Limit On Claims states that the handling of a claim and its timeliness will be governed by the postmark date of the U.S. Mail service.

- * Claim conference was held with no resolution -- February 8, 2011.
- * Organization advised Carrier that its final level declination was untimely -- March 23, 2011.
- * Carrier responded to the Organization's last letter and stated its second level declination was not untimely because it had been granted a time limit extension -- May 4, 2011.

There is no disagreement between the parties that Rule 49 - Time Limit On Claims requires that all initial claims and/or appeals must be responded to by the Carrier within 60 days or else the claim will be allowed as presented without being considered as a precedent or waiver of the contentions of the Carrier as to other similar claims or grievances.

There is no doubt that the Carrier sent its highest level declination on October 20, 2010, which was the 61st day. The question at issue is whether the Organization granted the Carrier an extension of the time limits to respond to its appeal. On March 23, 2011, the Organization advised the Carrier that its declination was untimely and requested that the claim be immediately sustained because Rule 49 (a)(3) had been violated. On May 4, 2011, the Carrier responded in pertinent part as follows:

"During our conference, it was reaffirmed that this claim was not untimely because we had agreed to a time limit extension. Attached is my conference sheet with my note on it stated no procedural issues. Please confirm."

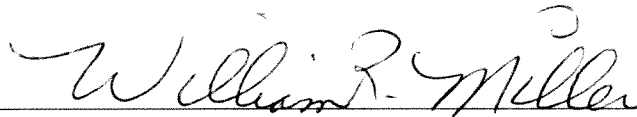
The Organization did not confirm the Carrier's contention that there was an agreed to time limit extension, or even discussion on the issue. It asserted that the claims conference sheet signed by the participants is the controlling document regarding the claims conference and it does not have any mention nor acknowledgement of a mutually agreed to time limit extension for the Carrier to respond to the claim. The Organization's position is consistent with its letter of March 23, 2011, when it asserted that the Carrier's declination was untimely.

The Board has determined that this dispute is governed by the precedent concerning Rule 49(a)(3) that requires that the time limits for the handling of claims must be strictly enforced in accordance with the parties' Agreement. Countless Boards have held that when the Agreement clearly sets forth time limit requirements with which to render a decision initially or upon appeal it will be strictly enforced so as to protect the integrity of the Agreement without further review

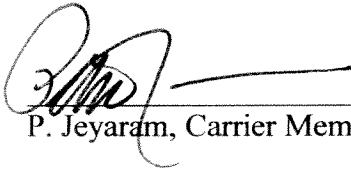
of any other issues (See First Division Award 16366, Second Division Award 2364, Third Division Award 20519, Fourth Division Award 4638 and P.L.B. 3397, Award No. 69 as examples of that principle). The Board will not address the merits of the claim as it evident that the Carrier violated the time limit provisions of the Agreement in the handling of this dispute. The Board finds and holds that the dismissal is rescinded and the Claimant is to be reinstated with seniority intact and all benefits unimpaired and made whole for all loss of monies at the straight time rate of pay.

AWARD

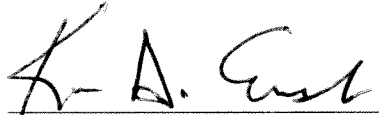
Claim sustained.



William R. Miller, Chairman



P. Jeyaram, Carrier Member



K. D. Evanski, Employee Member

Award Date: June 18, 2012