

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6402
AWARD NO. 164, (Case No. 185)**

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

vs

**UNION PACIFIC RAILROAD COMPANY (Former Missouri Pacific
Railroad Company)**

William R. Miller, Chairman & Neutral Member
T. W. Kreke, Employee Member
K. N. Novak, Carrier Member

Hearing Date: February 23, 2011

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

- 1. The Carrier's discipline (Level 5 Dismissal) of Mr. A. Lawson issued by letter dated July 27, 2010 in connection with alleged violation of General Code of Operating Rule 1.6 (Dishonesty) was unjust, capricious, based upon unproven charges and in violation of the Agreement (System File UP-521-JF-10/1536832).**
- 2. As a consequence of the Carrier's violation outlined in Part 1 above, Mr. Lawson shall have all charges dismissed, have the Level 5 discipline removed from his record and have all other rights guaranteed by Collective Agreement Rule 21(f)."**

FINDINGS:

Public Law Board No. 6402, 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.

The record indicates that the Claimant entered the service of the Carrier on February 13, 2006, and on the date of the incident was working as a Trackman.

On June 10, 2010, the Carrier advised Claimant to appear for a formal Investigation on June 17, 2010, which was postponed until July 20, 2010, concerning in pertinent part the following charge:

"...to develop the facts and place your responsibility, if any, in connection with

you possibly providing false information and misrepresented facts on your employment application that was of such a nature that the employee would not have been hired if the Carrier had timely knowledge of its."

On July 27, 2010, Claimant was notified that he had been found guilty as charged and assessed a Level 5 and dismissed from service.

It is the position of the Organization that the Carrier erred in holding the Investigation in "absentia" because neither the Carrier or the Organization had any knowledge as to why he did not attend and for all they knew he might have been ill or in a automobile accident and on that basis alone the Investigation should have been postponed . It argued that because the Hearing was held in absentia the Claimant was denied a fair and impartial Investigation and the discipline should be rescinded and the Claim sustained as presented.

It is the position of the Carrier that the Claimant was not denied a fair and impartial Investigation and it did not err in holding the Hearing in absentia. It argued that the Claimant was given two postponements prior to the Hearing, but elected not to attend. It further argued that the testimony offered during the Hearing verified that the Claimant was not forthright about his prior work history and according to it if they had known his employment record it would have never hired him. It closed by asking that the discipline not be disturbed and the Claim remain denied.

The Board thoroughly reviewed the transcript and the record of evidence and will first address the Organization's argument that the Investigation was not fair and impartial because it was held in "absentia". The record indicates the Claimant chose not to appear at the Investigation after being given two postponements and he offered no proof that he was ill or had some other substantive reason which did not allow him to attend the Hearing. The Carrier did not violate the Claimant's right to a fair and impartial Hearing, in this instance, when it was held in absentia. It is further noted there is no requirement that an accused must attend their formal Investigation, but when a charged employee chooses not to attend, he does so at his own potential peril because he offers no rebuttal or alternative theory or story. See Second Division Awards 11763, 13217, 13360, 13491, 13924, 13957 and P.L.B. No. 7426, Award No. 11. The dispute will be resolved on its merits.

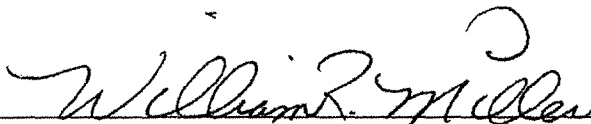
Turning to the merits the Board has determined that the record substantiates that during a Civil Court trial involving the Claimant and the Carrier evidence was discovered during a deposition taken from the Claimant on May 13, 2010, that he proffered a false work history. That deposition revealed that he had been asked to resign from the Army and terminated from Riviana Foods, City of Pearland and City of West University. The record further indicates that he offered incorrect dates of employment and had listed one employer (University of Houston) that he had never worked for. Additionally, the Claimant was specifically asked to disclose any

prior injuries or events that physically affected him. He stated that he had no prior physical incidents stemming from his prior employment, however, his deposition testimony revealed that he, in fact, had suffered multiple personal workplace injuries and had made claims against various employers. Because the Claimant elected not to attend the Investigation the evidence that was presented by the Carrier, which was substantial, stands un-refuted. It is clear that the Carrier met its burden of proof that Claimant was guilty as charged.

The only issue remaining is whether the discipline was appropriate. At the time of the dispute Claimant had a little over four years of service when he committed a serious breach of Rules, therefore, the discipline assessed was in accordance with the Carrier's UPGRADE Discipline Policy. The Board finds and holds that the discipline will not be set aside because it was not arbitrary, excessive or capricious.

AWARD

Claim denied.



William R. Miller, Chairman



K. N. Novak, Carrier Member



T. W. Kreke, Employee Member

Award Date: June 27, 2011