

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 7426

AWARD NO. 8, (Case No. 8)

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

vs

UNION PACIFIC RAILROAD COMPANY (SPWL)

William R. Miller, Chairman & Neutral Member

T. W. Kreke, Employee Member

B. W. Hanquist, Carrier Member

Hearing Date: September 22, 2010

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

1. The Level 5 discipline (dismissal) imposed upon Mr. C. Richey for alleged violation of General Code of Operating Rule 1.6 (Conduct) in connection with allegedly failing to report stalking felony conviction to Timekeeping, the Company, or any Union Pacific Official is unjust, unwarranted, based on unproven charges and in violation of the Agreement (Carrier's File 1523522).
2. As a consequence of Part 1 above, we request that Claimant C. Richey '...now be reinstated to the service of the Carrier on his former position with seniority and all other rights restored unimpaired, compensated for all wage and benefit loss suffered by him since his removal from service, and the alleged charge(s) be expunged from his personal record.' (Employees' Exhibit 'A-2')."

FINDINGS:

Public Law Board No. 7426, 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.

There is no dispute between the parties that the Claimant a short term employee (hired August 8, 2006) was dismissed after he pleaded guilty to Stalking - Felony on April 27, 2009, and was sentenced to be incarcerated for 20 months by the Circuit Court of the State of Oregon for Lane County. Claimant's Investigation was held in "absentia" while he was in jail.

On May 6, 2009, Carrier notified Claimant to appear for a formal Investigation on May 13, 2009, which was mutually postponed until June 16, 2009, concerning in pertinent part the following charge:

"...to develop the facts and place responsibility, if any, that while employed as Welder on Gang 8972, at Eugene, Oregon, near Milepost 650, at approximately 0700 hours, on April 27, 2009, you allegedly failed to report stalking felony conviction to Timekeeping, the Company, or any Union Pacific Official.

These allegations, if substantiated, would constitute a violation of Rule 1.6, (Conduct) and any other applicable rules that may be brought up during the investigation that are contained in the General Code of Operating Rules, effective April 3, 2005, and in the System Special instructions, effective November 17, 2008. 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 June 25, 2009, Claimant was notified that he had been found guilty as charged and was assessed a Level 5 discipline and dismissed from service.

It is the Organization's position that the Carrier did not provide a fair and impartial Investigation because it failed to grant a postponement so as to provide the Claimant an opportunity to appear at the Hearing. It further argued that the Carrier did not meet its burden of proof and the discipline was excessive. It concluded by requesting that the discipline be set aside and the Claim be sustained as presented.

It is the position of the Carrier that Claimant was afforded a fair and impartial Hearing and it had no obligation to postpone the Investigation for 20 months because Claimant was incarcerated. It argued that Claimant's incarceration was self-imposed, therefore, it did not err when it proceeded with the Hearing to determine whether or not the Claimant was guilty of the aforementioned charges. It closed by stating that the charges were proven by substantial evidence and it asked that the discipline not be disturbed and the Claim remain denied.

The Board will first address the Organization's assertion that the Investigation was not fair and impartial because it was held in "absentia". Conviction of a crime and incarceration does not constitute a valid reason to be absent from an Investigation nor is it an excuse for postponement. In the instant case, Claimant's jail time was the result of his voluntary choice to violate state laws regarding "stalking" which is a felony. The Carrier had no obligation to postpone its Hearing for 20 months until the Claimant could be released from jail. The Carrier in

the instant case did not violate the Claimant's right to "due process" when the Investigation was held in "absentia".

Turning to the merits the record is clear Claimant pled guilty and was convicted of a Felony, Stalking on April 27, 2009 and was sentenced to be incarcerated for 20 months by the Circuit Court of the State of Oregon for Lane County. Rule 1.6 states in pertinent part the following:

"The conduct of any employee leading to conviction of any felony is prohibited. Any employee convicted of a felony must notify the proper authority of that fact within 48 hours after the employee receives notice of the conviction."

The record is clear that Claimant violated the first sentence of Rule 1.6 and testimony further substantiates that he did not note this felony conviction to the Carrier. Mr. A. M. Buelna, Manager of Track Maintenance testified on page 53 of the Transcript that employees are required to report within 48 hours if they have been convicted of a felony. Buelna was Claimant's Supervisor and his testimony was not rebutted that the conviction was never reported to him. On page 54 he further testified that Claimant never reported anything about the conviction to GMS which is the timekeeping for the Engineering Department or any other Carrier officer. That testimony was not rebutted nor was there any alternative theory or story provided. Carrier met its burden of proof that the Claimant violated the charges levied against him.

The only issue remaining is whether the discipline was appropriate. At the time of the dispute Claimant was a short term employee who was convicted of a felony which he failed to report to the Carrier. Claimant's violation was a serious breach of Rules and the discipline assessed was in accordance with the Carrier's UPGRADE Discipline Policy, therefore, 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



B. W. Hanquist, Carrier Member



T. W. Kreke, Employee Member

Award Date: January 18, 2011