

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD 6302

**NMB NO. 182
AWARD NO. 179**

PARTIES TO DISPUTE

CARRIER

Union Pacific Railroad

Carrier's File

1517749

AND

ORGANIZATION

Brotherhood of Maintenance of Way Employees

System File

C-0948U-152

Division of International Brotherhood of Teamsters

STATEMENT OF CLAIM

1. The dismissal of System Fuel Truck Driver Kenneth Charles Reinke for his alleged violation of Rule 1.6 (Conduct) in connection with alleged "... stealing company fuel for your own use", was arbitrary, excessive, on the basis of unproven charges and in violation of the Agreement.
2. System Fuel Truck Driver K.C. Reinke shall "... be immediately reinstated to service with the Union Pacific Railroad Company with all of his Maintenance of Way and Structures Department seniorities restored unimpaired, his vacation rights restored unimpaired, all other Railway Labor Act employment rights restored unimpaired, as well as hourly compensation for all hours he has been denied since being removed from service until he is returned to service * * *."

STATEMENT OF BACKGROUND

At the time the events occurred that resulted in Claimant's dismissal from service, Claimant, with close to four (4) years of service and a pristine work record, had established and held seniority as a System Fuel Truck Driver regularly assigned to Gang 8567 in Portland, Oregon and Pulga, California under the direct supervision of Foreman Derek J. Dahms.

At some unspecified time in February of 2008, Manager of Track Programs, James A. Curtiss responsible for Gangs 8567 and 8557 received an anonymous voice mail telephone message apprising that, at the time Yard Gang 8567 was working in Portland, Oregon, the fuel truck driver was stealing fuel. Approximately a month and half later (in and around March / April / May, 2008), Curtiss received a second anonymous voice mail telephone message apprising that, at the time Gang 8567 became an Undercutter Gang and working in Pulga, California, the theft of Company fuel continued. In response to this second anonymous voice mail, Curtiss contacted the Carrier's Special Agent Police Department in Portland apprising of the information he had received regarding the theft of Company fuel and, in turn, the Police Department assigned Senior Special Agent, Hazardous Materials, Dan Milovanovic to investigate the matter. Initial contact between Curtiss and Milovanovic occurred sometime in October of 2008, wherein Curtiss informed Milovanovic he had information from Machinist Eric Smith that Claimant was involved in the theft of Company fuel. Acting on that information, Milovanovic commenced his investigation by first conducting a phone interview of Smith on October 23, 2008 regarding Claimant and the allegation of his stealing fuel. Between that date and January 12, 2009, Milovanovic interviewed System Switch Gang Foreman, Gang 8557, Todd G. Hawks, who also became a Claimant in connection with the allegation of stealing fuel and was tried in the same hearing as Claimant; and Kevin D. Kelso, Fuel Truck Driver and Book Truck Driver. On January 13, 2009, Milovanovic along with Special Agent Dan Woolstenhulme interviewed Claimant in person at his residence in Fruitland, Idaho, wherein Claimant denied having stolen any Company fuel. According to the record evidence, Milovanovic reported the results of his investigation to the appropriate Carrier representative(s) and, in turn, MTM, Curtiss on behalf of Carrier issued the following Notice of Investigation dated February 4, 2009 to Claimant:

Please report . . . for investigation and hearing on charges to develop the facts and place responsibility, if any, that information received on January 29, 2009, revealed that while you were employed as System Fuel Truck Driver on Gang 8567, in Portland, Oregon, and Pulga, California you were allegedly observed stealing company fuel for your own use.

These allegations, if substantiated, would constitute a violation of Rule 1.6 (Conduct), 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.

Additionally, by this Notice, Carrier informed Claimant he was being withheld from service pending the results of the investigation and hearing.

By letter dated March 17, 2009, from William A. Huber, Jr., Director Track Programs, the Carrier official who conducted the hearing, notified Claimant that upon his careful review and consideration of all the testimony contained in the hearing transcript, he found more than a substantial degree of evidence was presented to warrant sustaining the charge brought against him. Accordingly, Huber further apprised Claimant he was being assessed a Level 5 discipline for his violation of Rule 1.6 (Conduct) and dismissed from the service of the Carrier.

By letter dated March 30, 2009, the Organization filed the subject claim grieving Claimant's disciplinary dismissal from service alleging by its treatment of Claimant, Carrier had violated Rules 1, 14, 25, 26, 35, and 48 of the July 1, 2001 Collective Bargaining Agreement.

Before reaching the merits of this claim, the Board herein considers the multiple procedural violations the Organization alleges were committed by Carrier in connection with both its treatment of Claimant and the handling of the claim, thereby rendering the case against Claimant to be procedurally defective thus resulting in a sustaining award.

PROCEDURAL VIOLATIONS RAISED BY THE ORGANIZATION AND RESPONDED TO BY THE CARRIER

1. Carrier Improperly Removed Claimant From Service Pending the Hearing

The Organization submits that at hearing, Carrier failed to present any cause or reason which would justify its suspension of Claimant prior to affording him a fair and impartial investigation and that such suspension represents a disciplinary action in and of itself. The Organization posits that Rule 48 of the Controlling Agreement mandates that an investigation be held prior to the administration of discipline, citing the pertinent language of Paragraph (a) of Rule 48 which reads in pertinent part as follows:

Except as provided in Paragraphs (k), (l), and (m) of this provision, an employee who has been in service more than sixty (60) calendar days whose application has not been disapproved, will not be dismissed or otherwise disciplined until after being accorded a fair and impartial hearing.

The Organization submits that because none of the conditions set forth in paragraphs (k), (l), and (m) are applicable to Claimant's case, Carrier was without contractual authority to remove Claimant from service pending investigation. The Organization further submits in support of its position that Carrier had knowledge of the allegations against Claimant some seventy-five (75) days before it actually charged Claimant and because it did not act to withhold Claimant from service when it first had such

knowledge, it had no grounds to withhold Claimant from service pending investigation when it finally did take action.

Carrier's Response

Carrier submits that Paragraph (o) which the Organization failed to cite, gives it the contractual authority to remove an employee from service when he or she is charged with a serious rule violation. Paragraph (o) reads as follows:

It is understood that nothing contained in this rule will prevent the supervisory officer from suspending an employee from service pending hearing where serious and/or flagrant violations of Company rules or instructions are apparent, provided, however, that such hearing will be conducted within thirty (3) calendar days from the date the employee is suspended and a decision rendered within twenty (20) calendar days following the date the investigation is concluded.

Carrier contends that the charge lodged against Claimant of stealing equates to a serious violation as envisioned by Paragraph (o) of Rule 48, thus giving it the authority to withhold him from service in advance of holding the hearing.

2. Carrier Failed to Level a Precise Charge Against Claimant Prior to Commencing the Hearing

The Organization contends that the charge of "stealing fuel for your own use" which constituted the entire charge against Claimant was general and vague in nature in that it was void of any dates or specifics relative to the alleged act of "stealing fuel" for his own use. The Organization submits a charge that is definitive and certain in nature is a part of 'due process' to be accorded an accused employee, as was Claimant, of violating a Carrier rule(s) or regulation(s), in order to be guaranteed a fair and impartial hearing which includes the right of the accused employee to prepare an adequate and the best defense possible relative to the particular charge or charges specified.

Carrier's Response

Carrier holds that the Organization's assertion the charge preferred against Claimant as being vague and non-specific is completely meritless. Carrier contends the charge was specific and not general in that it plainly put Claimant on notice that the alleged misconduct he was being accused of involved the theft of gas belonging to the Company for his own personal use. As far as the criticism articulated by the Organization that the charge was devoid of any dates, Carrier retorts that the charge made clear his alleged misconduct occurred when he performed his job of Fuel Truck Driver while assigned to Gang 8567 at the locations of Portland, Oregon and Pulga,

California and that based on this information, Claimant was aware of the time parameter, meaning the dates he worked at these two locations. Contrary to the Organization's assertion with regard to this procedural challenge, Carrier maintains the charge as set forth in the notice of investigation allowed Claimant to prepare his defense and to secure both witnesses and representation as he so desired.

3. The Charge Leveled Against Claimant Was Not Timely Instituted In Violation of Rule 48 (a)

The Organization notes that the record evidence adduced at the investigation revealed that the accusation Claimant was stealing Company [diesel] gas was brought to Carrier's attention as long ago as the years 2007 and 2008, yet Carrier failed to acknowledge the information until January 29, 2009 and to finally act on the information when on February 4, 2009, it formulated the charge against Claimant and issued him the Notice of Investigation. The Organization contends that whenever in the years 2007/ 2008 Carrier learned of an alleged occurrence of gas theft allegedly committed by Claimant, that, that was the point in time when it should have invoked and scheduled an investigation. Because it waited to initiate an investigation at a much later time, the Organization submits that Carrier ran afoul of Paragraph (a) of Rule 48 which reads in pertinent part as follows:

Formal hearing, under this rule, will be held thirty (30) calendar days from date of the occurrence to be investigated or from the date the Company has knowledge of the occurrence to be investigated,

Carrier's Response

Carrier acknowledged that Manager of Track Programs, Curtiss did receive information concerning the theft of gas by the employee who held the position of System Fuel Truck Driver, but not identified by name from two (2) anonymous voice mail messages left on his telephone in the first half of 2008, but since he had no idea at that point in time if there was any truth to the information, he was not going to cite any employee for a hearing until the matter was fully investigated. Carrier notes the record evidence adduced at the formal hearing clearly establishes that when the matter was fully investigated and when it obtained proof on January 29, 2009 that Claimant apparently had engaged in an act or acts of securing Company gas he was not entitled to take, Curtiss immediately responded well within the thirty (30) days specified by the applicable provision of Rule 48 (a) and scheduled a formal hearing. Thus, Carrier avers, there is no merit to this procedural challenge raised by the Organization.

4. Claimant's Right to a Fair and Impartial Hearing Was Prejudiced by His Having to Share the Hearing With Another Charged Employee, Todd Hawks

The Organization concedes that while it is not always improper to have more than one charged employee in the same hearing, it nevertheless asserts that in holding a dual hearing with Todd Hawks, hearsay testimony that was rendered by Special Agent Milovanovic from his interview of Machinist Eric Smith pertaining to Hawks, was melded with Claimant's situation producing conflicting accounts and confusion to the extent that it negatively impacted Claimant preventing him from receiving a fair and impartial hearing. According to the Organization, Smith did not provide to Milovanovic any credible information pertaining to Claimant and it was handicapped in bringing this point to the fore since Smith was not summoned to testify. The Organization submits that had Claimant not been forced to participate in the dual hearing, it is certain that no such confusion would have existed in the record proceedings.

Carrier's Response

Carrier avers the Organization has put forth two (2) separate issues comprising this procedural challenge, the first being that Claimant participated in a hearing with employee Hawks and the second being hearsay testimony by Special Agent Milovanovic from information he obtained from Eric Smith. As to the first issue, Carrier asserts it has historically held joint hearings when employees are involved in the same incident. In the case at bar, Carrier notes that both the Claimant and Hawks were charged with committing the same offense specifically, stealing fuel. In fact, the record evidence adduced at the hearing revealed they were observed taking fuel together. As to the second issue, Agent Milovanovic's testimony pertaining to the information given him by Smith as the first person he interviewed when he commenced his investigation was not the sole basis upon which its decision was predicated to dismiss Claimant from service as the Organization so asserts. Carrier submits that the purpose of the information Milovanovic obtained from Smith was intended as an explanation of Milovanovic's investigation and that this information led to interviewing both Hawks and employee Kelso who provided ample evidence of Claimant's guilt independent of any information obtained from Smith. Accordingly, Carrier maintains no procedural defect occurred relative to this challenge by the Organization that would warrant voiding the disciplinary assessment of dismissing Claimant from its 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.

We find that none of the procedural challenges raised by the Organization warrant a finding that Carrier's case against Claimant is defective and thereby, as the Organization asserts, demands that the discipline of dismissal assessed Claimant be reversed.

With respect to the first procedural challenge referenced above, the Board concurs in the Carrier's position that the act of theft, here the alleged stealing of Company diesel gas for Claimant's personal use meets the definition of a serious and/or flagrant violation as that term was contemplated and envisioned by the Parties in formulating and agreeing to the provision memorialized in Paragraph (o) of Rule 48 of the controlling 2001 Collective Bargaining Agreement. In so holding, we find that Carrier's withholding of Claimant from service pending commencement of the investigation was proper and appropriate and contractually supported given the nature of the charged offense against Claimant. Accordingly, we therefore reject as applicable, the Organization's procedural challenge that Carrier improperly removed Claimant from service pending the hearing.

As to the second procedural challenge referenced above, the Board finds contrary to the Organization's position that the charge preferred against Claimant as stated was vague and non-specific. Although no specific dates were specified as to the precise instances Claimant was allegedly observed stealing Company fuel for his own use, nevertheless, Carrier did fix the time frame within which the alleged acts of stealing occurred by qualifying that these occurrences of theft took place at the time Claimant was performing the duties of his fuel truck driver position when he and his Gang were employed at the Portland, Oregon and Pulga, California work sites. Given what Carrier knew of the circumstances at the time it formulated the charge against Claimant, it is beyond comprehension how it could have been any more specific in propounding the statement of the charge. In so holding, we further find that Claimant was not disadvantaged in preparing an adequate and the best defense possible relative to the manner in which the charge, as stated, read. Accordingly, we therefore reject as applicable, the Organization's challenge that Carrier failed to level a precise charge against Claimant prior to commencing the hearing.

With respect to the third procedural challenge referenced above, the Board is persuaded that the sequence and timing of events does not support the Organization's position that Carrier could have and should have charged Claimant with the alleged violation of Rule 1.6 at least, if not earlier than seventy-five (75) days prior to the time it actually did level the charge against Claimant. Again, given the tenuous nature of the surrounding circumstances and the manner in which Carrier was alerted to the possible violation of the theft of Company gas by Claimant, it is our view it would not have been very prudent on Carrier's part to have proceeded to take disciplinary action against Claimant before it received the report of Milovanovic's investigation. We find that in waiting for substantiation of the alleged misconduct on Claimant's part, Carrier acted properly and, in accord with receiving the information contained in Milovanovic's

investigatory report, Carrier acted promptly in moving to initiate the hearing pursuant to Paragraph (a) of Rule 48. Accordingly, we therefore reject as applicable, the Organization's procedural challenge that Carrier failed to timely charge Claimant with the alleged violation and by so failing, the investigation was not timely held.

As to the fourth procedural challenge raised by the Organization as referenced above, after a careful review of the hearing transcript, we are simply at a loss to find any evidence in support of the Organizations' position that because employee Hawks was tried along with Claimant in the same investigation that somehow and, in some way this fact of holding a dual hearing impacted negatively on Claimant to the degree it prevented Claimant from receiving a fair and impartial hearing. Had there been the least scintilla of merit to this challenge we would have discerned it in scouring the testimony proffered by the witnesses and detecting any inconsistencies that might have caused such confusion as to prevent the hearing officer from achieving the central purpose of ferreting out the truth of the matter to the best of his ability. Accordingly, we therefore reject this fourth and final procedural challenge as having any applicability to the instant case by finding that Claimant's right to a fair and impartial hearing was not prejudiced by his having to share the hearing with employee Hawks who was also charged with the identical misconduct of stealing Company gas.

Having rejected all four (4) procedural objections raised by the Organization, we now address the merits of the claim.

The Organization asserts the crux of the instant case rests on the admitted policy instituted by Track Foreman, Derek J. Dahms, whereby he authorized Claimant and Hawks when using their personal vehicle for Company business to top off their gas tanks with Company diesel fuel as a quid pro quo for not charging mileage and not charging for overtime. The Organization disputes Dahms testimony that he made it very clear to both Claimant and Hawks that this arrangement to take Company fuel was a onetime arrangement only, as evidenced by Hawks testimony that he was left with the impression from Dahms that whenever he used his personal vehicle for Company business this arrangement to take Company diesel fuel as payment for not charging Carrier for mileage or overtime was a continuing arrangement. In this regard, Hawks admitted that he took Company diesel fuel on more than one occasion and that each time he did so, he had used his personal vehicle to perform Company business. The Organization notes that Claimant acknowledges he was given permission by Dahms to take Company fuel when he used his personal vehicle for Company business due to a shortage of Company vehicles to accomplish the job of hauling a trailer. Other than that, Claimant's testimony reflects that he never took Company diesel fuel for his own personal use.

Carrier, on the other hand, asserts that testimony rendered by Fuel Truck Driver and Book Driver, Kevin Kelso casts Claimant's denial of taking Company fuel for personal use as not representing the truth of the matter. In a written statement Kelso provided to

Special Agent Milovanovic, which statement he stood by in his testimony at hearing that he personally was aware that both Claimant and Hawks stole diesel fuel from the Company, Kelso rendered the following account pertaining to Claimant;

In or about July, 2007 while I was working as a fuel truck driver in Huntington, Claimant was fuel truck driver on the regular gang. At the end of the last day of the half approximately, Claimant pulled up to the light plant and he filled up the light plant and he also fueled up his own vehicle at the time.

Claimant was wanting to know if I would watch and see if anyone was coming and I asked him why, so he told me he needed to watch because he was gonna fuel his own truck. I told him I didn't (sic) anything to do with it, I thought he was crazy.

So he called me back when he was done. I went back to him and said he's crazy for stealing, it ain't worth losing your job over. And he informed me that Union Pacific doesn't keep a close watch of fuel and they'd never know anyway.

From that time on, Claimant continually told me that he was taking diesel and bragged about how much money he was saving.

In a continuation of his written account, Kelso referenced an eyewitness account that occurred in around April/May of 2008 when the Gang had moved to Pulga, California. According to Kelso, he was sitting in his boom truck about 12:30 p.m. having lunch when he observed Claimant and Hawks backing Claimant's pick-up truck to the Company fuel truck and began fueling Claimant's personal vehicle. Kelso testified that while he only saw Hawks help Claimant take Company diesel fuel on just that one occasion, Hawks confided to him that he too was taking Company fuel, though he did so when using his personal truck for work. Kelso testified that since Hawks had a Company truck the entire time he was working at both the Portland and Pulga locations, he told Hawks he knew he was not telling the truth and that if he and Claimant got caught, he was not going to lie for them and asked Hawks to leave him out of it. Kelso further testified that once the matter of stealing fuel came to light, Hawks admitted to him he had stolen fuel a few times and that he knew I had personal knowledge of Claimant's involvement and that he gave my name to the police. Kelso asserted he told Hawks again that if he were asked about either he or Claimant he would not lie and that Hawks told him he understood but that he did not believe he would get in as much trouble about what he told the police about Claimant. Kelso testified that Hawks also informed him that Claimant had told him that he was going to lie about me (Kelso) because Claimant believed he was the one that informed the police about the fuel theft. While Kelso may not have informed the police about the stealing of Company fuel, he did concede in his testimony that he informed his foremen about the fuel thefts and that

this information took a long time to make it all the way up (meaning superior officials in Carrier's organizational hierarchy).

In his testimony, Claimant maintained Kelso's account of his having pulled up to fuel the light plant and his own personal vehicle and his asking Kelso to look out if anyone was coming never happened. Additionally, Claimant denied ever telling Kelso he was taking Company diesel fuel and bragging about it. In response to Dahms testimony that Dahms confronted him on one occasion as to whether he was using Company diesel fuel for his personal vehicle, Claimant told Dahms he was not and that he could check his truck. According to Claimant, Dahms did not check his truck. However, Claimant denied that Dahms ever stated to him that he had better not get caught taking fuel from the Company's fuel truck. Dahms disputed Claimant's denial relative to his having confronted Claimant, testifying that when someone had brought the matter to his attention, he told Claimant that he better not be running Company fuel in his tank and that Claimant told him he wasn't, that he was getting diesel fuel from his brother-in-law's farm. It is noted that Claimant, when asked by Agent Milovanovic if he was using Company fuel for his personal use, told Milovanovic the same thing, that he was taking fuel at his brother-in-law's farm and that he did so in order to avoid the high prices of diesel fuel at gas stations.

When asked Kelso's motivation for testifying he saw him take Company diesel fuel for his personal vehicle when Claimant denied it never happened, Claimant explained that he and Kelso were once friends, that they lived five (5) blocks from each other and he was responsible for getting Kelso hired by the Carrier. However, Claimant related, he and Kelso are no longer friends explaining that Kelso had been telling him and others that his wife was having an affair and Kelso took offense at something he said about his wife. Claimant opined that since making that comment about his wife, Kelso has a personal vendetta against him.

Todd Hawks testified that he and Claimant saw each other socially and that he and Claimant had been to each other's homes. Hawks attested to the fact that when interviewed by Agent Milovanovic, he told Milovanovic he had witnessed Claimant taking Company fuel on two (2) occasions but at the time he did not know that Dahms had authorized him to take Company fuel on one occasion. Hawks acknowledged that Kelso had called him to tell him he had seen Claimant take Company fuel and he, in turn called Agent Milovanovic to inform him of what Kelso had told him. Hawks further acknowledged that Claimant had sent him an email that, fuel truck at Truckee Yard was easy pickings and that he interpreted this email to mean there was a fuel truck sitting at Truckee Yard and to come and get some fuel. According to Hawks, he texted Claimant back telling him he was an idiot and that he never got a response back from Claimant. Hawks opined that Claimant sent him that email based on the two (2) times he had observed Claimant take Company diesel fuel and that Claimant was wanting to take some free fuel there in Truckee.

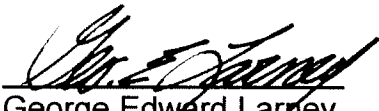
It was subsequently revealed to the Board that Hawks subsequently was reinstated to employment with Carrier and that Dahms received only a reprimand for his deviation from Company policy regarding being reimbursed for the use of personal vehicles in performance of Company work with Company fuel rather than submitting payment for mileage incurred and overtime worked.

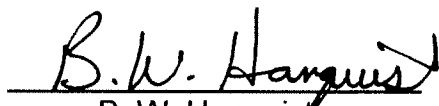
While the Board has not been privy as to the rationale for Carrier's decision of having subsequently reinstated Hawks, whatever induced Carrier to reinstate Hawks we deem not to be relevant to our decision in Claimant's case. It is apparent to the Board from a thorough review of the testimony by all witnesses and the written record in its entirety, that Claimant's account of events does not represent the truth of the matter as there exists too many discrepancies we view as critical in nature. The most damning evidence not refuted by Claimant is the testimony proffered by Hawks of the email he received from Claimant regarding the easy pickings from the fuel truck located at Truckee Yard. Of all the evidence presented, this clearly implicates Claimant of past instances other than the one authorized instance he obtained Company fuel for use of his personal vehicle to perform Company work by Dahms, that without authorization, he helped himself to Company fuel for his own personal use. The fact that he never got caught with the goods by either Foreman Dahms or Agent Milovanovic does not in any way persuade us differently as to his guilt given other testimony rendered by Hawks and the testimony proffered by Kelso. While we note the possibility that Kelso may have harbored ill-feelings toward Claimant for personal reasons we do not believe Kelso's detailed testimony consistent with the testimony rendered by Hawks represented something other than the truth. The clearest example of Kelso's account being truthful is that which addressed the verbal interchange between Foreman Dahms and Claimant wherein, Dahms confronted Claimant that he better not be taking Company fuel for his own use. Dahms testified he had such a verbal exchange with Claimant whereas, Claimant maintained no such interchange occurred and that he did not recall Kelso being present to witness such an interchange. Claimant's denial this verbal interchange did not occur is simply an untruth. The remaining discrepancy is the testimony presented by both Hawks and Kelso who both asserted that they witnessed Claimant on at least two (2) occasions taking Company fuel for personal use whereas Claimant simply denies he ever obtained Company diesel fuel for personal use.


Based on the foregoing analysis the Board concludes that Claimant was guilty of the charge of having violated GCOR Rule 1.6 and, that notwithstanding Claimant's pristine work record up until the time he was charged with this violation, we do not find that the discipline of dismissal for this first violation given the egregious nature of stealing Company property for personal use was at all improper or inappropriate. Accordingly we rule to deny the subject claim in its entirety.

AWARD

Claim Denied


George Edward Larney
Neutral Member & Chairman


B. W. Hanquist
Carrier Member


T. W. Kreke
Employee Member

Chicago, Illinois

Date: 10/25/01