NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6302
AWARD NO. 218, (Case No. 228)

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
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: September 19, 2012

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

1. **The discipline (removal from service and Level 5 dismissal) imposed on Mr. M. Larsen by letter dated March 25, 2011 for alleged violation of Rule 1.6 Conduct (4) Dishonest of the General Code of Operating Rules in connection with allegations that he used a Company vehicle for personal use on October 8, 2010, October 9, 2010, October 12, 2010, October 14, 2010, November 27, 2010 and November 28, 2010 and that he falsified payroll for claiming time on October 8, 201 was without just and sufficient cause, unwarranted and in violation of the Agreement (System File G-1148U-51/1554108).**

2. **As a consequence of the Carrier's violation referred to in Part 1 above, the Carrier must remove this discipline from Mr. Larsen's record and compensate him for all losses, including wages, benefits, seniority rights and any other losses suffered as a result of the Carrier's improper discipline."**

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 January 27, 2011, Carrier notified Claimant to appear for a formal Investigation on February 16, 2011, which was mutually postponed until March 25, 2011, concerning in pertinent part the following charge:

"...to develop the facts and place responsibility, if any, for the following charge: Information discovered in an audit of vehicle usage on January 16, 2011, revealed

that while employed as BMWE BUC Operator on Gang 9401, at St. Joseph, Missouri, you were allegedly dishonest when you utilized the company vehicle for personal usage on October 8, 2010, October 9, 2010, October 12, 2010, October 14, 2010, November 27, 2010, and November 28, 2010. In addition, you allegedly falsified the payroll when claiming time on October 8, 2010.

These allegations, if substantiated, would constitute a violation of Rule 1.6 Conduct (4) Dishonest, as contained in the General Code of Operating Rules, effective April 7, 2010. Please be advised that if your 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 25, 2011, 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 the Claimant was denied a "fair and impartial" Investigation because the alleged charge of falsification of payroll on October 8, 2010, was based on knowledge the Carrier had in its possession well beyond 30 days of the alleged incident. Additionally, it argued the Carrier failed to provide documents related to the Claimant's work history when requested. Lastly, it argued the Hearing Officer improperly restricted questioning of witnesses and/or failed to have all witnesses present that could shed more light on the alleged allegations. Based upon those procedural violations the Organization asserted the claim should be sustained without review of the merits.

Turning to the merits the Organization argued the Claimant did not violate any Carrier Rules and the Carrier failed to meet its burden of proof that he falsified the payroll on October 8, 2010, or that he misused the company vehicle on the various cited days. According to it, the testimony by Claimant explains in great detail as to where and what he was doing pertaining to his work on the cited days and the Carrier failed to refute the Claimant's explanations. The Organization also pointed out that the Claimant had 31 years of excellent service during which time he was three times nominated for the World Class Employee Award and won it twice probably something that no other employee had ever done. The Claimant also suggested that the Investigation had been called as retaliation for an on duty injury. The Organization concluded by requesting that the discipline be rescinded and the claim sustained as presented.

The position of the Carrier is that evidence presented at the Hearing indicates a vehicle usage audit was conducted on January 18, 2011, in which several issues stood out in regards to the Claimant's company vehicle and its fuel usage. Manager Hendricks testified that a careful review of the audit documents revealed multiple fueling entries that Claimant made in a limited timeframe, either within his hometown (when he should have been performing service for the

Carrier in other locations) or in areas where no work was ever assigned, scheduled or performed. Between October 7 and 9, 2010, Claimant spent over $200 when he purchased 72 gallons of gas, despite having no work entries or exceptions listed for pending work. Fuel transaction documents indicate that Claimant fueled up after his western journey in St. Joseph, Missouri, (which is near his home) on October 7. The documents indicate he fueled the vehicle again on October 8th in Eldon, Missouri, (Lake of the Ozarks) and again on October 9, in St. Joseph. The Carrier pointed out that it does not have a railroad track at Lake of the Ozarks, nor any equipment or structures that Claimant could work on. It argued the Claimant's explanations were not logical nor convincing and the fuel records and work list do support the Claimant's version of events. It closed by stating that Claimant was dishonest when he utilized the Company vehicle for personal use and when he falsified payroll for the date of October 8, 2010, and because of that it asked that the discipline not be disturbed and the claim remain denied.

The Board will first address the assertion that the Claimant was denied a "fair and impartial" Investigation because he was allegedly prevented from presenting a defense that would have shown that the Hearing was called in retaliation for a prior on-duty injury. Review of the transcript reveals that on pages 45 and 46 Claimant questioned the Manager of Maintenance of Way Equipment Operations, Mr. J. F. Hendricks about an injury and was advised by the Hearing Officer that the Investigation was not about injuries. Claimant responded by stating "Okay" and dropped that line of questioning. Claimant never voiced an objection nor did he suggest that the Hearing Officer had prevented him from presenting a plausible defense that might have shown that the instant case was tied to a previous incident and the Investigation had been called in retaliation account of the prior matter. Failure by the Claimant to object or explain to the Hearing Officer why he should have been allowed to continue to question Officer Hendricks about a prior injury and its pertinence to the instant dispute indicates he accepted the Hearing Officer's ruling and leaves no basis for the Board to examine the question of whether or not the Claimant was improperly cutoff from exploring an alternate defense. The Organization's and Claimant's closing statement that the Investigation had been called in retaliation of Claimant's injury lacks foundation as there was no substantive showing that the Investigation was called in retaliation for an on-duty injury.

The Organization also argued that the Claimant was denied a fair Hearing because he was not given access to his personal notes and/or records regarding his daily activities that he had input into the Carrier's computer system. It asserted that if he had been given that access he would have been able to solidify his defense as to what his day to day activities had been. The Carrier countered the Organization's argument by stating that it provided the Claimant and his representative all documentation it intended to use against the Claimant and they were afforded the opportunity to review the information. It further argued that when the Board reviewed the transcript and evidence presented it would discover that the Claimant was purposely evasive in his answers, however, it suggested that in one instance he inferred that he knew he was guilty of

some misconduct when he offered a curious answer to a question on page 79 of the transcript wherein he stated the following:

> **"A -yes that's where it shows right there. And that's no problem I'm not caught on that. I did some work there, okay?** *(Underlining Board's emphasis)*

At first blush the Organization's argument is not without some appeal, but in this instance after careful review of the entire record the Board is not persuaded that the Claimant was "blindsided" or that his defense was impeded and/or hindered by the Carrier.

The Board has thoroughly reviewed the record and determined that the Claimant received a "fair and Impartial" Hearing and was afforded his Agreement "due process" rights, therefore, the dispute will be resolved on its merits.

There is no dispute between the parties that the Claimant set his own scheduling, worked irregular hours and days and was headquartered out of his home while under the direct supervision of Manager of Maintenance of Way Equipment Operations J. F. Hendricks.

The facts indicate that a vehicle usage audit was conducted on January 18, 2011, which revealed Claimant spent over $200 between October 7 and 9, 2010, when he purchased 72 gallons of gas during which time he had no work entries or exceptions listed for pending work. In an e-mail from the Claimant to Manager Hendricks on October 4th, Claimant advised he was finishing his western repair journey and would return to his office (home) on October 5th. Fuel transaction documents indicate Claimant purchased fuel after the aforementioned trip in St. Joseph, Missouri, which is near his home, on October 7, 2010. The evidence further indicates Claimant fueled the vehicle again on October 8th in Eldon, Missouri, (Lake of the Ozarks) and again on October 9, in St. Joseph. Additionally, the record reveals the Carrier does not have a railroad track at Lake of Ozarks, nor any equipment or structures that needed Claimant's service.

On page 19 of the transcript Manager, J. F. Hendricks testified regarding a conversation he had with the Claimant in pertinent part as follows:

> **"Now on October 8th, as the charge letter states, Mr. Larsen also charged eight hours time for that day, which was a Friday and the reason for the charge is, we don't have a railroad track at Lake of the Ozarks. And I- I questioned Mr. Larsen on it. He said he couldn't remember. So that's why he was charged with falsifying the time on the 8th, using his Company truck for personal business on that day...."** *(Underlining Board's emphasis)*

At the Hearing, Claimant testified as to why he was in the recreational area towns of Eldon and Osage Beach on October 8th. He stated that he had intended to look at some equipment in Southeastern Missouri on October 8, using an alternative route that took him towards the Southwestern part of the State after which he turned directly east in the middle of the state near the Lake of the Ozarks. The Carrier argued that the Claimant's explanation was not logical when maps of the various states are examined in conjunction with its rail lines and facilities. The Carrier's rebuttal was not effectively refuted.

The evidence further reveals that on October 11th, Claimant sent an e-mail to Carrier Manager's Hendricks, Dooley and Sealey that stated he would be repairing equipment in Iowa and Illinois (Transcript Exhibit B, page 116). He explained he would be in his office on Monday and then on the road the rest of the week. Transcript Exhibit B, pages 117 and 118 established the Claimant had work (exceptions) to resolve in Iowa and Illinois, however, the fuel records do not show that the Claimant was in either state. Instead fuel documents substantiate that between October 12 and 15, the Claimant remained in the St. Joseph, Missouri, area where there were no machines in either St. Joseph or Kansas City in need of repair. During that time period Claimant purchased 74 plus gallons of fuel costing approximately $200 in St. Joseph. The time stamps for each of these transactions occurred in the late morning when the Carrier asserted the Claimant should have been well into his work day at locations other than his hometown.

In his defense, Claimant suggested he performed work in State Center, Iowa, which is approximately 222 miles from his hometown and Dolton, Illinois, which is approximately 485 miles from his headquarters. The Claimant's argument is not persuasive because there were no fuel transaction log or receipts of fuel purchase in either Iowa or Illinois during that time period. The Claimant argued there must have been a glitch in the fuel audit system that did not record his fuel transactions and he must have misplaced his receipts. Assuming for the sake of argument that the Claimant made the trip to Iowa and Illinois that does not explain how he put fuel in his company vehicle on three out of four days in his hometown when he was allegedly out of state. Claimant's explanation was not persuasive.

On October 16, 2010, Claimant's rest day he had multiple fuel purchases in Iowa and Illinois, which substantiated that Claimant went to those locations a week later than he told his Supervisors he was going to go. The Carrier raised the question that if the Claimant did not go out of state until October 16th then what necessitated him purchasing nearly 74 gallons of fuel while at his hometown location. When the Claimant was questioned about those fuel purchases he could not recall (See Transcript pages 78 and 94).

On page 21 of the transcript, Manager Hendricks testified as to what he had told the Claimant to do during the month of November as follows:

" Okay. And then moving on to the date of November the 20th - 27th, 2010, and November 28th, 2010, Mark had sent me an email on November 1st, 2010 and he stated several machines in the areas that he lined up and I replied back to Mark that I do not want you working over the holidays." *(Underlining Board's emphasis)*

On page 22 of the transcript Hendricks further testified in pertinent part:

"Well on November the 24th, prior to the holiday, Mark had made a trip up to Iowa and back and then on Friday, the 26th, fueled up again in St. Joe, Missouri, which was the holiday. Now I specifically told him not to work on the holiday. So my concern was, why is he filling his truck up on the 26th.

Now again he filled up on the 28th, but had never left St. Joe. The 28th is that- is a Sunday following the holiday. On the 28th, he also charged eight hours overtime which was, according to my email, I did not want him working the holiday." *(Underlining Board's emphasis)*

Mr. Hendricks testimony was not effectively refuted and the record further substantiates that at no time did the Claimant ever advise his superiors of any change in his planned work schedule and the fuel records and work lists are contrary to his version of the events covered by the Notice of Investigation. Substantial evidence was adduced at the Investigation that the Claimant improperly used a company vehicle for personal use on multiple days and entered an inaccurate payroll for the date of October 8, 2010. However, we are not convinced that he knowingly entered a falsified payroll with intent to defraud the Carrier of monies.

The only issue remaining is whether the discipline was appropriate. At the time of the incident Claimant had 31 years plus service with an unblemished record during which time he was nominated for three World Class Employee Awards and won two. Claimant's committed several serious infractions and the Board does not excuse or condone his actions, but believes in this instance dismissal is excessive. The Board finds and holds that the dismissal is reduced to 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 on a "Last Chance" basis. The Board also forewarns the Claimant that he needs to follow all Rules, 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

William R. Miller, Chairman

P. Jeyaram, Carrier Member

K. D. Evanski, Employee Member

Dissent to Follow

Award Date: 2/22/13

LABOR MEMBER'S DISSENT
TO
AWARD 218 OF PUBLIC LAW BOARD NO. 6302
(Referee Miller)

A dissent is required in this case because the Majority failed to apply the clear terms of Rule 48 which mandate that an employe be given a fair and impartial investigation prior to the Carrier imposing any discipline. While the Carrier conducted an investigation in this instance, that investigation was neither fair nor impartial because the Carrier did not provide all relevant evidence in connection with the charges at hand. Instead, the Carrier cherry picked the evidence it wanted to present and flat out refused to supply additional relevant evidence requested by the Organization and Claimant. The Carrier's actions in this case were contrary to any sense of fairness or impartiality and the Majority's failure to apply the clear language to the straightforward facts of this case was unmistakably wrong. Thus, I must register a vigorous dissent.

The Organization made multiple requests prior to the investigation for specific evidence and made multiple objections during the formal investigation in connection with the Carrier's refusal to supply specific evidence. Those objections were carried forward throughout the on-property handling of the case. In light of the fair and impartial hearing requirement, there was no reasonable basis for the Carrier to refuse to produce the evidence requested by the Organization and it was contrary to the basic concepts of fairness that the Carrier did not provide that evidence for the formal investigation. It is well established by decades of award precedent that in disciplinary proceedings the Carrier is required to develop all relevant facts in connection with the charges it has filed against an employe. Here that meant the Carrier had an obligation to produce the Claimant's daily work reports, payroll and other documentation that was kept in connection with the Claimant's assigned duties for the Carrier. After all, the Claimant's day-to-day duties were what were being investigated by the Carrier. The fact that the Organization had to request this evidence shows the Carrier was disinterested in developing all the facts, and the fact that the Carrier refused to supply the evidence when requested by the Organization unequivocally establishes the Carrier violated the Claimants right to a fair and impartial hearing.

Carrier Had Sole Possession Of Relevant Evidence But Refused To Supply That Evidence.

There is no question that the evidence withheld by the Carrier was: (1) requested by the Organization and Claimant; (2) directly relevant to charges issued by the Carrier; and (3) in the Carrier's sole possession. These facts are best conveyed by citing the transcript wherein the hearing officer acknowledges the relevance of the requested information because he specifically asks the Claimant to provide supporting documentation outlining his daily activities. The Claimant answered the Hearing Officer's questions by stating that said documentation was in fact available but was being withheld by the Carrier. The pertinent part of the transcript (Tr.PP.76&77) reads:

"A I can't remember. I really can't remember. Like I say, without any documentation-

Q Um huh.

A -I just can't tell you. It's five months ago.

Q Can I ask you Mr. Larsen, why you wouldn't know exactly day to day, as much as you travel, why don't document and keep-

A Well-

Q -it in- in your possession?

A I have all that stuff in my possession. But when I was finished up with this, I took all the paper copies- now listen to what I'm saying, all the paper copies, except for this one, that was folded up in my organizer that I'm working off of and threw it away. All of my documentation that I have is in my Mobilenet spreadsheets in my computer that I have been denied access to.

I have been waiting a month and a half for supportive documentation so I can prove my innocence on this entire case and I've been not- denied with two letters and I've asked today for my laptop computer so I can get into my Mobilenet, so I can get in my Lotus Notes, so I can get into my documentation and everything I've got, so I could put together a reasonable defense.

We've been waiting a month and a half. I've had no proof that I've done anything and I've got nothing but some fuel receipts that I saved out of my truck.

Q But-

A How am I supposed to tell where I was at?

Q -but again Mr. Larsen, if- if-

A No sir, I have no way to tell.

"Q -I would think that if you're traveling that much on the railroad, and- and dong that much documentation and working that hard for Union Pacific, that you would keep a day to day diary?

A I do not have, sir. Everything I had on paper, I threw away, cleaned it out because I started my new project."

The Carrier never denied that the requested information was in its sole possession or that the requested evidence would have provided pertinent insight into the Claimant's activities on the dates cited.

The Plain And Unambiguous Agreement Language Required A Fully Sustained Claim.

The language involved here is clear and unambiguous. Rule 48 of the Agreement provides that an employe will not be dismissed or otherwise disciplined until after being accorded a fair and impartial hearing. Given that withholding relevant evidence cannot be reconciled with the basic terms of fairness and impartiality, the Board should have overturned the discipline and sustained the claim based on these facts and the plain Agreement language. But, the Organization also cited Award precedent in support of its position. The Organization's submission cited two (2) thoroughly reasoned Public Law Board Awards (PLB) (Award 43 of PLB No. 5392 and Award 2 of PLB No. 6699) one of which addressed the general expectations of the fair and impartial hearing requirement and the other addressing the propriety of a Carrier's withholding of evidence under a provision requiring a fair and impartial hearing prior to discharge. Award 43 of PLB No. 5392 involved Union Pacific and, in pertinent part, held:

"The Board, after a careful review of the record, finds that the claim must be sustained because the Claimant did not receive a fair and impartial hearing.

The course of the disciplinary proceedings is under the control and direction of the Carrier. The language of the Parties' Agreement, when it addresses matters related to the Employer/Employee relationship, makes it clear that the notion of fairness is fundamental to that relationship. Indeed, for example, the Discipline Rule provides that an employee 'will not be discipline (sic) without first being given a fair and impartial investigation.' This provision advances the basic principle that the Carrier will deal with its employees in an impartial fashion in accordance with the commonly accepted standards of fairness. One of the requirements for a fair and impartial hearing is to take all reasonable steps

"necessary to establish relevant facts. In this case, both the Conductor and the Claimant, repeatedly testified that a third party, Conductor Courbier, assumed responsibility for the 'north switch.' Both Union representatives repeatedly asked to have Conductor Courbiew (sic) present to testify. Clearly, Conductor Courbier could have offered relevant testimony. The failure of the Hearing Officer to call Conductor Courbier also lends further substance to the Organization's claim of pre-judgment.

In summary, while the Board is not unmindful of the Carrier's position in its brief and in its arguments before the Board at this hearing, these arguments cannot overcome the on the (sic) property proceedings that did not meet the standards of fairness and impartiality. The parties contracted to provide the employee the right to a fair and impartial trial before any disciplinary action could be taken. If that procedural safeguard can be circumvented by the kind of hearing process used here, the Parties' contract would have little substance. For any disciplinary action to have a legitimate foundation, a 'fair' and 'impartial' trial, as provided by the Agreement, must occur."

Award 2 of PLB No. 6699, in pertinent part, held:

"*** Yet discovery at the pre-investigation stage of the process may indeed be important under certain situations, which Carrier management should allow and not reject. The neutral member of this Board addressed a similar discovery request in a dispute adjudicated by another Public Law Board, which made the following observations:

> Generally, there are no formal discovery procedures in labor arbitration. However, the deliberate withholding of requested documents and information until the hearing that is relevant to the matter at issue, may, in certain circumstances, provide sufficient grounds for their exclusion. While a formal investigation in the rail industry conducted internally by a Carrier employed and unilaterally designated hearing officer cannot be equated to a de novo arbitral proceeding, the procedural safeguards preserving due process and a fair and impartial hearing still control. To guarantee the fairness and impartiality of an investigation, a limited form of discovery by the Organization on behalf of the charged employee, which is an essential element of due process, should be permitted notwithstanding the absence of contract language or a rule sanctioning the production of evidence or relevant information prior

> "to the hearing. As noted, such discovery should be permitted in certain circumstances where the Carrier has in its possession tapes, transcripts and other documents that are germane to the accusation(s) or issue(s) subject to the investigation and of critical importance to the charged employee in mounting a defense against the allegations being probed. Since fairness and impartiality are integral components of due process, it is incumbent upon the parties to thoroughly develop, without surprise, the facts as they relate to the matter under investigation. To arbitrarily withhold documentary and other written evidence until the investigation is held, during which the Organization and the charged employee are allowed to recess periodically to examine the evidence it had earlier requested, is palpably unreasonable. Under these circumstances, the fairness and impartiality of the investigation has been compromised, abridging the charged employee's due process rights.
>
> Public Law Board No. 6365, Award No. 2, Case No. 2 (Fischbach, 2001), at 3." (Emphasis in original)

An important distinction between the instant case and Award 2 of PLB No. 6699 is that, in the instant case, the Carrier did not simply refuse to supply the information prior to the investigation, but instead the Carrier refused to provide the evidence at the investigation. In other words, the Carrier prevented the evidence from being entered in the record. Despite the plain agreement language, the straightforward facts of this case and the well-reasoned award support, the Majority still managed to reach findings that stood in direct conflict with the basic concepts of fairness and impartiality required of the clear terms of Rule 48. The Majority's finding in connection with the Carrier's withholding of evidence consists of a single sentence void of any meaningful rationale and, in pertinent part, reads:

> "At first blush the Organization's argument is not without some appeal, but in this instance after careful review of the entire record the Board is not persuaded that the Claimant was 'blindsided' or that his defense was impeded and/or hindered by the Carrier."

It is inconceivable that the Carrier can withhold relevant evidence and still provide a fair and impartial investigation to "develop the facts" as stated by the Carrier's notification of investigation.

Carrier's Whole Basis For Issuing Discipline Is Tainted.

Not only was the Carrier's actions in this case diametrically opposed to the "fair and impartial" requirements of Rule 48, but the fact that it was undisputed in the record that the requested evidence was directly related to the charges undermines any determination made in the absence of that evidence. Thus, the Carrier's failure to produce the evidence subverts any of the Carrier's so-called factual determinations made on this record and undermines the findings of the Majority in this award because those determinations were made knowing full well that there were additional facts not presented.

While there are a significant number of other flaws in the Majority's determination, the fact is that its failure to enforce the Claimant's right to a fair and impartial hearing was a significant and definite error. Beyond that, the Carrier's defense of imposing the discipline was built on a deliberate withholding of evidence. While the errors in this award are bound to the facts of this case that does not mean that the error was insignificant. To the contrary, decisions like this undermine the confidence of the employes that they can get a fair hearing on their disputes and shakes the very foundation of the statutory dispute resolution process. For all these reasons this Award is palpably erroneous and of no precedential value and, I emphatically dissent.

Respectfully submitted,

Kevin D. Evanski
PLB Advocate