**NATIONAL MEDIATION BOARD**
**PUBLIC LAW BOARD NO. 6302**
**AWARD NO. 219, (Case No. 229)**

**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: December 20, 2012

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

1. **The discipline (dismissal) imposed on Mr. T. Ray by letter dated December 30, 2009 for alleged violation of Rules 1.6 and 1.2.5 in connection with allegations that while employed as an assistant foreman in Boone, Iowa on November 18, 2009 he changed the reporting of an off duty/off company property knee surgery to a cumulative trauma on company property and on duty was without just and sufficient cause, unwarranted and in violation of the Agreement (System File R-0919C-303/1531870).**

2. **As a consequence of the Carrier's violation referred to in Part 1 above, the Carrier must remove the discipline from Mr. Ray's record and compensate him for all losses, including straight time and overtime wages, benefits, seniority rights and any other losses suffered as a result of the Carrier's unjust and 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 November 24, 2009, Carrier notified Claimant to appear for a formal Investigation on November 27, 2009, which was mutually postponed until December 22, 2009, concerning in pertinent part the following charge:

**"...to develop the facts and place responsibility, if any, that while employed as an Assistant Foreman in Boone, Iowa, on November 18, 2009, you allegedly changed**

**the reporting of an off duty/off company property knee surgery to reporting a cumulative trauma, on company property and on duty.**

**These allegations, if substantiated, would constitute a violation of Rule 1.6 (Conduct), and Rule 1.2.5 (Reporting), among others of the General Code of Operating Rules as adopted and modified by Union Pacific. 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 December 30, 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 Claimant was denied his right to a "fair and impartial" Investigation because the Carrier attempted to add evidence to the record that was not presented during the Hearing and added allegations that were not contained in the initial Notice of Investigation or the Carrier's Discipline letter revealing that the Claimant was disciplined for charges that were not precisely set forth prior to the Hearing. It stated that on the procedural errors alone the discipline should be set aside and the claim sustained without even reviewing the merits. If, however, the Board chose to address the merits it will discover the Carrier did not meet its burden of proof. It argued the Claimant was not dishonest and he did not fail to comply with Carrier instructions. Instead the record shows that there was no dispute that the Claimant was injured, or that it was a cumulative trauma on-duty injury which Claimant did not understand when he initially reported the injury as having occurred while off-duty. However, after securing expert medical opinions Claimant attempted to correct the record and for that attempt he was dismissed. It further argued that the deposition transcript was inadmissible evidence as it was not presented at the formal Investigation and the Carrier had an obligation to make its case at the Hearing and not after its closure. Additionally, it asserted that the record shows that in the years leading up to the Claimant's injury report the Carrier had created an injury reporting environment that had a "chilling effect' on its employees reporting injuries as they feared reporting an on-duty injury would lead to being disciplined which was evidenced by what happened to the Claimant. Lastly, it argued that if the Claimant was in violation, which it stated was not proven, the punishment of dismissal was excessive. It concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the position of the Carrier that the transcript and record contains substantial, credible evidence to support a finding of guilt of the charges that Claimant was dishonest and failed to report his injury in accordance with its Rules. Procedurally it argued that Claimant was properly notified of the acts of misconduct to be reviewed, and nothing occurred that denied or prejudiced the Claimant from having a fair Hearing and appeal process. It emphasized that the introduction of the Claimant's legal deposition taken while under oath was admissible because it

was a public court document that arbitral tribunals have determined are admissible at any stage of arbitration proceedings. It argued that the Board should consider that evidence since it was highly relevant to the issues as it further confirmed Claimant's dishonest behavior that was proven at the formal Investigation by the testimony of various witnesses and other evidence. It closed by stating that the discipline assessed was not arbitrary, capricious, or an abuse of its managerial discretion and it should not be obligated to retain in its employ the Claimant who displayed dishonest behavior. It closed by asking that the discipline not be disturbed and the claim remain denied.

The Board will next address the Organization's procedural arguments. The Organization asserted that the Claimant was denied a "fair and impartial" Investigation because the Carrier attempted to add evidence to the record that was not presented during the Hearing along with additional allegations not contained in the initial Notice of Investigation or in its Discipline Letter.

A review of the transcript indicates that the Claimant and Organization were apprised in writing of the specific charges and the Notice of Investigation was presented sufficiently in advance of the formal Investigation affording the Claimant a reasonable opportunity to prepare a defense. The record further reveals the Claimant was well represented and afforded the opportunity to testify, present witnesses, cross-examine witnesses, and introduce evidence. There is no showing that the Claimant and Organization did not understand the charges or that they were blindsided by the introduction of any material at the Hearing or during the appeal process. The Organization argued that the introduction of the Claimant's January 2012 deposition was inadmissible evidence because it was not presented during the Claimant's Hearing. In most instances the Organization's argument would be correct that evidence not presented at the Hearing and/or between the parties during their handling of the dispute would be considered "de novo". However, the Organization's argument does not take into consideration that the Claimant filed a lawsuit against the Carrier based upon the same facts as set forth in the claim at dispute and his deposition was taken on January 4, 2012, while the parties were still handling the RLA claim on the property ( See the parties respective letters of June 21 and July 25, 2012). Additionally, arbitral precedence has determined that Court documents are matters of public record that may be introduced at any stage of case handling on the property (See Second Division Awards 11201 and 12969), therefore, the Board is not persuaded that the Carrier erred when it presented the Claimant's deposition while the parties were still actively engaged in the grievance handling process and before the case was docketed for arbitration. The Board has determined that the Claimant was not denied a "fair and impartial" Investigation and he was afforded all of his "due process" Agreement rights during the handling of the claim.

Turning to the merits the facts indicate that about mid-October 2009, the Claimant advised Manager J. E. Biggerstaff that he needed to be off work for approximately six to eight weeks to take care of a knee injury. After listening to the Claimant's request Mr. Biggerstaff asked the Claimant about the injury, and whether it occurred on-duty or off-duty. It was not disputed that the Claimant told him the injury did not happen on the railroad.

Subsequently, after the knee surgery on November 13, 2009, the Claimant's lawyer advised the Carrier that his injuries were the result of cumulative trauma caused from working on the railroad. On November 19th Claimant confirmed his attorney's conversation when he filled out a Report of Personal Injury or Occupational Illness Form, 52032, wherein he changed his position stating that the knee injury was the result of cumulative trauma that had been caused while being on duty at the railroad rather than having occurred off-duty.

Based upon Claimant's change regarding the knee injury a formal Investigation was called. At the Hearing Manager Biggerstaff was questioned about his conversation with the Claimant. On page 12 of the transcript he testified as follows:

> "A **About mid-October, Mr. Ray called me on the phone and told me that he was gonna need some time off, he was scheduling to have his knees worked on, be off about six to eight weeks. I asked Mr. Ray at that time, you know, what was the problem or was it anything related to the railroad and he told me no, it was not. It was a- you know, personal, just wanting to get his knees fixed, they'd been bothering him and you know, pretty well what he told me at that point in time and because I specifically asked him, you know, bo- and you know had anything to do with the railroad and he said not, it was not related..."** *(Underlining Board's emphasis)*

The Organization argued that there is no dispute that the Claimant was injured, or that it was cumulative trauma and according to it that trauma was the result of difficult manual work under varying conditions over an extended period of time. It asserted the Claimant did nothing wrong when he reported his injury as on-duty cumulative trauma injury, instead of allowing the injury to remain incorrectly reported as off-duty after having discovered that he had erred in his earlier reporting to Mr. Biggerstaff.

Examination of the various medical documents submitted by the Claimant from his personal physician James J. Mueller, MD, have a recurring theme regarding Claimant's knee problems being partially related to his weight. For example, the Doctor's diagnostic statement regarding Claimant's appointment of April 1, 2009, stated in pertinent part:

**"HISTORY: He has had some improvement in his knee since he has lost 60 pounds of weight with a recent lap band procedure. He has also become active at the Y which is helping out....He doesn't feel the cortisone injections done last year were of much benefit. However, at that point in time he was 60 pounds heavier at 405 pounds.**

**IMPRESSION: Status post lap band procedure with improvement in weight control. He is down 60 pounds. He has had some improvement of his knee symptoms which is primarily related to the weight reduction....**

**PLAN: ...If he can drop another 30 or 40 pounds he will probably notice some continued improvement in his knee symptoms...."**

The Doctor's diagnostic statement of October 20, 2009, stated in pertinent part the following:

**"PLAN: ...At this time he is not a surgical candidate for knee replacement surgery. His weight is still too high and he is much too young...."**

On page 50 of the transcript the Claimant was questioned as to when he discovered that his knee problems were the result of cumulative trauma and he responded as follows:

**"A After the surgery and in talking to- to my buddies who'd come over to see me at work and- or at my house and visited about-"**

According to the Claimant that after discussions with his friends he became convinced that his knee injury might be the result of cumulative trauma and on December 2, 2009, Claimant's physician wrote the following:

**"Mr. Ray's present employment is probably a contributing factor to arthroscopic findings seen at the time of Mr. Ray's surgery. An exact determination of the percentage of contributing factor unable to provide but certainly a heavy labor job can create arthritic changes as well as meniscal pathology."**

The Organization argued that Claimant was not dishonest because at the time he made the statements to Manager Biggerstaff, he was not aware of cumulative trauma and his first knowledge that his injury could have been related to employment was when he received an opinion from his doctor on December 2nd, set forth above. That argument overlooks the fact that Claimant's attorney notified the Carrier on November 13th that he was representing him account of on-duty injuries and on November 19th Claimant filled out Form 52032 wherein he

stated that his injury was the result of cumulative trauma. Secondly, on Form 52032 the Claimant was asked the following question:

> **"When did you first become aware that this condition may have been caused by your work?"**

The Claimant responded to the aforementioned question as follows:

> **"Year ago."** *(Underlining Board's emphasis)*

According to Claimant's written statement he would have been aware that his knee injury was work related on November 19, 2008, therefore, when he told his Manager that he needed to be off for surgery account of off-duty injuries he knew that statement was not accurate.

At Claimant's Deposition on January 4, 2012, Claimant was questioned about the statement he made to Manager Biggerstaff in October, 2009. Claimant explained on pages 77, and 102 and 103 of that Deposition he did not tell Mr. Biggerstaff the truth because he was afraid he might be fired. The Organization suggested the Claimant was intimidated and/or harassed into lying to Carrier officials because he feared he would lose his job, however, the Carrier argued that the answer to that question was an unequivocal "no" that he was never harassed or intimidated. The Organization argued that the Carrier along with other Carriers in the industry had created an Injury Reporting Environment that had a chilling effect on the reporting of on-duty injuries. It asserted that employees believed that if you properly reported an injury, especially on-duty, in a timely fashion there would be a subsequent formal Investigation wherein you would be charged with being negligent and/or careless and would probably be disciplined with a real threat of dismissal. On the flip side the Organization argued that employees further felt that if you reported an injury in a less than timely fashion because it took awhile to recognize when that injury occurred you would again face charges with probable discipline. Simply put the Organization argued that its members were in a "Catch 22" situation wherein whatever they did they were in trouble and because of that many employees simply did not report injuries that were no fault of their own.

The record indicates that the Organization's argument is not without some merit as the Chief Safety Officer for the Union Pacific Railroad testified before a House Transportation and Infrastructure Committee on Railroad Harassment and Injury Reporting on October 25, 2007, wherein he stated in pertinent part:

> **"We are committed to complete and accurate reporting of all accidents, incidents and injuries arising from the operation of the railroad. UP will not tolerate harassment or intimidation of any person who seeks medical treatment or reports an accident. Disciplinary actions, up to and including termination of employment, will be taken against any employee**

**who commits a violation of this policy. In fact, we have issued 61 cases of discipline and have dismissed 4 high level managers in just the last few years for violations of this policy."**

There is no debate that some Carrier Officers had harassed and/or intimidated employees to not properly report injuries or accidents, however, that does not mean that all Carrier Officers participated in such actions or that all employees have been subjected to that kind of behavior or that the Carrier sanctioned those actions. Therefore, the question at issue then becomes was the Claimant in this case intimidated or harassed in such a manner that he did not properly report his on-duty injuries in a timely fashion because he feared that he might lose his job.

At Claimant's Deposition he was questioned about possible "intimidation and harassment" as follows:

**"Q: That's the meeting I'm talking about. November 19 of 2009. Did you tell anyone at that meeting that you felt intimidated?**

**A: Not at the meeting, no. I don't believe I told anybody that period. I'm not positive.**

**Q: Did you- - -**

**A: There was a lot of stuff talked.**

**Q: Did you say anything to the people at the November 19, 2009 meeting to indicate to them that you didn't think the process was fair or that - - -**

**A: Oh, no I didn't. We all got up and shook hands afterwards.**

**Q: All right. So if you in your own mind thought something wasn't fair or right about that meeting, they would have no way of knowing that?**

**A: If I thought that in my own mind?**

**Q: Yeah.**

**A: Well they asked me if I thought it was fair.**

**Q: And what did you say?**

A: **And I thought at the time everything was just fine. We had a nice discussion. Nobody got real mean."** *(Underlining Board's emphasis)*

Based upon the aforementioned testimony of the Claimant the Board is not persuaded that harassment and intimidation played any role in Claimant's decision not to tell the truth to Manager Biggerstaff in mid-October 2009.

After careful consideration of the extensive record the Board has determined that substantial evidence was adduced at the Investigation that the Claimant was guilty as charged.

The only issue remaining is whether the discipline was appropriate. At the time of the incident the Claimant had 17 years of service with a good work record. Claimant committed a serious offense, but based upon the Claimant's years of good service, the Board finds and holds that the discipline was excessive and is reduced to a lengthy suspension which is corrective in nature and in accordance with the Carrier's UPGRADE Discipline Policy. Claimant is to be reinstated to service with seniority intact, all benefits unimpaired, but with no back pay. Claimant is also forewarned that after reinstatement he needs to adhere to all Carrier Rules and directives.

## 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, Chairman

P. Jeyaram, Carrier Member

K. D. Evanski, Employee Member

Award Date: 4/18/13