

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6302
AWARD NO. 220, (Case No. 232)**

**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. R. Hinton by letter dated July 12, 2011 for alleged violation of Rule 1.6 Conduct (4) Dishonest in connection with allegations that he improperly used a company vehicle and allegations that he removed concrete blocks from company property June 8, 2011 was without just and sufficient cause, unwarranted and in violation of the Agreement (System File D-1148U-209/1557977).**
- 2. As a consequence of the Carrier's violation referred to in Part 1 above, the Carrier must remove this discipline from Mr. Hinton'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 June 17, 2011, Carrier notified Claimant to appear for a formal Investigation on June 24, 2011, concerning in pertinent part the following charge:

"...to develop the facts and place responsibility, if any, that while employed as System Switch Tie Gang Foreman on Gang 4921, at South Morrill, Nebraska, South Morrill Subdivision, on June 8, 2011, you allegedly removed concrete blocks from company property at South Morrill, Nebraska, using a company vehicle and had the company vehicle driven to your home in Kimball, Nebraska,

in which the concrete blocks were possibly unloaded for your personal use, indicating theft.

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 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 July 12, 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 that Claimant was denied a "fair and impartial" Investigation because the Hearing Officer required the Claimant to testify before any other witnesses in an attempt to force him to testify against himself. Additionally, it argued that the Hearing Officer should have issued the discipline decision as he was better able to make credibility decisions than a third party who did not attend 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 had no intent to defraud the Carrier because he asked Manager Mumm permission to take the blocks and he maintained that Mumm gave him permission. It asserted that Mumm could not deny that he gave Claimant permission because he could not remember if he gave the Claimant permission or not. It further pointed out that it does not make sense that the Claimant would jeopardize his career for a few concrete blocks of nominal value that were not being used by the Carrier. It concluded the Claimant did nothing that was dishonest and it requested that the discipline be rescinded and the claim sustained as presented.

It is the position of the Carrier that Claimant, a Tie Gang Foreman, stole concrete blocks from South Morrill Yard, Nebraska, using a company vehicle on June 8, 2011. It asserted Claimant drove the company vehicle home with the intent of using the concrete blocks for a personal home improvement project and that act of theft/dishonesty was a violation Rule 1.6 Conduct. It argued there is no doubt Claimant stole the concrete blocks as he admitted on pages 102 and 103 of the transcript he removed the blocks and did not have permission to take them. According to the Carrier that argument was verified by the testimony of Claimant's immediate Supervisor D. H. Booth who testified on pages 68 and 69 of the transcript he never gave Claimant permission to take the blocks and company truck home. The Carrier also addressed the Organization's procedural arguments and argued that Claimant was afforded all requisite elements of due process. It stated that the Organization's argument that the Claimant did not receive a "fair and impartial" Hearing because the Hearing Officer allegedly attempted to depose the Claimant so that he would testify against himself before the other witnesses testified has

no merit because there is no Agreement right that requires a specific order for the calling of witnesses. Additionally, it argued there is no Rule that mandates that the Hearing Officer must render the discipline decision. Lastly, it argued that the discipline was appropriate and was in accordance with its disciplinary policy. It closed by asking that the discipline not be disturbed and the claim remain denied.

The Board has thoroughly reviewed the record and assessed the Organization's procedural argument 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.

The undisputed facts indicate that on June 8, 2011, Claimant, a Tie Gang Foreman, asked his co-worker K. S. Bower, a Backhoe Operator, to help him remove concrete blocks off Carrier property in a company vehicle at South Morrill Yard, Nebraska, to his home in Kimball, Nebraska. Claimant was under the supervision of ARASA Supervisor D. H. Booth. There is no argument between the parties that the Claimant took Carrier material to his home. The question at issue is whether or not he had permission. The Carrier argued that he did not have permission whereas the Organization asserted that he thought he had permission. The Organization further argued that the Carrier could not show the Claimant had an intent to defraud.

The Organization argued that a review of Manager of Special Projects, R. E. Mumm's testimony verifies that he could not recall whether or not Claimant had asked him for permission to remove the cinder blocks (See page 97 of the transcript). However, on that same page Mumm went on to testify as follows:

"Q Do you have the authority to tell anybody they could take those if- if it's not under your supervision?

A No, it's not my material. It's not on my territory.

Q So you couldn't authorize anybody to take it?

A No.

Q Okay. If- if an employee were to ask to take something, how would that process take place?

A Well if an employee had asked me, primarily it would've been probably ties and we had a process for that if somebody wanted to get some wood ties, I would give them a tie permit. It's a documentation with my name

on it giving them authority to take used ties off of Union Pacific property that would've been on my territory."

Mumm's testimony was not refuted that the material in question was not under his authority nor was it rebutted that if the material had been under his control he would have required the Claimant to have a permit before removing the material.

On pages 68 - 69 of the transcript Claimant's direct Supervisor testified that he never gave Claimant permission to take the concrete blocks home or that he had given the Claimant permission to take a company truck home. When asked at the Hearing if Claimant had any latitude in presuming he could take the truck home, Supervisor Booth stated on page 73 of the transcript **"...no because I'm accessible to my phone. He can call my phone anytime."**

It is clear from the aforementioned testimony that neither Carrier Officer gave Claimant permission to remove the blocks. On page 102 of the transcript the Claimant was asked if he had requested permission from his direct Supervisor to remove the blocks or use the company truck. He was questioned as follows:

"Q Did you ask- on this day, Mr. Booth was your supervisor, is that correct?"

A That's correct.

Q Did you get any permission from him to drive the truck?

A No.

Q To remove the blocks from the South Morrill Yard, did you get permission from Mr. Hinton- Mr. Booth to do that?

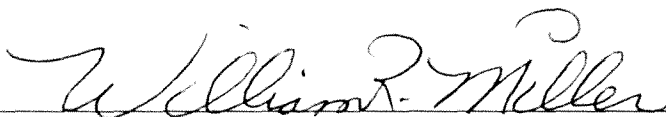
A No, I didn't."

Claimant confirmed in the testimony above that Supervisor Booth did not give him permission to remove the blocks and then on page 56 of the transcript Senior Special Agent R. E. Wilson testified that Mr. Bower, the Backhoe Operator who helped the Claimant move the cinder blocks told him when the Claimant saw Supervisor Booth's truck at the Gering Yard he told Bower they needed to leave before Booth saw them, or words to that effect. When Mr. Bower testified he did not refute Wilson's testimony and according to the Carrier that confirmed that Claimant knew he did not have permission to remove the blocks. Because Wilson's testimony was not effectively refuted it must stand as being factually correct. The totality of the record shows that substantial evidence was adduced at the Investigation that the Carrier met its burden of proof that Claimant was guilty as charged.

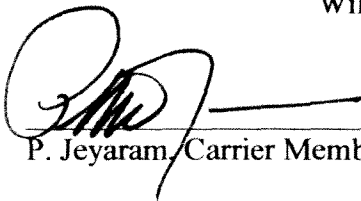
The only issue remaining is whether the discipline was appropriate. At the time of the incident the Claimant had approximately 15 years of service with an unblemished record. Claimant committed a serious offense, but based upon the Claimant's years of good service, the Board finds and holds that the 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 Carrier Rules and directives.

AWARDS

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