

**NATIONAL MEDIATION BOARD  
PUBLIC LAW BOARD NO. 6302  
AWARD NO. 224, (Case No. 237)**

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

**vs**

**UNION PACIFIC RAILROAD COMPANY**

William R. Miller, Chairman & Neutral Member  
K. D. Evanski, Employee Member  
J. T. Wayne, Carrier Member

Hearing Date: June 5, 2013

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

- 1. The discipline (dismissal) imposed on Mr. J. Duran by letter dated August 4, 2011 in connection with allegations that he violated Rule 1.6 Conduct (1) Careless of Safety of Themselves or Others, (2) Negligent, (3) Insubordinate, (4) Dishonest, (5) Immoral was without just and sufficient cause, unwarranted and in violation of the Agreement (System File RC-1148U-452/1558545D).**
- 2. As a consequence of the violation referred to in Part 1 above, the Carrier must remove the discipline from Mr. Duran's record with seniority and other benefits unimpaired and compensate him for all wage loss 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 June 20, 2011, Claimant was directed to attend a formal Investigation on June 30, 2011, which was mutually postponed until July 29, 2011, concerning in pertinent part the following charge:

**"...to develop the facts and place responsibility, if any, that while employed as Sys Const Foreman on Gang 8522, on June 16, 2011, at approximately 0705 hours, you reported a personal injury late after you were informed that you had been disqualified as a Gang Foreman. You were careless of your safety when exited the portable toilet and dishonest in what you reported. In addition, you were**

**immoral in allegedly trying to get your supervision and manager to rescind your disqualification in exchange for not reporting an injury.**

**These allegations, if substantiated, would constitute a violation of Rule 1.6 Conduct (1) Careless of the Safety of Themselves or Others, (2) Negligent (3) Insubordinate, (4) Dishonest, (6) Immoral, and the part that reads, "*Any act of misconduct, or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported. Indifference to duty or to the performance of duty will not be tolerated.*" 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 August 4, 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 the Carrier did not meet its burden of proof. It argued that the Carrier alleged that the Claimant attempted to make some kind of agreement in relation to the disqualification versus an injury report, namely that if the Carrier rescinded the disqualification he would drop the injury report. It asserted that a close reading of the transcript reveals there was no mention of a potential trade agreement and the facts further indicate that the Claimant was not careless, but suffered a legitimate injury. It further argued that the burden of proof is on the Carrier to establish that a Rule was violated and when the record contain two competing assertions, either one of which is plausible, the Carrier cannot meet its burden of proof. Lastly, if there was any substance to the Carrier's argument, which there was not, the discipline assessed was excessive for a 28 year plus employee with a good work record. It concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the position of the Carrier the evidence presented at the Investigation demonstrated that Claimant was careless of his safety and the safety of others. It argued the Claimant admitted that he was careless of his safety and should have reported the purported hazard that caused his alleged injury. It further argued there were four witnesses who all testified that Claimant attempted to barter a deal to rescind his disqualification in exchange for not reporting an alleged injury. Contrary to the Organization's argument it suggested that it was illogical to believe that four witnesses conspired against the Claimant and that the Claimant is the only one telling the truth especially when you consider the fact that the other four employees had nothing to gain by not being truthful. Lastly, the Carrier asserted there was substantial evidence produced that shows that Claimant violated all of the Rules set forth in the Notice of Investigation. It closed by asking that the dismissal not be disturbed and the claim remain denied.

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.

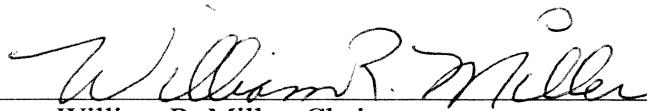
It has been brought to the attention of the Board that on October 22, 2012, Claimant signed a Release and Settlement Agreement for personal injuries arising out of an accident on or about June 15, 2011, at Henderson, Nevada, wherein it was agreed that the Claimant will be retained on the roster as a permanently disabled employee without rights to return to active service. Additionally, that Agreement specifically stated:

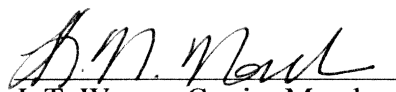
**"In further consideration of the amount received, Claimant releases and discharges Union Pacific and A Portable from any and all liabilities, causes of actions, claims, actions, or rights, known or unknown, arising from Claimant's employment, including, but not limited to, any and all claims or rights which Claimant may have accumulated under any applicable collective bargaining agreement, claims for wages and bonuses, grievances, claims for other compensation of any type arising out of any employment relationship with the Company or its subsidiaries...." (Underlining Board's emphasis)**

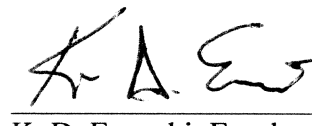
The record is clear that the Claimant is physically unable to return to service and has permanently waived any claims and/or grievances arising out of his employment relationship with the Carrier that are covered by the Collective Bargaining Agreement. On that basis the Board finds and holds that because the subject dispute meets the definition of those grievances waived by the Claimant that the claim has become moot, therefore, the claim is dismissed.

**AWARD**

Claim dismissed.

  
William R. Miller, Chairman

  
J. T. Wayne, Carrier Member

  
K. D. Evanski, Employee Member

Award Date: 8-5-13