

NATIONAL MEDIATION BOARD

**PUBLIC LAW BOARD NO. 6402
AWARD NO. 150, (Case No. 171)**

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

vs

**UNION PACIFIC RAILROAD COMPANY (Former Missouri Pacific
Railroad Company)**

**William R. Miller, Chairman & Neutral Member
T. W. Kreke, Employee Member
B. W. Hanquist, Carrier Member**

Hearing Date: August 18, 2010

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

1. The discipline (removed and withheld from service beginning on September 1, 2009 and subsequent Level 5 - dismissal by letter dated October 5, 2009) imposed upon Mr. A. Dirden for alleged violation of Rule 1.6 of the General Code of Operating Rules for alleged dishonesty in connection with his medical examination report for commercial driver fitness determination on August 4, 2009 and his his absence from work August 4, 2009 through August 18, 2009, was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File UP-516-JF-09/1522155D).
2. As a consequence of the violation referred to in Part 1 above, Mr. A. Dirden shall now have the aforesaid discipline removed from his record and he shall be reinstated to service with all rights unimpaired and compensated for all time lost beginning on September 1, 2009 and continuing until he is returned to service and he shall be paid all expenses, including mileage and meals, incurred in attending the formal investigation on September 23, 2009."

FINDINGS:

Public Law Board No. 6402, 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 September 1, 2009, Carrier notified Claimant to appear for a formal Investigation on September 8, 2009, which was mutually postponed until September 23, 2009, concerning in pertinent part the following charge:

"...to develop the facts and place your responsibility, if any, in connection with you allegedly being dishonest in connection with your medical examination report for commercial driver fitness determination on August 04, 2009 and your absence from work August 04, 2009 through and including August 18, 2009, while employed by the Union Pacific.

This is a possible violation of Rule 1.6 of the Union Pacific General Code of Operating Rules."

On October 5, 2009, Claimant was notified that he had been found guilty as charged and his record was assessed with a Level 5 and he was dismissed from service.

The undisputed facts are that Claimant entered the service of the Carrier on February 13, 2006, and was employed as a Truck Operator in the Houston, Texas, area when the incident in dispute arose.

It is the Organization's position that the Carrier failed to provide the Claimant a fair and impartial Investigation and to meet its burden of proof regarding the two allegations of dishonesty. It argued that his illness for the aforementioned period in dispute was legitimate and authorized by a physician. It further argued that Claimant simply filled out his DOT form in a pro-forma manner and did not associate a prior heat exhaustion episode as falling under the parameters of the questions asked on that form as he had no regular problems associated with those questions. According to it, Claimant did not intentionally mislead any medical examiner or Carrier official, in being checked out and re-certified again with his CDL, having fully disclosed everything concerning his blood pressure issues, which was his sole reason for being subjected to annual exams by the DOT. It concluded by requesting that the discipline be set aside and the Claim be sustained as presented.

It is the position of the Carrier that the record indicates that Claimant allegedly over exerted himself at work on July 30, 2009, and had to call emergency technicians to his sister's home at night for treatment. It argued that the incident was not reported to his Foreman until August 4, 2009, at which time the Claimant also told his Foreman that he would be off work from August 4 through 18, 2009, due to his doctor's orders. It further noted that on August 4th Claimant attended a DOT physical in order to remain qualified to drive DOT required vehicles for the Carrier.

The Carrier argued that Claimant checked "no" on a few boxes of the health history questionnaire, which asked whether he had been ill or injured, lost or experienced altered consciousness, or fainted/experienced dizziness within the last five years. The Carrier alleged that Claimant's "heat exhaustion" episode of July 30, 2009, qualified as all three, and thus Claimant's negative responses were outright lies. It closed by asking that the discipline not be disturbed and the Claim remain denied.

The Board has thoroughly reviewed the record and we find no procedural errors which require setting aside the discipline as the Claimant was afforded his "due process" Agreement rights.

Turning to the merits the Board will first address the latter charge regarding the Claimant's absence from August 4 through 18, 2009. The Carrier did not offer substantial evidence and/or testimony that Claimant lied when he told his Foreman that he would be off work for two weeks, per his doctor's orders, when it alleged that Claimant, at the time of the phone call, was still hours away from finding out this information from his doctor. No proof was offered that Claimant had not consulted his physician before calling his Foreman on August 4, 2009, therefore, the Carrier did not meet its burden of proof with respect to the second charge.

Review of the first charge indicates that the Claimant called his immediate Supervisor on August 4, 2009, and advised him that he had suffered heat exhaustion while on the job on July 30, 2009. He told his Supervisor that after he left work he went to his sister's home and while there, lost consciousness, and emergency personnel were called to respond to his medical condition. During that conversation he informed his Supervisor that because of that incident his doctor ordered that he would be off-work on Medical Leave from August 4th through the 18th. Claimant also told his Supervisor that he would be taking his DOT examination later that day.

The evidence adduced at the Hearing indicates that the Claimant a few hours after advising the Carrier he would be off-work due to the aforementioned medical conditions, per his personal physician's instructions did not answer the DOT Questionnaire in a forthright manner or inform the DOT physician of his current medical condition. Under Section 2 - Health History of the Medical Examination Report for Commercial Driver Fitness Determination he answered "NO" to the following questions: "(1) Any illness or injury in the last 5 years?, (2) High Blood Pressure - Medication, (3) Loss of, or altered consciousness and (4) Fainting, dizziness."

On page 150 of the Transcript the Claimant was questioned as to why he didn't tell the DOT physician on August 4th about losing consciousness on July 30th requiring medical attention. He testified that because the doctor did not specifically ask the question he did not volunteer the information. That answer substantiates that the Claimant was purposely evasive when examined by the DOT physician and ignores the fact that based upon his answers on the

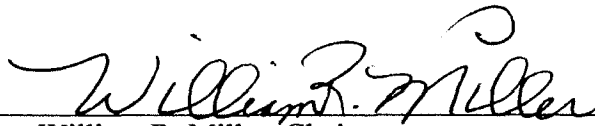
Questionnaire the physician had no reason to ask that question. On page 151 he further testified that he didn't think the doctor had the right to know. That answer was not logical nor persuasive. Those are just a couple of examples that indicate the Claimant's testimony lacked credibility regarding the first charge.

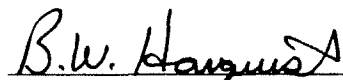
It is clear from the record that the Claimant did not inform the DOT physician that he had recently lost consciousness nor that he was on Medical Leave for that condition on the same day that he was telling the DOT he had no physical problems. Claimant was not honest in disclosing pertinent information on the DOT questionnaire or to its physician. The Carrier met its burden of proof on the first charge.

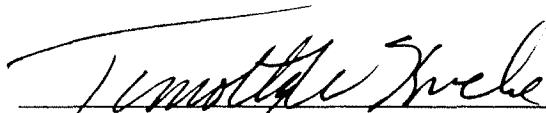
The only issue remaining is whether the discipline was appropriate. Claimant was a relatively short time employee whose dishonesty was a severe offense that could of led to putting an employee behind the wheel of Carrier vehicle who was not fit for service. The purpose of the DOT Certification is to ensure that employees are medically fit to operate large machinery or vehicles on public roads and in this instance the Claimant's dishonesty potentially jeopardized the public safety. The discipline will not be set aside because it was not arbitrary, excessive or capricious.

AWARD

Claim denied.


William R. Miller, Chairman


B. W. Hanquist, Carrier Member


T. W. Kreke, Employee Member

Award Date: Nov 1, 2010