

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6402
AWARD NO. 188, (Case No. 209)**

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

vs

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

William R. Miller, Chairman & Neutral Member
K. D. Evanski, Employee Member
K. N. Novak, Carrier Member

Hearing Date: September 18, 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 Welder L. Bilbo for alleged dishonesty in connection with allegations of stealing a trailer from Robinson Yard, Houston, Texas on July 15, 2011 was without just and sufficient cause, unwarranted and in violation of the Agreement (System File UP-525-JF-11/1555105).**
- 2. As a consequence of the violation referred to in Part 1 above, the Carrier must remove the discipline from Mr. Bilbo'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 as outlined in Rule 22(f)."**

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 and did participate therein.

On August 2, 2011, Claimant was directed to attend a formal Investigation on August 11, 2011, concerning in pertinent part the following charge:

"...to develop the facts and determine your responsibility, if any, in connection with your alleged dishonesty when you allegedly stole a trailer from Robinson Yard, Houston, Texas, on July 15, 2011, at approximately 12:00 p.m., while working as a Welder, resulting in your arrest.

These actions, if proven, are considered a violation of Rule 1.6 - Conduct, as contained in the General Code of Operating Rules, effective April 7, 2010. Proposed discipline for this offense is a Level 5...."

On August 11, 2011, Claimant was found guilty as charged and was assessed a Level 5 discipline and dismissed from the service of the Carrier.

The facts indicate that on July 14, 2011 Claimant was assigned to perform work near the Robinson Yard located in the vicinity of Dayton, Texas. After the Claimant had fulfilled all of his assigned duties and was not on Carrier time, he proceeded to remove a trailer that was not owned by the Carrier and was parked in a parking lot located in the vicinity of the yard with his personal vehicle. After the Claimant removed the trailer an employee from Gulf Switching Inc. contacted the Dayton Police Department and informed the police that the Claimant had allegedly removed the trailer from Robinson Yard.

The following day, July 15th, Manager Track Maintenance, T. Russell received a phone call from the Dayton Police Department and was asked by the police if he knew of the Claimant's whereabouts at that time. Mr. Russell informed the police that the Claimant was at the Dayton Yard Depot. Subsequently, the police traveled to that location where an officer arrested the Claimant for alleged theft of the trailer that he had removed from the parking lot the previous day near Robinson Yard. The trailer in question belonged to an individual named M. Sjolander.

It is the Organization's position that the Carrier failed to provide a precise notice of the specific charges and it did not properly charge the Claimant until four days outside the appropriate time limits and because of those procedural violations the claim should be sustained without reviewing the merits. However, it argued that if the merits were examined it was clear the Carrier failed to meet its burden of proof; and if the Carrier had proven its case which it did not, the discipline was excessive and unwarranted. Lastly, it argued because the trailer was not owned by the Carrier that should mitigate the Claimant's alleged guilt. It concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the position of the Carrier that substantial evidence was presented at the Investigation to warrant the assessed discipline. It argued the Claimant's testimony substantiates that he stole the trailer from Robinson Yard. The Claimant's theft is a clear act of dishonesty and cannot be tolerated. It further argued that the Organization's argument of mitigation is without merit because the trailer was in Robinson Yard, which is leased and operated by the Carrier. The trailer was owned by a subcontractor of the Carrier and was specifically used for railroad purposes. The fact that the Carrier did not own title to the land does not excuse it from being company property. It also does not excuse the Claimant from stealing. There is a clear nexus

between the Claimant's actions and its impact on the Carrier. The Carrier has a business relationship with the subcontractor. The Carrier has an interest in maintaining that relationship as well as continued usage of the leased railroad yard. Dishonest behavior by employees could place those relationships in jeopardy and adversely affect the Carrier's ability to perform operations. Lastly, it argued there were no procedural errors that affected the Claimant's right to a "fair and impartial" Investigation. It concluded by requesting that the discipline not be disturbed and the claim remain denied.

The Board has thoroughly reviewed the transcript and record of evidence and will first address the Organization's argument that the Notice of Investigation was not specific. A reading of the record indicates that the charges were not vague and Claimant and Organization understood them which was evidenced by the Organization's vigorous defense. Secondly, the Organization argued that the Claimant was charged in an untimely manner. In support of that argument it asserted the Carrier had knowledge of the incident on July 15th. Contrary to that argument the record substantiates that the Claimant had a brief telephonic conversation with MTM, T. N. Russell on July 16th at which time the Claimant told Russell he would come into the office to talk about the incident on July 18th. After that meeting, the Carrier possessed enough information as to what had transpired and it removed Claimant from service in the afternoon, therefore, the Carrier's August 2, 2011, letter was sent within 15 days from the time the Carrier had first knowledge of the occurrence. It is determined that the Investigation and appeal process met the guidelines of the Agreement and Claimant was afforded all of his "due process" Agreement rights.

The case will be resolved on its merits. On page 36 and 37 of the transcript the Claimant was questioned about his activities on the night of July 15, 2011, as follows:

"Q: Mr. Bilbo, did you take a trailer from Robinson Yard?

A: Yes, sir. I did.

Q: Was that trailer yours?

A: No, sir. It wasn't.

Q: Were you stopped by a highway patrolman and asked about the trailer?

A: Yes, sir. I was.

Q: What did you tell him that you knew about the trailer?

A: I told him that I bought the trailer.

Q: Did you buy the trailer?

A: No, sir. I didn't.

Q: Were you later arrested for the theft of this trailer?

A: Yes, sir. I was." (*Underlining Board's emphasis*)

The testimony above reveals that the Claimant admitted to stealing a trailer from Robinson Yard and then being dishonest when he lied to a highway patrolman about how he obtained the trailer.

The Organization attempted to mitigate the Claimant's guilt by arguing that the trailer was not on Carrier property nor was it owned by the Carrier. That argument is not persuasive because the trailer was in Robinson Yard, which was leased/controlled and operated by the Carrier and the trailer was owned by a subcontractor of the Carrier that was specifically used for railroad purposes. The Carrier is correct when it argued that even though it does not own title to the land that does not exclude it from being under company auspices nor does it give the Claimant a license to steal without consequences. There was a clear nexus between the Claimant's behavior and its impact on the Carrier because it had a business relationship with the subcontractor and the property owner. The Carrier had an interest in maintaining that relationship as well as continued usage of the leased railroad yard. Claimant's dishonest behavior placed the Carrier's relationship with the sub-contractor and the property owner in jeopardy and could have adversely affected its operations. 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 Claimant had approximately 15 years of service. Claimant committed a serious offense of dishonesty that countless arbitral boards have determined is worthy of dismissal for first time offenders. The discipline assessed was in accordance with the Carrier's UPGRADE Discipline Policy and it was not excessive, arbitrary or capricious, therefore, the Board finds and holds the discipline will not be set aside and the claim will remain denied.

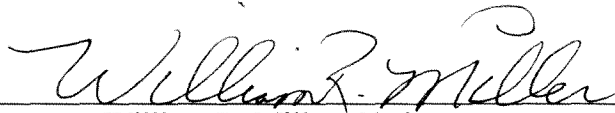
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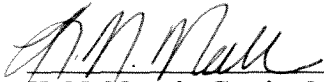
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AWARD

Claim denied.



William R. Miller, Chairman



K. N. Novak, Carrier Member



K. D. Evanski, Employee Member

Award Date:

11/11/12