

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6402
AWARD NO. 190, (Case No. 212)**

**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
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. P. Harris by letter dated September 27, 2011, for alleged violation of Rule 1.6 - Conduct of the General Code of Operating Rules in connection with allegations that he used Union Pacific Fuel Cards to purchase fuel for personal use while employed as track foreman from March 30, 2009 to August 18, 2010 was without just and sufficient cause, unwarranted and in violation of the Agreement (System File UP526JF11/1557404).**
- 2. As a consequence of the Carrier's violation referred to in Part 1 above, the Carrier must remove the discipline from Mr. Harris'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. 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 August 5, 2011, Claimant was directed to attend a formal Investigation on August 11, 2011, which was mutually postponed until September 7, 2011, concerning in pertinent part the following charge:

"...to develop the facts and determine your responsibility, if any, in connection

with the charge that you allegedly used Union Pacific Fuel Cards to purchase fuel for your personal use, while employed as Track Foreman, from March 30, 2009, to August 18, 2010. First knowledge of this incident was received on August 3, 2011.

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 September 27, 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 Claimant was denied a "fair and impartial" Investigation because the charges were vague and untimely. Additionally, he was denied the opportunity to secure his duly authorized representative to attend the Carrier's interview which was nothing more than an investigation held prior to the formalized Investigation. It argued that the Claimant was denied the opportunity to face his accusers as the Investigation was held in "absentia" despite the fact that the parties did not know if he might have been ill, hurt or worse. It asserted there was no reason to go ahead with the Investigation and that it should have been postponed. It further argued that because of those 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 because the evidence was circumstantial and based upon hearsay. It concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the position of the Carrier that the record shows that there were no procedural errors and the Claimant's Investigation and the investigative process was "fair and impartial". It asserted that it was not improper to hold the Investigation in "absentia" because of the un-refuted testimony of Director P. Kreifels who explained that the Claimant called him on the day of the Investigation to inquire about a one day postponement as he was allegedly in Rockford, Illinois. On the same date the Claimant also called his representative and told him he was in Franklin, Louisiana, at a funeral for his deceased aunt. Kreifels further testified that he called the Claimant back after talking to his representative and at that time the Claimant said he thought he was in Rockford, Illinois, but discovered he was in Franklin, Louisiana. Carrier researched and found no records or obituary notice that could validate the death of Claimant's aunt. It reasoned the Claimant of his own choosing did not appear for the Hearing. Turning to the merits it argued that the evidence was overwhelmingly clear that the Claimant used his company fuel card and pin number to purchase fuel for himself. It further argued that contrary to the Organization attempts to argue that perhaps the Claimant's PIN was used by someone else; the record was substantiated by Carrier Officer A. J. Rose on pages 58 and 59 of the transcript that the hundreds of purchases made between 2008 and 2010 with four fuel cards and four different locations

were at the exact time the Claimant had access to the cards due to his assignment, thus, the Carrier concluded that the Claimant dishonestly made the purchases. It closed by asking that the discipline not be disturbed and the claim remain denied.

The Board will first address the Organization's procedural arguments. It initially argued that the Claimant was denied a "fair and impartial" Investigation because the Hearing was held in "absentia". On point with the instant case is Award No. 186 of this Board wherein it was determined as follows:

"...Many Awards have determined that because an Investigation was held in does not necessarily equate to being unfair. For example, in Second Division Award 13957 it was determined in pertinent part:

'It is further noted there is no requirement that an accused must attend their formal Investigation, but when a charged employee chooses not to attend, he does so at his own potential peril because he offers no rebuttal or alternative theory or story. See Second Division Awards 11763, 13217, 13360, 13491 and 13924.'

However, in Award 13957 the Board prefaced the aforementioned statement regarding the Claimant's conduct with the following finding:

'...discovered that he chose not to appear at the Investigation and offered no subsequent proof that he could not attend the Hearing.'" (*Underlining Board's emphasis*)

The question at issue in this case as it was in the aforementioned case is whether or not the Claimant had a justifiable reason for not appearing at the Investigation. The record reveals that the Claimant was originally directed to attend a formal Investigation on August 11, 2011, that was mutually postponed until September 7, 2011. The record substantiates that the Claimant knew when the Investigation was scheduled because he called Director Kreifels shortly before the start of the Hearing requesting an additional postponement telling Kreifels in his first conversation that he was in Rockford, Illinois, and in a second return call made by Director Kreifels the Claimant corrected his location to that of Franklin, Louisiana. The Board finds it odd that the Claimant did not know where he was at during the first telephone call, but giving him the benefit of doubt that he had a legitimate reason for not knowing where he was, a review of a 2011 calendar shows that September 7, 2011 (the day of the formal Investigation) was a Thursday, when Claimant's Aunt's funeral allegedly occurred. Claimant never offered any substantive proof that her funeral was held on that day or that he attended, nor did he give any reason why he could not have notified the Carrier prior to the Hearing date that he wanted to

attend the funeral as he clearly would have known when the funeral was going to be held and whether or not it might conflict with his attendance at the Investigation. The Board has determined that the Claimant made the choice not to appear at the Investigation and offered no proof that he had a legitimate reason for not attending, therefore, the Carrier's decision to hold the Investigation in absentia was not in error.

The Organization also argued that the Claimant should have been allowed a Union representative during the interview that took place on August 3, 2011. The record indicates the interview on August 3rd was an interview and not a formal Investigation and there is no Agreement right that guarantees union representation during an interview of that nature. Nonetheless, on pages 73 - 74 of the transcript Auditor Rose testified that the Claimant never requested union representation and that a different employee interviewed prior to the Claimant did bring a Union representative, thus, according to the Carrier the Claimant was not prevented from having union representation. Auditor Rose's testimony was not effectively rebutted and must be considered to be factually correct and because of that the Board is not persuaded that the Claimant was not treated fairly or in accordance with the Agreement.

The Board has thoroughly reviewed the transcript and record of evidence and 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.

Turning to the merits, a review of the evidence and the testimony offered during the Hearing indicated that approximately 10,000 gallons of fuel at a cost of about \$38,000.00, had been purchased with the Claimant's PIN number, (a private number known only by the Claimant). A substantial majority of those fuel purchases were for unleaded fuel, not diesel fuel that was used in Claimant's company vehicle (a Ford F880, a diesel welding truck) and were purchased at a Phillips 66 Station located three blocks from the Claimant's residence and a little over 22 miles from the Claimant's work headquarters at Englewood Yard. Interestingly, the record further shows that the Phillips 66 Station did not sell diesel fuel, thus, there was no showing as to why so many fuel purchases would have occurred at that station. Furthermore, the record showed that many of the fuel purchases occurred on the weekends between 9:00 p.m. and 11:00 p.m. whereas the Claimant was assigned to work weekdays from 6:30 a.m. to 3:00 p.m. Additionally, it was not refuted that most of the unit gallons purchased exceeded the fuel capacity of the company vehicles.

The Organization argued in behalf of the Claimant that the Claimant's PIN number was used by someone else. However, Carrier Officer A. J. Rose testified on pages 58 and 59 of the transcript that if someone else did have access to the Claimant's PIN, then they would have made hundreds of purchases between 2008 and 2010 that would have required them to have access to four different fuel cards at four different locations at the exact time the Claimant also had access

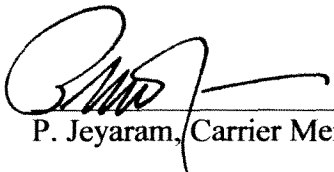
to them. That scenario is highly unlikely since the Claimant was suppose to keep his PIN number private and no one else would have access unless the Claimant had given it to them. The Board is not persuaded that someone other than the Claimant purchased fuel using the Claimant's PIN number. Substantial evidence was adduced at the Investigation that the Carrier met its burden of proof that the Claimant purchased fuel for himself over a two year period using Carrier fuel cards.

The only issue remaining is whether the discipline was appropriate. At the time of the incident Claimant had approximately six years of service. On three different dates (August 6, 9 and 16, 2010) the Claimant attempted to report and be paid for overtime he did not perform. Claimant signed a Waiver for those violations accepting a Level 4 discipline. Shortly, thereafter, the instant dispute arose wherein it was shown that the Claimant had committed another serious offense of dishonesty over an extended period of time. Countless arbitral boards have determined dishonesty is worthy of dismissal for first time offenders. The discipline assessed in this case 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.

AWARD

Claim denied.


William R. Miller, Chairman


P. Jeyaram, Carrier Member


K. D. Evanski, Employee Member

Award Date: March 20, 2013