

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6302
AWARD NO. 208, (Case No. 214)**

**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
P. Jeyaram, Carrier Member

Hearing Date: April 10, 2012

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

- 1. The dismissal of Mr. G. J. McCain for violation of General Code of Operating Rule 1.6, Part 3 (Insubordinate), Rule 1.6, Part 6 (Quarrelsome) and Rule 1.11 (Sleeping) in connection with an incident that occurred on April 9, 2010 is based on unproven charges, unjust, unwarranted and in violation of the Agreement (System File J-1048U-260/1539025).**
- 2. As a consequence of the violation referred to in Part 1 above, Mr. McClain shall have any mention of this incident removed from his personal record and be compensated for all straight time and overtime hours that he was unjustly withheld from service."**

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 April 15, 2010, Carrier notified Claimant to appear for a formal Investigation on May 7, 2010, concerning in pertinent part the following charge:

"...to develop the facts and place responsibility, if any, that on April 9, 2010, while I was conducting audits throughout the tie and S/L gangs, I observed and conversed with you twice about sleeping in the bus while on duty within a three hour period. During the second discussion, you became quarrelsome towards me concerning your possible violation of Rule 1.11 - Sleeping. Also, you were possibly insubordinate towards me after being instructed several times

to go with me, which you refused to do.

These allegations, if substantiated, would constitute a violation of Rule 1.6 - Part 3 (Conduct - insubordinate), Rule 1.6 - Part 6 (Conduct - Quarrelsome), and Rule 1.11 (Sleeping), 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 May 25, 2010, Claimant was found guilty as charged and was assessed a Level 5 discipline and dismissed from the service of the Carrier.

It is the position of the Organization that the Claimant was denied his right to a "fair and impartial" Hearing because the Carrier had pre-determined the guilt of the Claimant which was evidenced by the fact that he was removed from service prior to the Hearing. In addition to the fact that the Carrier wrongly withheld the Claimant from service pending the formal Hearing, it argued that it was undisputed that Supervisor Lopez told Claimant that he was going to receive a Level 5 discipline for insubordination on the date in question which was clear evidence of prejudgment. The Organization asserted that after the record is reviewed in its entirety, a ruling on the merits is not necessary because the procedural errors alone require the discipline to be set aside and the claim sustained. However, if the merits are reviewed, it stated that the Carrier did not meet its burden of proof. It argued the Carrier dismissed Claimant in connection with three separate incidents that allegedly occurred on April 9, 2010. The first allegation asserted that Claimant was sleeping on a work bus which was not proven. Rule 1.11 defines sleeping as employees reclined with eyes closed. Testimony shows that Claimant never closed his eyes and was aware of Supervisor Lopez's presence at all times. The second and third allegation was that Claimant was quarrelsome and insubordinate after Lopez accused him of a second incident of being asleep and when he chose not to get into the truck with Lopez. It argued that the testimony of other witness confirmed that there was no yelling or raised voices and the discussion was civil. It further argued that the reason the Claimant did not get into the truck with Lopez was because he was fearful of him since Lopez had used ridiculous terms in conversing with him. Additionally, it argued that the Claimant did not know Lopez. It concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the Carrier's position that the Claimant was not denied a "fair and impartial" Hearing and was afforded his "due process" rights. It argued that the testimony reveals that on April 9, 2010, Track Supervisor Lopez was conducting audits throughout the tie and S/L gangs when he observed and conversed Claimant, who was working as a Bus Driver, twice about sleeping in the bus while on duty within a short period of time. According to it, during the second discussion, Claimant became quarrelsome towards Supervisor Lopez after being instructed several times to

go with him, which Claimant refused to do which amounted to insubordination. It closed by asking that the discipline not be disturbed and the claim remain denied.

The Board has thoroughly reviewed the transcript and record of evidence and has determined that none of the Organization's procedural arguments rise to the level to set aside the discipline without reviewing the merits as the Claimant was afforded his "due process" Agreement rights.

The facts indicate that on April 9, 2010, Supervisor M. B. Lopez was conducting audits of Tie and Servicing Gangs and during that audit Supervisor Lopez approached Claimant's bus and discovered he was stretched out between two seats asleep. After waking the Claimant, Lopez warned Claimant to stay awake and keep alert. Lopez then continued with his audit. Shortly, thereafter, because of a washout Lopez was forced to turn around and proceed back past Claimant's bus and as he passed Claimant he noticed his head was back and he was in a reclined position.

After being observed in a reclined position for the second time, Claimant became quarrelsome and insubordinate towards Lopez. On page 21 of the transcript Supervisor Lopez testified regarding the incident and Claimant's behavior as follows:

"A: ...I backed up and had Safety Captain, Jordan Stewart, roll down his window. I honked my horn, and bus driver jumped up and went to the front door. I asked him if he had a rough night. He said, what do you think? I wanted to know what was wrong, why he was so tired. He became very agitated and started talking very loudly. He said I better get my hardhat on. He then stepped off the bus and started hollering that I was just harassing him...he said what do you want me to do? My bus is clean' my tools are fixed, come on man, what am I supposed to do? Am I supposed to sit up and wave as you go- as you drive by. I won't kiss your ass just because you're the supervisor."
(Underlining Board's emphasis)

On page 48 of the transcript Mr. J. Stewart, the Safety Captain who accompanied Supervisor Lopez on the audit confirmed Lopez's rendition of the event.

On page 54 of the transcript the Claimant was questioned about what transpired on April 9th as follows:

"Q: All right. Did you refuse to get into the supervisor's vehicle to go to town after you were asked to do so?

A: Yes.

Q: Okay. Were you in a position on the bus that could be presumed to be asleep?

A: Yes."

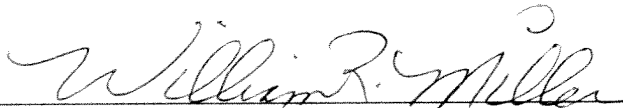
It was not refuted that the Claimant disputed Supervisor Lopez's explanation of how sleeping is defined in the Rule Book and because of that disagreement Lopez requested the Claimant to get into his vehicle so they could go get a Rule Book to show the Claimant that sleeping was defined as being in a reclined position with eyes closed. Claimant in an obstinate manner refused to accompany Supervisor Lopez. After that refusal Lopez made the decision to withhold Claimant from service due to his quarrelsome and insubordinate behavior. Lopez again asked Claimant to accompany him so that he could take him to his car and send him home. Once again, Claimant refused to follow a directive. Claimant testified he was fearful of Lopez, which according to him is why he would not get into the vehicle, however, there is nothing in the record to even infer there was any basis for that alleged fear. Claimant's argument is without substance as it ignores the fact that Supervisor Lopez was accompanied by Safety Captain J. Stewart who was a neutral observer of the April 9, 2010, incident.

The record is clear the Claimant was caught sleeping twice. The first time he was verbally warned and within minutes after that warning he went back to sleep. Claimant then became defiant arguing about the definition of sleeping after which he chose twice to not follow a reasonable directive from his Supervisor. 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. Review of the record reveals that at the time of the incident the Claimant was a short term employee who had approximately four years of service. Claimant's infractions were of a serious nature and the discipline assessed was in accordance with the Carrier's UPGRADE Discipline Policy, therefore, the Board finds and holds the discipline will not be set aside because it was not arbitrary, excessive or capricious and the claim will remain denied.

AWARD

Claim denied.



William R. Miller, Chairman



P. Jeyaram, Carrier Member



K. D. Evanski, Employee Member

Award Date: August 1, 2012