

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7426
AWARD NO. 14 (Case No. 14)**

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

vs

UNION PACIFIC RAILROAD COMPANY (SPWL)

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

Hearing Date: July 20, 2011

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

- 1. The dismissal of Foreman M. R. Brown for violation of Rule 1.66 (4) [Conduct (Dishonest)] of the General Code of Operating Rules in connection with the improper use of UPRR Company fuel credit card to fuel a personal vehicle on October 5, 19 and 31, 2009 is unjust, unwarranted and excessive (System File L-1045S-453/1531927).**
- 2. As a consequence of Part 1 above, we respectfully request that Mr. Brown be reinstated to the service of the Carrier on his former position with seniority and all other rights restored unimpaired, compensated for all wage and benefit loss suffered by him since his removal from service and the alleged charge(s) be expunged from his personal record."**

FINDINGS:

Public Law Board No. 7426, 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 November 16, 2009, Carrier notified Claimant to appear for a formal Investigation on November 20, 2009, (Notice revised on November 17th) concerning in pertinent part the following charge:

"...to develop the facts and place responsibility, if any, that information received on November 9, 2009, revealed that while employed as Track Supervisor on Gang 8675 and a Specialized Foreman on Gang 8697, at Lancaster, California, near Milepost 405, at approximately 2:04 P.M., on October 5, 2009, at 8:01 A.M.

October 19, 2009, and 9:57 A.M., on October 31, 2009 which were your assigned days off, you allegedly removed from vehicle #63686 and vehicle #64943, a hyrail vehicle both assigned to you in your possession, willfully used the UPRR Company fuel credit card and your personal pin number to fuel a personal vehicle without authority.

These allegations, if substantiated, would constitute a violation of Rule 1.6(4) (Conduct (Dishonest)), and the part read: '*Any act of hostility, 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*', as contained in the General Code of Operating Rules effective April 3, 2005...."

On December 9, 2009, Claimant was notified that he had been found guilty as charged and was assessed a Level 5 dismissal.

It is the position of the Organization that the charge leveled against the Claimant is that he was dishonest, however, testimony developed during the Investigation clearly revealed that the Claimant was well aware that procedures were in place for using the fuel card and he knew that video surveillance at the location where he purchased fuel would undoubtedly establish his unauthorized use of the fuel card. It argued that the Claimant had an unblemished record for 11 years and is not a dishonest employee who for some unexplained reason made an error in judgment. It further argued that the record is clear the Claimant was extremely remorseful and offered to make restitution while requesting a second chance. It concluded by requesting that the discipline be rescinded and the claim be sustained as presented.

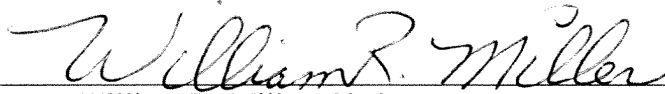
It is the Carrier's position that this is a case of Claimant being found guilty of dishonesty while employed as Track Supervisor on Gang 8675 and a Specialized Foreman on Gang 8697, at Lancaster, California, near Milepost 405, when on three different dates that were his assigned rest days he used a company credit card to purchase fuel for his personal vehicle. It argued that his behavior was a flagrant and serious violation of Rule 1.6 which Claimant admitted to during the Hearing. It further argued that Claimant's admission of guilt does not remove the fact he lost trust of the Carrier and it is not obligated to give employees who steal a second chance at employment. It closed by asking that the claim remain denied.

The Board has thoroughly reviewed the transcript and the record of evidence and the facts indicate that there is no dispute between the parties and the Claimant that he used a UPRR Company fuel credit card to fuel his personal vehicle on October 5, 19 and 31, 2009, without permission of the Carrier and whether or not he knew he would be caught is immaterial. Substantial evidence was adduced at the Investigation that the Carrier met its burden of proof that Claimant was guilty as charged.

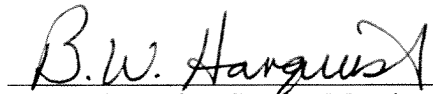
The only issue remaining is whether the discipline assessed was appropriate. At the time of the incident Claimant had 11 years of service with no prior discipline, but was guilty of a serious infraction of theft. It is a well settled issue in the industry that in cases of discipline where there is no argument as to the guilt of a Claimant, as in this instance wherein he admitted guilt and pleaded for leniency, that leniency is the prerogative of the Carrier and not the Board. The Carrier chose not to extend the Claimant another chance and there is nothing in the Agreement that requires it to do so. The Board finds and holds that the discipline will not be disturbed because it was not excessive, arbitrary or capricious as it was in accordance with the Carrier's UPGRADE Policy and the claim will remain denied.

AWARD

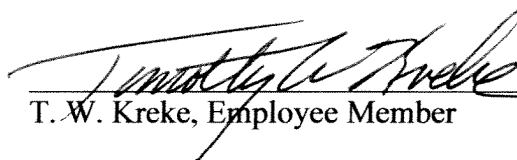
Claim denied.



William R. Miller, Chairman



B. W. Hanquist, Carrier Member



T. W. Kreke, Employee Member

Award Date: Sept 12, 2011