

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6302
AWARD NO. 216, (Case No. 225)**

**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: September 19, 2012

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

- 1. The dismissal of Mr. K. S. Miller for alleged dishonesty in acquiring a Department of Transportation/Communication Motor Vehicle medical clearance card while employed as a B&B Foreman based on information obtained by the Omaha Engineering Department on Thursday, February 10, 2011 is unjust, unwarranted, based upon unproven charges and in violation of the Agreement (System File J-1119C-351/1550148D).**
- 2. As a consequence of the violation referred to in Part 1 above, Mr. Miller shall be compensated for all lost time, be made whole for all losses and have any reference to the investigation removed from his personnel record as outlined in Rule 19 of the Agreement."**

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 February 14, 2011, Carrier notified Claimant to appear for a formal Investigation on February 17, 2011, which was mutually postponed until February 24, 2011, concerning in pertinent part the following charge:

"...to develop the facts and place responsibility, if any, that while employed as a B&B Foreman, you were allegedly dishonest in acquiring a Department of Transportation/Commercial Motor Vehicle medical clearance card. This information was obtained by Omaha Engineering Department on Thursday,

February 10, 2011.

These allegations, if sustained, would constitute a violation of Rule 1.6 (Conduct), 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 charge, the discipline assessment may be a Level 5, and under the Carrier's UPGRADE Policy may result in permanent dismissal."

On March 2, 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 Claimant's Investigation was held outside of the contractually mandated time limits and the charges were not precise. Rule 19 requires that a Hearing shall be held within ten calendar days of the alleged offense. It argued the Carrier does not dispute that its failure to hold the Investigation within the time limits would require a sustained claim, however, in this instance the Carrier contended it did not have knowledge of the incident until February 10, 2011. The Organization disputed that contention and argued that the record shows that the Carrier had knowledge of the incident under investigation as early as October 27, 2009, when Claimant filled out the DOT Examination Report. Additionally, it argued the Carrier decertified Claimant on January 21, 2011, thus, according to the Organization, giving the Carrier the benefit of the doubt, there can be no question that the Carrier had knowledge of the incident under investigation in this case on January 21st. The original Hearing was scheduled for February 17, 2011, which is 27 days after the Carrier had knowledge which means the Carrier failed to hold the Hearing within ten calendar days of the alleged offense or within 10 calendar days of the date the Carrier had knowledge of the occurrence to be investigated. The Organization further argued that violation coupled with the lack of precise charge require the claim to be sustained without examination of the merits.

Turning to the merits the Organization argued that the record shows that the Claimant testified that any discrepancies between the March 30, 2009 document and the October 27, 2009 document was nothing more than a unintentional mistake. Claimant pointed out that the Carrier had all of his medical records and was well aware of his medical conditions because he had identified his medical conditions to the Carrier in previous instances. In addition, the Organization argued that Claimant had experienced a seizure while on-duty and the Carrier withheld him for six months until he provided a clearance to return to work and it does not ring true that Claimant would be dishonest in connection with providing information that it is well known and would be easily discovered to be untrue. It concluded that the Carrier denied the Claimant his "due process" rights and it did not meet its burden of proof and it requested that the discipline be rescinded and the claim sustained as presented.

It is the position of the Carrier that there were no procedural errors that occurred during the handling of the claim. It argued there was substantial evidence presented that Claimant violated Rule 1.6 (Conduct) which shows that Claimant was dishonest by not reporting his seizure history on October 27, 2009, when filling out a DOT Examination Report. By not reporting his seizure history, Claimant acquired his DOT certification from medical personnel whom had previously determined him unfit for such a clearance when such information had been accurately reported on March 30, 2009. It further argued that because the Claimant was dishonest in acquiring a DOT certification the discipline exercised was in accordance with the Carrier's UPGRADE Discipline Policy. It closed by asking that the discipline not be disturbed and the claim remain denied.

The Board will first address the Organization's argument that the Carrier did not hold the Investigation in a timely manner. The Organization asserted that the Carrier had knowledge of the incident under charge as of October 27, 2009, and no later than January 21, 2011, when the Claimant was decertified. The Carrier countered that argument by asserting that the Medical Department did not discuss its reasons for the decertification with the Manager of Bridge Maintenance, S. Thompson, at that time, and it was not until February 10, 2011, Mr. Thompson was advised why the Claimant had been decertified. There is no dispute between the parties that Mr. Thompson was the direct Supervisor of the Claimant and according to the Carrier he was the Officer who had authority to initiate the discipline process and he did not have knowledge of the alleged dishonesty until February 10th, thus the Investigation was initially set within the time limits prescribed by Rule 19.

Review of the transcript shows that on page 32 Mr. Thompson testified that he was not made aware of why the Claimant was decertified by the Medical Department and on page 33 he further testified that when he asked the Medical Department why the Claimant was being decertified they advised him they could not release that information. Thompson requested an e-mail confirmation of his telephone conversation with the Medical Department. Review of the e-mail from Jennifer Gdanov, Regulatory Specialist for the Health and Medical Services Department sent to Mr. Thompson on January 21st shortly after their telephone conversation reveals the following:

"Per our conversation Mr. Miller is being decertified as a DOT driver at this time. If he has any questions he needs to get in contact with our nurse...."

Gdanov's e-mail confirms Thompson's testimony that the Medical Department did not tell him why the Claimant was decertified. Thompson's testimony was not effectively rebutted. The record substantiated that the Officer with responsibility to initiate action against the Claimant did not have actual knowledge of the alleged dishonesty until February 10, 2011, thus the Notice of Investigation was timely.

The Board next turns its attention to the Organization's argument that the Notice of Investigation was not precise which denied the Claimant his right to a "fair and impartial" Investigation. That argument is not persuasive as it is clear from a reading of the transcript the Claimant and the Organization understood the allegations offering a vigorous defense. The record is clear the Claimant was afforded his "due process" Agreement rights and the case will be resolved on its merits.

Review of the facts indicate that the Claimant suffered a seizure in 2007. On March 30, 2009, Claimant filled out a Department of Transportation (DOT) Examination Report as part of the requirements for a Commercial Driver's License (CDL) wherein he indicated that he had previously suffered a seizure. Because of the reporting of his prior seizure he was disqualified by the Medical Officer.

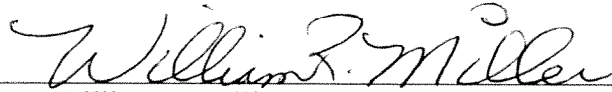
On October 27, 2009, Claimant filled out another DOT Examination Report, but in this instance he did not report his past seizure after which he was approved by the DOT Medical Examiner for his DOT Certification. Subsequently, and upon further review of the Report and Claimant's medical history the Claimant was decertified by the Carrier's Medical Department on January 21, 2011.

It is the Carrier's position that Claimant's actions were purposeful whereas the Organization countered that argument by asserting that it was nothing more than an unintentional mistake. The Organization's argument is not without some merit, but it ignores the fact that the Claimant knew he was disqualified, seven months before, in March of 2009 because he had a history of past seizures. The DOT Examination Report inquired about seizure history because it wanted to protect everyone including the Claimant who uses the public roads. If the Claimant had suffered another seizure while driving he could have jeopardized the safety of other employees, himself and the general public. Substantial evidence was adduced at the Investigation that the Claimant was less than forthright in the attainment of a medical clearance card.

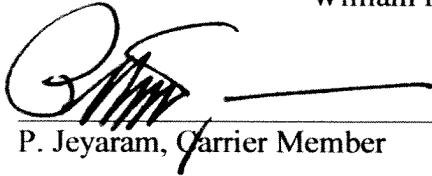
The only issue remaining is whether the discipline was appropriate. At the time of the incident Claimant had eight plus years of service with a good work record. Claimant's violation was a serious infraction which the Carrier noted in its Notice of Investigation may result in dismissal, but in this instance because of unique circumstances it is determined that dismissal is excessive. The Board finds and holds that it is reduced to a lengthy suspension which is corrective in nature and in accordance with the Carrier's UPGRADE Discipline Policy. The Claimant is to be reinstated to his prior disciplinary status with seniority intact, benefits unimpaired, but with no back-pay.

AWARD

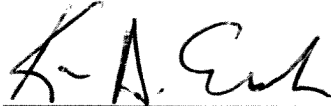
Claim partially sustained in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed.



William R. Miller, Chairman



P. Jeyaram, Carrier Member



K. D. Evanski, Employee Member

Award Date: 1-14-13