

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7426
AWARD NO. 20, (Case No. 20)**

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

vs

UNION PACIFIC RAILROAD COMPANY (SPWL)

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 five (5) day suspension imposed upon Foreman D. W. Abel for violation of General Code of Operating Rule (GCOR) 1.13 Reporting and Complying with Instructions when he was requested to call Senior Manager Equipment Operations Roger Riojas on January 22, 2011, is based on unproven charges unjust, unwarranted and in violation of the Agreement (System File RC-1148U-451/1553427D).**
- 2. As a consequence of the violation referred to in Part 1 above, Mr. Abel shall have his record cleared of this matter and he shall be compensated for net wage loss, both straight time and overtime and benefit loss suffered by him for the five (5) day suspension without pay."**

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 February 8, 2011, Carrier notified Claimant to appear for a formal Investigation on February 16, 2011, which was mutually postponed until March 18, 2011, concerning in pertinent part the following charge:

"...to develop the facts and place responsibility, if any, that while employed as Foreman on Gang 9378, at Elk Grove, California, near Milepost 053, on January 22, 2011, you allegedly failed to comply with instructions when you were requested to call Sr. Manager Equipment Operations, Roger Riojas,

and you used vulgar language and stated you would not call him.

These allegations, if substantiated, would constitute a violation of Rule 1.13 Reporting and Complying with instructions 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 3, and under the Carrier's UPGRADE Discipline Policy may result in up to five (5) days off work without pay or up to one (1) day training without pay and a Corrective Action Plan must be developed upon return to work."

On April 7, 2011, Claimant was notified that he had been found guilty as charged and was assessed a Level 3 discipline with a five day suspension without pay.

It is the position of the Organization that the Claimant was denied a "fair and impartial" Investigation because there was a discrepancy in who filed the charges against the Claimant and he was disciplined without benefit of impartial and unbiased consideration being given to the testimonies of the transcript record and on that basis alone the claim should be sustained without reviewing the merits. Additionally, it argued that the Carrier failed to meet its burden of proof. It asserted that the facts indicate Claimant was working as a Foreman on Gang 9378 on the date in dispute and was tamping in and around the area of Milepost 053 near Elk Grove, California. According to it, Claimant was approached by Mechanic Johnson who directed him to contact Senior Manger of Operations Riojas and when Claimant reached a safe point in his tamping he went to call Mr. Riojas. Shortly, before that call, Claimant noticed he missed a prior call from Riojas after which he called and spoke to Riojas. It argued the record further reflects that Claimant received a call from Manager of Work Equipment C. Thompson; and that Claimant's phone records confirm that all of the aforementioned phone calls took place at approximately 12:00 p.m. on January 22nd. According to it Claimant made timely contact with Mr. Riojas which proves he did not delay or disobey an order and was in compliance with GCOR 1.13. It concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the Carrier's position that the Organization's rendition of the facts does not tell the entire story. It argued that the facts indicate that Mr. Riojas attempted to contact the Claimant multiple times on the morning of January 22, 2010, to make sure that he understood prior instructions, which included not leaving work early. After failing to get a hold of the Claimant Riojas called Mechanic T. A. Johnson at approximately 8:30 a.m. to 9:00 a.m. Mr. Riojas asked Johnson to tell the Claimant that he needed to call him "right away". Johnson called the Claimant without success so he decided to deliver the message to him in person at approximately 9:00 a.m. to 9:30 a.m. According to the Carrier the Claimant responded by saying: *"F... him, he doesn't call me, I'm not going to call him, why should I call him"*. Subsequently, Mr. Johnson then relayed the Claimant's response to Mr. Riojas and told him that he did not think he would be

getting a call back. Upon receipt of Claimant's response Mr. Riojas decided that Manager of Work Equipment, C. L. Thompson, should intercede, so he left him a voice message sometime that morning detailing the situation. According to it, that after waiting about three hours to hear back from the Claimant, Mr. Riojas tried calling him again. Claimant did not answer, but did return the call shortly thereafter. It further argued that contrary to the Organization's rendition of the facts Claimant took over three hours to respond to Mr. Riojas initial request to speak with him and told a co-worker he was not going to call him in a vulgar manner. It closed by asking that the claim remain denied.

The Board has thoroughly reviewed the transcript and record of evidence and is not persuaded that the Claimant was denied a "fair and impartial" Investigation. Claimant was afforded his "due process" Agreement rights and the claim will be resolved on its merits.

On page 46 of the transcript Mechanic T. A. Johnson was questioned about the January 22, 2011, incident as follows:

"Q Do you happen to know what time it was that Mr. Riojas called you directly, originally?

A Roger called me at- it was approximately 9:00 - 9:30. We were out on the track working.

Q And about 9:00 or 9:30, Roger gave you an instruction, what was that instruction?

A It was to have Jon call him. Jon Abel to call Roger.

Q Was it to call him before the end of shift?

A No, it was to call him right away.

Q Do you know if he did that?

A I- I don't know if he did it or- he didn't do it in my presence. I- I tried to get a hold of- I tried calling Jon and he usually wears his phone in his bibs, and so he didn't answer. But then I looked down and he was down at the switch. So I walked down to- down to him and I said that Roger wanted to or- Jon to call him right away. And he- his response to me was, 'F__ _ him, he doesn't- he doesn't- he doesn't call me, I'm not going to call him.'" (*Underlining Board's emphasis*)

Mr. Johnson further testified that he relayed the Claimant's response to Mr. Riojas and advised him that he did not believe the Claimant would be calling right back.

Claimant contradicted Johnson's testimony as he and the Organization argued that Claimant's cell phone records showed that he called Mr. Riojas on January 22nd at 12:17 p.m. According to the Claimant he called Mr. Riojas four minutes later after receiving a missed call from him at 12:13 p.m. He also asserted that Johnson did not deliver Mr. Riojas' message until around noon time. Thus, he asserted there was not an unreasonable delay in the time it took him to contact Mr. Riojas and he was not vulgar. (See Transcript pages 99 - 103)

Despite the Organization's vigorous argument in behalf of the Claimant that he quickly responded to Mr. Riojas call of 12:13 p.m. it could not overcome the fact that Claimant waited three hours to respond to his Supervisor's initial instructions delivered by his co-worker who told him to call "right away". It is irrelevant whether or not the Claimant immediately responded to Mr. Riojas 12:13 p.m. call, the question at issue is: "Did Mr. Johnson deliver Mr. Riojas message at approximately 9:00 a.m. or about noon time?"

As cited above Mechanic Johnson testified Mr. Riojas called him about 9:00 a.m. to have the Claimant contact him. Mr. Riojas confirmed that he asked Mr. Johnson to get hold of the Claimant around 8:30 a.m. to 9:00 a.m. and that Johnson called him back shortly afterwards and passed on the Claimant's message. After Riojas conversation with Johnson he called his superior C. L. Thompson, Manager of Work Equipment. Thompson was questioned about the timeline of the incident on page 28 of the transcript as follows:

"Q What time did you receive the message from Mr. Riojas?

A I do not know. I didn't have a clock to see at that time. But I had time to listen to that message, call the Mechanic, talk to him, and then I called Mr. Abel, and he said he had just got off the phone.

Q So, are you saying then that you got a message from Mr. Riojas telling you that Mr. Abel had not called him?

A Yes.

Q And what time was that?

A I don't know.

Q Middle of the day, morning, afternoon?

A Morning.

Q In the morning, okay.

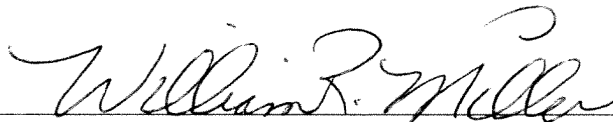
A Early in the morning. (*Underlining Board's emphasis*)

On page 51 of the transcript Mechanic Johnson testified that Mr. Thompson called him about the situation at approximately 10:00 a.m. The record reveals that three witnesses testified that Johnson's conversation with the Claimant occurred at approximately 9:00 a.m. and/or early morning as opposed to the Claimant's rendition that it happened about 12:00 p.m. Mr. Johnson's testimony as a neutral party with no motive to fabricate Claimant's comments or the timeline is convincing whereas the Claimant's testimony which is contradictory to three other witnesses is best described as self-serving. Substantial evidence was adduced at the Investigation that Claimant was guilty as charged.

The only issue remaining is whether the discipline was appropriate. At the time of the incident the Claimant had approximately 18 years of service with a good work record and some minor discipline. Nonetheless, the discipline administered was in accordance with the Carrier's UPGRADE Discipline Policy and because it was not excessive, arbitrary or capricious it will not be disturbed and the claim will remain denied.

AWARD

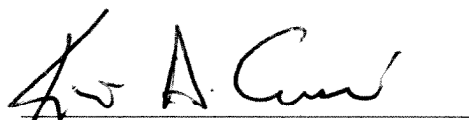
Claim denied.



William R. Miller, Chairman



P. Jeyaram, Carrier Member



K. D. Evanski, Employee Member

Award Date: Dec 17, 2012