

PUBLIC LAW BOARD NO. 7660
AWARD NO. 46

BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES

PARTIES
TO DISPUTE:

and

UNION PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The Carrier’s dismissal of Mr. M. Torres by letter dated October 10, 2014, for alleged violation of General Code of Operating Rules (GCOR) Rule 1.6 Conduct (4) Dishonest and the part that reads, ‘...*“Any act of hostility, misconduct or wilful 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,”*...’ (Emphasis in original); (Employes’ Exhibit ‘A-1’) in connection with allegations that he knowingly operated a Carrier vehicle while his driver’s license was under suspension/cancellation from the State of Oregon was without just and sufficient cause, unwarranted and in violation of the Agreement (System File T-1448U-705/1618078 UPS).

2. As a consequence of the violation referred to in Part 1 above, the Carrier shall immediately reinstate Claimant M. Torres to service with all rights and benefits unimpaired, expunge the Level 5 discipline from his record, compensate him for all loss suffered in connection with the inappropriate discipline and provide all other relief outlined in the Organization’s initial letter of claim dated November 29, 2014. (Employes’ Exhibit ‘A-2’)”

FINDINGS:

Upon the whole record, after hearing, this Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted under Public Law 89-456 and has jurisdiction of the parties and the subject matter.

Claimant, a System Truck Driver with 9 years of service, was issued a Notice of Investigation (NOI) dated August 18, 2014 on charges that he acted in a fraudulent and dishonest manner when he knowingly operated a UP vehicle while his driver's license was under suspension/cancellation from the State of Oregon between December 12, 2012 and November 1, 2013. An Investigation was conducted on September 23, 2014, at which time the Organization's request to permit the use of a Spanish language interpreter for Claimant during the hearing was denied by the Hearing Officer. The October 10, 2014 Notice of Discipline finds Claimant guilty of the charge in violation of GCOR Rule 1.6 Conduct (4) Dishonest, and assesses him a Level 5 dismissal. The instant appeal resulted.

Claimant held seniority as a Truck Driver, Machine Operator and Laborer. He was working as a Truck Driver between December, 2012 and his on-the job injury in October, 2013. The driver's license he possessed was issued to him by the State of Oregon on December 18, 2012, with an expiration date of December 8, 2020. Manager of Track Programs Ruiz was notified in August, 2014 by Carrier's Claims Department, that Claimant's license had been suspended by the State of Oregon, and was provided two letters sent by the DMV to Claimant concerning the status of his license. The first, dated December 24, 2012, is entitled Notice of Cancellation, and indicates a problem with verifying his identity with biometric data, as required, notifying Claimant that his interim driver card and driving privileges were cancelled effective January 23, 2013, and he was to stop driving and surrender his driver license as of that date, unless he provided an alternative method of verification or requested a hearing.

It was unclear from Claimant's answers at the Investigation whether he recalled receiving this letter, but he did recall going to a hearing with DMV, where he was permitted to have an interpreter. Claimant testified that they wanted him to prove his legal status with a green card and social security number, which he did, and that he was told that everything was okay, was never told that his license was being cancelled, and they never took his license. A copy of his driver's license was produced at the Investigation.

The second letter provided to MTP Ruiz was from the DMV, dated May 29, 2013, entitled Notice of Immediate Suspension, indicates that they had information that he gave false information when applying for a drivers license, and that the biometric data submitted matched a different person. The letter states that the prior notice of suspension did not take place pending the outcome of the hearing he requested, which was either held or withdrawn, and that a final order was issued telling him his driving privileges were suspended effective June 3, 2013. Claimant stated that he never received any such notice, was unsure whether he had seen this second letter, and did not have anything in writing indicating what he was told at the conclusion of the hearing. He testified that if he had known that his license was suspended, he would have informed Carrier (which he understood was his responsibility) and bumped into a Machine Operator or Laborer job. There is no dispute that Claimant continued to drive Carrier vehicles during this period of time.

Carrier argues that Claimant was provided a fair and impartial hearing and that the Agreement does not require Carrier to permit an interpreter during an Investigation, especially where the record reveals that Claimant understood the questions and was able to respond to them fully, and had taken 294 tests over the years in English to maintain his qualifications. It contends that, by Claimant's own admission, and the DMV documents showing the dates of his license suspension, he was guilty of operating a Carrier vehicle while his driver's license was suspended. Carrier maintains that it has long been accepted

that Level 5 dismissal is the appropriate penalty for a Rule 1.6 (4) dishonesty violation, as noted in the UPGRADE policy.

The Organization contends that Claimant did not receive a fair and impartial hearing, especially since the Hearing Officer, without explanation, denied his request to have an interpreter at the Investigation, and the record reveals that Claimant did not fully understand the questions asked or documents presented, and could not answer without apparent confusion. It asserts that Carrier failed to prove a violation of Rule 1.6 (4), since Claimant was unaware that his license had been improperly suspended until December 23, 2013, when he went to get his Hazardous Materials Endorsement renewed, and had been informed at the DMV hearing that he only needed to prove his legal status, which he did, and was assured he was okay. The Organization maintains that Claimant could not have formulated any intent to deceive when he had no knowledge that his license was suspended while he continued to drive. It points out that Claimant had no motivation to drive without a valid license, since he had the seniority to bump into a lower classification to keep his job, and would have done so if he knew that his license was suspended. The Organization argues that the penalty imposed was arbitrary, excessive and unwarranted in these circumstances, and that the only motivation for bringing Claimant up on these charges was to adversely impact his pending FELA lawsuit resulting from his serious October, 2013 on-the-job injury.

On the basis of the entire record, the Board first notes that there was no reason given for the Hearing Officer to deny the Organization's request to permit Claimant to have an interpreter during the Investigation, especially for his testimony, other than that he was convinced that it was not necessary or mandated by the Agreement. While the Agreement may not specifically mandate that the request for an interpreter should be granted, and the decision is discretionary with the Hearing Officer, the Agreement does give Claimant the due process right to a full and fair investigation, which includes the right to understand the charges and have the ability to fully defend himself against them.

It was apparent when reading Claimant's testimony at the Investigation, that he was confused with the import of certain documentation being relied upon by Carrier, and could not adequately express himself concerning what he knew, or understood, about what took place at the DMV when he presented the documentation of his legal status that he thought had solved the issue. The documentation itself was unclear as to whether a DMV hearing actually took place, or whether Claimant presented himself at the DMV in some other manner. It does confirm that a hearing was requested by Claimant.

The Board is not taking the position that the denial of the Organization's request for an interpreter, *per se*, denied Claimant a fair and impartial hearing in this case. However, we are of the opinion that Carrier is unable to rely upon certain information furnished by Claimant at the Investigation that apparently arose from confusion on his part, to sustain its burden of proving that Claimant was guilty of dishonesty as charged. The documentary evidence appears to show that Claimant's license was suspended as of June 3, 2013. There is no dispute that Claimant continued to drive for Carrier after that date, and never notified Carrier of his license suspension. The record does not establish that Claimant received actual notice of suspension, or that he knew his license was suspended while he continued to drive vehicles for Carrier. His evidence that he was first informed of the suspension was when he responded to a December 11, 2013 letter about renewing his Hazardous Material Endorsement, at a time when he was off on injury and not driving for Carrier, was not rebutted.

Under the circumstances of this case, the Board concludes that Carrier failed to establish the requisite intent to deceive underlying the charge of dishonesty. Whether or not the suspension was a clerical error, as alleged (but not proven) by the Organization is not determinative. Since Claimant was off from work on a Medical Leave of Absence (MLOA) due to injury at the time of his dismissal in October, 2014, and it is unclear whether there has been any loss of earnings in the interim, the Board returns this case to the parties with the direction that Claimant's October 10, 2014 Notice of Discipline be

removed from his file, and he be appropriately compensated for any loss of earnings and benefits attributable to that discipline.

AWARD:

The claim is sustained in Accordance with the Findings.

Margo R Newman

Margo R. Newman
Neutral Chairperson

Dated: December 9, 2017

K. N. Novak

K. N. Novak
Carrier Member

Andrew Mulford

Andrew Mulford
Employee Member