

**NATIONAL MEDIATION BOARD  
PUBLIC LAW BOARD NO. 6402  
AWARD NO. 194, (Case No. 216)**

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

**vs**

**UNION PAICIC RAILROAD COMPANY (Former Missouri Pacific  
Railroad Company)**

William R. Miller, Chairman & Neutral Member  
K. D. Evanski, Employee Member  
K. N. Novak, Carrier Member

Hearing Date: June 4, 2013

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

- 1. The discipline [Level 4 ten (10) day suspension] imposed on Mr. K. Zackery by letter dated October 20, 2011 for alleged violation of General Code of Operating Rules (GCOR) Rule 1.15 Duty - Reporting or Absence in connection with allegations that the Claimant was absent without authority on July 25, 2011 was without just and sufficient cause, unwarranted and in violation of the Agreement (System File UP530JF11/1559315).**
- 2. As a consequence of the violation referred to in Part above, the Carrier must remove the discipline from Mr. Zackery's record with seniority and other benefits unimpaired and compensate him at the straight time and overtime rates of pay for all wage loss suffered as a result of the Carrier's unjust and improper discipline."**

**FINDINGS:**

Public Law Board No. 6402, 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 August 31, 2011, Claimant was directed to attend a formal Investigation on September 7, 2011, which was mutually postponed until October 4, 2011, concerning in pertinent part the following charge:

**"...to develop the facts and place responsibility, if any, that while employed as Machine Operator on Gang 9169, on July 25, 2011, you were allegedly absent**

**without authority.**

**These allegations, if substantiated would constitute a violation of Rule 1.15  
Duty - Reporting of Absence, as contained in the General Code of Operating  
Rules, effective April 7, 2010."**

On October 20, 2011, Claimant was notified that he had been found guilty as charged and was assessed a Level 3 discipline, but because Claimant already had an active Level 3 discipline on his record the instant discipline equated to a Level 4 with a ten day suspension beginning on October 20, 2011, through and including October 30, 2011.

It is the Organization's position that the Claimant was denied a "fair and impartial" Investigation because the Notice of Investigation was sent to the wrong address. According to it, that error prevented the Claimant from being advised as to what the precise charges were which denied him the ability to prepare a proper defense and on that basis alone the discipline should be set aside without even reviewing the merits. If, however, the Board did address the merits it would discover that the reason why the Claimant was off work was because he had a family emergency when his two year old son fell out of bed and was injured and had to be taken to the hospital at approximately 6:15 a.m. It asserted that was a justifiable reason for missing work and no discipline should have been exercised in this instance. It concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the position of the Carrier that the Investigation was "fair and impartial" and there was no procedural error that warrants overturning the discipline. It asserted the record shows that the Claimant acknowledged that he failed to contact his Supervisor at anytime on July 25, 2011, to inform him of his absence or provide an explanation as to why he did not come to work. It argued the incident with the Claimant's child occurred between 2 and 3 in the morning and Claimant took his son to the hospital around 6:00 a.m. and there was nothing that prohibited him from calling his Supervisor prior to taking the child to the hospital, therefore, he was guilty as charged. It closed by asking that the discipline not be disturbed and the claim remain denied because it was in accordance with the Carrier's disciplinary policy.

The Board will first address the Organization's procedural argument that the Claimant was denied a "fair and impartial" Investigation because Rule 22 (c)(1) was allegedly violated since the Claimant was not apprised in writing of the precise charges sufficiently in advance of the formal Investigation. It was not disputed that the Claimant did not receive the Notice of Investigation as it was sent to a prior address, but Claimant did appear at the Hearing because a Supervisor orally instructed him to attend. The Organization argued that the Claimant sent his change of address to the Carrier a year before the incident under charge whereas the Carrier argued that it sent the Notice of Investigation to its last known address of record and it had not been notified by the Claimant that he had a new mailing address.

The record substantiated that Claimant's prior address was 3019 Edgewick Elm Street, Fresno, TX 77545 and his address at the time the Notice was sent was 2710 Skyview Ridge Ct., Houston, TX 77047.

On pages 8 and 9 of the transcript the Claimant was questioned about the Notice of Investigation as follows:

**"Mr. J. C. Phillips: ...Mr. Zackery did you receive notice to report for this Investigation?"**

**Mr. K. W. Zackery: No, sir.**

**Mr. J. C. Phillips: Okay. Is this your mailing address?**

**Mr. K. W. Zackery: No, sir, that's the o- I was in that address about a year ago.**

**Mr. J. C. Phillips: Okay.**

**Mr. K. W. Zackery: It's an old address.**

**Mr. J. C. Phillips: Have you notified the Carrier of any address change?**

**Mr. K. W. Zackery: Yes, I- I sent a blank sheet of paper- I faxed it over to the Union Pacific- of address change.**

**Mr. J. C. Phillips: Do you know who you faxed it to?**

**Mr. K. W. Zackery: I'm not exactly sure." (Underlining Board's emphasis)**

In the Claimant's testimony above, he asserted he faxed a change of address to the Carrier a year before the incident, but he did not know to whom or where he sent it. The Board is not persuaded that the Carrier was advised of Claimant's change of address, therefore, it is determined that the Carrier properly sent the Notice of Investigation to the last address of record it had been provided. The Board has thoroughly reviewed the transcript and record of evidence and has determined that no procedural errors occurred during the Investigation and the Claimant was afforded his Agreement "due process" rights.

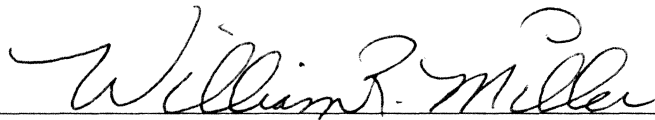
Review of the transcript reveals that Claimant testified on page 18 that he did not come to work on July 25, 2011, and he did not obtain permission to be absent. The Organization argued that the reason why he did not call the Carrier was because he had a family emergency involving his son. The record was not refuted that the Claimant had a medical issue with his two year old

son who busted his lip and damaged a tooth between 2:00 a.m. and 3:00 a.m. which necessitated taking his son to the hospital at approximately 6:15 a.m. where the Claimant stayed until about noontime. The Organization suggested that Claimant's first concern was his son's well being and because he was worried about his child he overlooked calling the Carrier. The Board understands the Claimant's concern for his son, however, the record established that the Claimant's shift started at 6:00 a.m. and according to the Claimant's testimony on page 22 of the transcript the accident involving his son occurred approximately three to four hours earlier and it was not until about 6:15 a.m. the Claimant decided he needed to take the child to the hospital. There was no showing that the Claimant was prohibited from calling his Supervisor and notifying him of the circumstances prior to leaving for the hospital nor was there anything that prevented him from calling his Supervisor after he left the hospital, or at any other time, on July 25th to advise the Carrier as to what had transpired. Despite the fact that Board sympathizes with the Claimant we cannot ignore the fact that he had responsibility to advise his employer as to why he could not come to work and in this case it is clear that he had multiple opportunities wherein he could have called. Substantial evidence was adduced at the Investigation that the Claimant was absent without authority in violation of Rule 1.15.

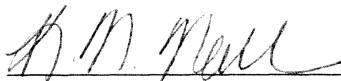
The only issue remaining is whether the discipline was appropriate. At the time of the incident Claimant had almost five years service with a prior Level 3 discipline. Review of the Carrier's UPGRADE Discipline Policy shows that a violation of Rule 1.15 warrants a Level 3 discipline and because Claimant was at that time already at a Level 3 the two Level 3 disciplines equated to a Level 4, therefore, the Board finds and holds the discipline was not excessive, arbitrary or capricious and will not be set aside and the claim will remain denied.

**AWARD**

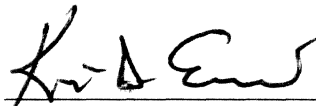
Claim denied.



William R. Miller, Chairman



K. N. Novak, Carrier Member



K. D. Evanski, Employee Member

Award Date: Aug 2, 2013