

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6402
AWARD NO. 195, (Case No. 217)**

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

vs

**UNION PACIFIC 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 (dismissal) imposed on Mr. R. Garcia by letter dated November 3, 2011 for alleged violation of Rule 1.6 Conduct (4) Dishonest in connection with allegations that Mr. Garcia was dishonest when claiming pay on June 24, 2011 was without just and sufficient cause, unwarranted and in violation of the Agreement (System File UP280WF11/1559139).**
- 2. As a consequence of the violation referred to in Part 1 above, the Carrier must remove the discipline from Mr. Garcia's record and compensate him for all losses, including straight time and overtime wages, benefits, seniority rights and any other losses 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 September 30, 2011, Claimant was directed to attend a formal Investigation on October 6, 2011, which was mutually postponed until October 20, 2011, concerning in pertinent part the following charge:

"...to develop the facts and place responsibility, if any, from information received on September 29, 2011, that while employed as Maintenance of Way employee on Gang 4140, you were allegedly dishonest when you claimed 10 hours pay on June

24, 2011, for time not worked.

These allegations, if substantiated, would constitute a violation of Rule 1.6 Conduct (4) Dishonest, 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 5, and under the Carrier's UPGRADE Discipline Policy may result in permanent dismissal."

On November 3, 2011, Claimant was notified that he had been found guilty as charged and was assessed a Level 5 discipline and dismissed from service.

Claimant's alleged dishonesty in reporting time not actually worked came to the attention of the Carrier because of a prior Investigation held on September 29, 2011. At that Hearing Claimant was charged with refusing to comply with instructions and for allegedly being dishonest in claiming travel allowance he was not entitled to. At that Investigation, a gas receipt and subsequent testimony suggested that Claimant may have been dishonest in reporting time not actually worked on June 24, 2011, and because of that the instant Notice of Investigation was filed.

It is the Organization's position the Carrier did not meet its burden of proof. It argued that the Claimant provided a receipt according to the Carrier that was dated June 24, 2011, in connection with his travel allowance and that the receipt was stamped with a time of 3:50 p.m. in San Antonio, Texas. It asserted that the Carrier reasoned that the Claimant would of had to have left his job early on June 24th to be in San Antonio at 3:50 p.m., thus, Carrier contended the Claimant having requested a full days' pay was dishonest. However, it further argued the Carrier's case cannot overcome the testimony of Maintenance of Way employee G. Johnson and the Claimant both of whom testified that the Claimant was present all day on June 24, 2011. Additionally, it pointed out that the receipt provided by the Carrier purported to be from June 24th is illegible and the date and time cannot be made out. It concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the position of the Carrier that Claimant testified that on June 24th he worked on the Lafayette, Subdivision with Gang 4140. It asserted that Claimant was assigned to work 6:30 a.m. to 4:30 p.m., Tuesday through Friday and it would have been impossible for Claimant to have actually worked ten hours on the date in question because he presented a receipt from a San Antonio gas station dated June 24, 2011, that was time stamped at 3:50 p.m. and it takes approximately two and a half hours to drive those 200 plus miles. It argued that put the Claimant in San Antonio 40 minutes before he was even supposed to be done with work. It reasoned the evidence shows the Claimant was dishonest when he requested 10 hours pay for the date covered

by the Notice of Charges. 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 has thoroughly reviewed the transcript and record of evidence and it is determined that the Investigation and appeal process met the guidelines of the Agreement and Claimant was afforded all of his "due process" Agreement rights.

The Board notes that this is the second of two dismissal cases involving the same Claimant, with the other case being Award No. 193, Case No. 215.

The present case arises out of the Claimant's previous case mentioned above. At the prior Investigation of September 29, 2011, the Claimant was alleged to have refused to comply with instructions in providing travel receipts and being dishonest in claiming travel allowances he was not entitled to. At the Hearing of October 20, 2011, involving the instant case, the Hearing Officer questioned Manager Track Projects, B. W. Shields on page 14 of the transcript as follows:

"Q: Mr. Shields, will you give us the- the facts pertaining to this investigation and hearing today?"

A: At- on mileage claims, receipts that were sent in by Mr. Robert Garcia, on June 24th, 2011, he turned in a receipt to- for his mileage claims showing he got fuel in San Antonio, Texas at a Shell station at 3:50 p.m. And on that date in question, he worked on the Lafayette Sub, at Milepost 352 which depending on traffic, he would've had to leave by approximately 1:00 in the afternoon.

Q: And where is Milepost 352?

A: It's east of- east of Houston on the Lafayette Sub around Highway 90, I believe it is.

Q: Okay, you may continue.

A: Alright and on the transcript from previous investigation where these receipts were submitted, on Page 60, Mr. Garcia was asked starting at Line 8, on June 24th, you provided documentation that said you went through San Antonio. Is that correct? Mr. Garcia answered yes.

He admitted to leaving work early that day and then claimed 10 hours of pay. The time that was submitted on June 24th was submitted by Mr.

Garcia shows on June 24th, he put 10 hours of straight time. So he claimed 10 hours of pay that he did not work the full 10 hours.
(Underlining Board's emphasis)

There is no dispute between the parties that at the time of the incident Claimant was assigned on Gang 4140 that worked four days per week, 10 hours a day, Tuesday through Friday, 6:30 a.m. to 4:30 p.m., for a 40 hour week.

Claimant's testimony from the September 29, 2011, Investigation page 60 was entered as an exhibit in the present case. In that Investigation the Claimant was questioned as follows:

"Q: And that's the same June 17th. Then on June 24th, you provided documentation that said that you went through San Antonio. Is that correct?"

A: Yes sir.

Q: Did you go- come off duty at around 1:20 in the afternoon?

A: Yes sir.

Q: But yet, you claimed 10 hours pay?

A: Yes sir. (Underlining Board's emphasis)

In addition to the Claimant's admission at the September 29th Investigation that he left work early on June 24th the Carrier argued that the Shell Gas Station receipt from San Antonio, Texas, was dated June 24, 2011, and time stamped at 3:50 p.m. which further confirmed that Claimant left work early without permission as he was 200 plus miles from his work location 40 minutes before his assignment concluded on that date.

The Organization countered the Carrier's proof by arguing that the Carrier's case cannot overcome the details provided from the Claimant and his co-worker G. Johnson both of whom testified that the Claimant was present the entire day of June 24th and it further argued that the receipt provided by the Carrier purported to be from June 24, 2011 is illegible and the date and time cannot be made out.

The Board has examined the alleged June 24, 2011, receipt as it was presented as an exhibit at both Investigations. It is somewhat clearer as an exhibit at the September 29, 2011, Investigation than the October 20, 2011, Investigation, but even with the use of a magnifying glass it is impossible to ascertain the *month* of the receipt. In most instances the Board would

not give that receipt any credence, but in this instance the Claimant was asked in the testimony above if he provided documentation that he traveled through San Antonio, Texas, on June 24th and he stated: **"Yes sir."** The only documentation/receipt the Claimant submitted for June 24, 2011, was the questionable receipt, therefore, we have an admission by the Claimant that he left work early on that date and a verification that the receipt in dispute was for June 24, 2011.

Despite the Claimant's self-inflicted and damaging testimony the Organization made a strong argument in behalf of the Claimant that his co-worker G. Johnson verified that the Claimant worked with him the entire day of June 24th and that testimony should be given significant weight as Johnson had nothing to gain by not telling the truth. Review of Johnson's testimony pages 36 through 43 of the transcript confirms that he stated that the Claimant worked all day June 24, 2011, however, Johnson was not clear as to whether two men worked on the Gang or three (See pages 41 and 43) and the reason he stated he was not certain was because the event happened over four months ago. The Board does not question Johnson's intentions to be truthful about the incident, but the accuracy of his recollection may have faded account of the lapse in time and is questionable when examined against the Claimant's testimony at the September 29, 2011, Investigation as well as the Claimant's testimony in the October 20th Investigation on page 46 of the transcript that immediately followed Johnson's testimony wherein the Claimant was questioned in pertinent part:

"Q: Mr. Garcia, of course Mr. Johnson's testimony stated that you was- you was- walk us through your list until 4:30 p.m. on the 24th. Course the- your gas receipt shows 3:50 in San Antonio and I would imagine San Antonio is about a four hour- about a four hour differential which I guess is kind of unexplainable here.

But the- go back to that gas receipt on Exhibit #3. I think it was showing for \$33.74. Do- do you know that was paid for?

A: Let me check and see.

Q: Can we show our debit card?

A: Yes, that's what it says there, debit card.

Q: Is- is that a Visa or Mastercard? Do your recall?

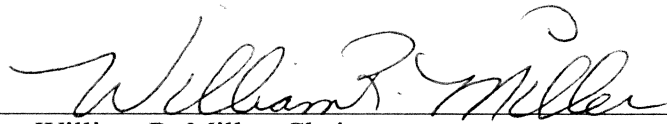
A: Mastercard I believe."

Claimant again confirmed that the difficult to read receipt was for fuel purchased on June 24, 2011, at a San Antonio gas station and was time stamped at 3:50 p.m. that was paid by him with a debit card. Substantial evidence was adduced at the Investigation by the Claimant's testimony that the Carrier met its burden of proof that Claimant violated Rule 1.6 when he paid himself for time he did not work. The Board further notes that the Claimant offered no mitigating reason as to why he paid himself improperly.

The only issue remaining is whether the discipline was appropriate. At the time of the incident Claimant had approximately 16 years of service that included prior significant discipline including Award No. 193 of this Board that was reduced from a dismissal to a lengthy suspension with no back-pay. Countless tribunals have recognized the importance of employees being honest in their dealing with their employers and have upheld dismissal for first offenses of theft and/or dishonesty on a consistent basis. Therefore, the Board finds and holds that the assessment of dismissal was not excessive, arbitrary or capricious and was in accordance with the Carrier's UPGRADE Discipline Policy. The discipline will not be set aside and the claim will remain denied.

AWARD

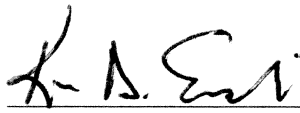
Claim denied.



William R. Miller, Chairman



K. N. Novak, Carrier Member



K. D. Evanski, Employee Member

Award Date: Aug. 2, 2012