

PUBLIC LAW BOARD NO. 6621

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

and

UNION PACIFIC RAILROAD COMPANY

Case No. 52

Statement of Claim: It is the claim of the System Committee of the Brotherhood that:

1. The Level 5 (dismissal) assessed Bridge and Building Truck Driver M. A. Payen for allegedly falsifying his employment application was without just and sufficient cause and based on unproven charges (Carrier's File 1400647 D).
2. Bridge and Building Truck Driver M. A. Payen shall: '... now be reinstated to the service of the Carrier to his former position with seniority and all other rights restored unimpaired, compensated for net wage and benefit loss suffered by him since his removal from service and subsequent dismissal, and that the alleged charges be expunged from his personal record.'

Background:

Claimant Mike Angel Payen, an employee with seniority dating from May 20, 1998, filled out his original application for employment with the Carrier on April 18, 1998. The application form included the following language: "By signing this request for employment I authorize investigation of all statements. I understand that my misrepresentation or omission of facts could be sufficient cause ... [for] possible termination of my continued employment whenever the misrepresentation or omission is discovered." Attached to the application and also signed by Claimant as an applicant were Terms and Conditions of Employment, which includes "Investigation of Character, Ability and Service Record: I hereby authorize the company, at any time prior to or during my employment to investigate my character, ability and prior service record..." (§

5). Section 13 provides, "Cause for Discharge: I agree that ... the misstatement of any fact in my application for employment ... shall constitute sufficient cause for my immediate discharge from the service of the company." On the application form, in answer to the question of whether he had ever been convicted of a felony or misdemeanor, Claimant answered "No." In September 1999, a formal investigation was initiated on a charge that Claimant had criminal convictions he had failed to disclose on his application. During the investigation, the Carrier discovered that the third-party investigator had used an incorrect Social Security number in attempting to access Claimant's records. The investigation ended at that point, and Claimant continued to work for the Carrier.

In December 2003,¹ Claimant worked as a Bridges and Buildings Truck Driver at Watsonville, California. On December 3, a Carrier police officer, William Dabney, informed Claimant's supervisor, David Applegate (Manager, Bridge Maintenance) that Claimant had criminal convictions he had not disclosed on his employment application. Applegate discussed the matter with Claimant on December 4, and according to Applegate, Claimant admitted that he did have convictions, but then stated that he had been a minor at the time of the convictions. Claimant told Applegate that he couldn't recall whether he had checked "yes" or "no" in answer to the question regarding criminal convictions on his employment application.

Applegate removed Claimant from service, and Claimant was instructed by the Carrier, by letter dated December 4, to report on December 12 for a formal hearing:

to develop the facts and determine responsibility, if any, on the charge that you failed to disclose on your employment application that you had been convicted of a felony and or misdemeanor,

¹ All dates herein are 2003 unless otherwise stated.

indicating a possible violation of Rule 1.6 Conduct, 4)
Dishonest....

At hearing, Officer Dabney testified that he had performed a criminal history check on Claimant with the National Crime Information Center (NCIC), after an incident between Claimant and another Carrier employee. Dabney stated that he had not run Claimant's Social Security number, and that there were several different ways to obtain information on an individual from NCIC. Dabney testified from typed notes that Claimant had used five aliases, two birth dates, two Social Security numbers, and two driver's license numbers. He further stated that Claimant had been convicted of burglary and vehicle theft in May 1988, of possession of stolen property in October 1988 and again in June 1991, and of second degree burglary in September 1991. When questioned about the official records documenting the facts alleged, Officer Dabney stated: "I have those records. But those—that is a criminal history which the ones entitled to see that is law enforcement officers. It cannot be presented in this hearing.... I have confidential records with me." (Car. Exh. B at 47 – 48.)

Testifying on his own behalf, Claimant asserted that the information Officer Dabney had obtained was falsely linked to him. He stated that, in 1999, he had discovered that someone had been using his identity, and he had hired an attorney to try to clear his record but had run out of money. Claimant testified that he has never been convicted of a crime, and that he told Applegate on December 4 that he had no convictions when he filled out his employment application.

By letter dated January 14, 2004, the Carrier found Claimant guilty of the charge, and assessed him UPGRADE Level 5 discipline, terminating him from employment. The

Organization objected to the discipline by letter dated March 2, 2004, arguing that the charges against the Claimant had not been proved at the hearing. The Carrier upheld the assessment by letter dated May 4, 2004. The parties exchanged additional letters and discussed the matter in conference. The matter not being resolved, it was presented to this Board for final decision.

Carrier's Position:

The Carrier contends that Claimant was afforded a full and fair hearing with notice of the charges, the opportunity to defend, and representation. According to the Carrier, substantial evidence supports its conclusion that Claimant was dishonest, in violation of Rule 1.6. While the Organization argues that Officer Dabney's testimony and notes should not have been admitted into evidence because they constitute hearsay, hearsay is routinely admitted in administrative procedures such as the hearing in the instant case. Moreover, Officer Dabney's testimony and notes fall under the hearsay exception provided by Federal Rule of Evidence 803 (8):

Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth ... (C) in civil actions and proceedings ... factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

Officer Dabney's notes were a data compilation used in a civil matter, and his factual findings resulted from an investigation made as a Carrier police officer. The source of the information reported by Dabney, Claimant's confidential California police records, indicates that the information is trustworthy and reliable. In addition, "the Carrier has ... provided a copy of the Claimant's record that substantiates Mr. Dabney's notes concerning the Claimant." (Car. Subm. at 12.)

With regard to Claimant's assertion that he was the victim of identity theft and that the records reviewed by Officer Dabney not actually his, the Carrier argues that Claimant presented no evidence supporting his assertion. Moreover, Claimant admitted to Applegate on December 4 that he had previous criminal convictions. The Organization's contention that Claimant was exonerated in 1999 on the same charge presented here also is without merit. The investigation in 1999 ended without being completed. After the incident between Claimant and another employee in 2003, the investigation was renewed.

The Level 5 discipline assessed was not arbitrary or capricious. Claimant answered "No" to the question regarding convictions on his employment application. Section 13 of the Terms and Conditions of Employment put Claimant on notice that such a misstatement is cause for discharge. Rule 1.6 (4) violations are very serious and—especially where, as here, an employee misrepresented his criminal history to the Carrier—warrant Level 5 discipline, and the Level 5 discipline assessed is in accordance with the Carrier's UPGRADE policy.

Organization's Position:

The Organization contends that the Carrier held an investigation on the same charge against Claimant in September 1999, and exonerated him when it was discovered that the Carrier had been given erroneous information based on an incorrect Social Security number. Claimant continued to be employed by the Carrier and garnered no discipline in six years of employment. The trigger for the 2003 investigation was questionable: Claimant saw a weapon on Carrier property and properly reported it in November 2003.

In addition, the Carrier presented no evidence supporting the Level 5 discipline assessed against Claimant. Officer Dabney presented only typed notes. He failed to provide official documentation of the information he reported, although he said it was in his possession, asserting that only law enforcement officers could view the records. While only law enforcement officers can acquire such records, Officer Dabney could have presented the records at hearing, and his failure to do so indicates that the records must have been flawed. In the absence of the official police records, the Carrier has failed to prove that Claimant falsified his employment application. Claimant testified that he had been working with an attorney to clear up false entries on his record that resulted from identity theft. Clearing up records in cases of identity theft can take substantial time and money. The Carrier never investigated the identity theft possibility, instead assuming that Claimant falsified his application.

Findings:

The key issue to be determined by the Board in the instant case is whether the Carrier proved that Claimant falsely stated on his employment application that he had no criminal convictions. Claimant asserted at hearing that he has never been convicted of a crime, and that on December 4, 2003, he told Applegate that he had no convictions when he filled out his employment application. Claimant's assertion, however, is belied by his own handwritten statement on the December 4, 2003, Incident Review form filled out by Claimant and Applegate. In the "Employee's Comments" section, Claimant wrote: "I can't recall if I check[sic] yes or no on application for previous convictions." (Car. Exh. B at 74.) If, as Claimant asserted at hearing, he had never been convicted of a crime, there would have been no reason for him to wonder whether he had answered the

application question on convictions "yes" or "no." In addition, Applegate testified that Claimant admitted that he had convictions, although he stated that they had occurred when he was a minor. No evidence was presented of any bias against Claimant on Applegate's part or any motive to for him to fabricate his testimony regarding Claimant's admission. Applegate did not initiate the investigation into Claimant's criminal history, and in fact first heard of it when Officer Dabney informed him of the results of that investigation. Based on Applegate's credible testimony regarding Claimant's admission, weighed against Claimant's illogical assertion that he had no convictions but nevertheless might have answered "yes" on his application, the Board finds that the Carrier proved that Claimant had criminal convictions that he failed to disclose on his employment application.

However, it is not clear what those criminal convictions were for, or when they occurred. Claimant admitted only that he had convictions when he was a minor. The Carrier based its finding of Claimant's guilt in large part on the testimony and evidence presented by Officer Dabney. The best evidence of Claimant's guilt would have been the official records of conviction Officer Dabney reported he had reviewed. Officer Dabney, however, submitted only his typed notes.² Claimant testified at hearing that he had discovered in 1999 that he had been the victim of identity theft, and had been unable to get his record cleared due to lack of funds. In light of the abrupt end to the Carrier's 1999 investigation of Claimant on a similar charge, Claimant's explanation for the records found by Officer Dabney is at least colorable. In these circumstances, the Carrier

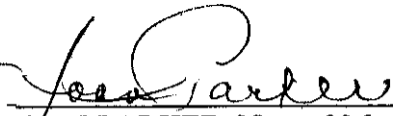
² While the Carrier argues that the official records were subsequently produced, no such records were submitted at hearing or appear as part of the parties' submissions to this Board, nor is there any indication that Claimant or the Organization were given the opportunity to challenge the validity of such records.

should have more thoroughly investigated Claimant's records to verify the convictions reported by Officer Dabney.

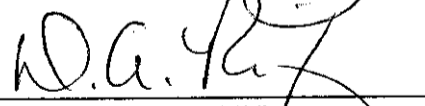
The Board finds that in the absence of incontestable official records, the Carrier simply has not proved the convictions to which Officer Dabney testified. The Carrier has proved only that Claimant failed to disclose on his application convictions he had received as a minor, by his own admission. This is a far cry from the level of criminal activity the Carrier alleged Claimant had failed to disclose. The Board finds that under the circumstances, the Level 5 discipline assessed Claimant was excessively harsh, and that Claimant therefore should be reinstated, although without back pay.

Award:

The claim is granted in part. Claimant shall be reinstated, but without back pay.



JOAN PARKER, Neutral Member



CARRIER MEMBER

DATED: 2-13-06



ORGANIZATION MEMBER

DATED: 2-13-06