

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 5905
AWARD NO. 44, (Case No. 44)**

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

vs

GARY RAILWAY COMPANY

William R. Miller, Chairman & Neutral Member
T. W. Kreke, Employee Member
R. J. Mahon, Carrier Member

Hearing Date: July 20, 2011

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

- 1. The dismissal of Track Foreman Willie J. Carson for his alleged violation of Maintenance of Way Rules 0.1, 0.3, 0.4, 0.7, 1.12, 1.15, 1.47, 1.50, 15.16, USS Rules 21.6, RWP Rules 25.2 and 25.8 in connection with an incident that occurred on June 9, 2009 at approximately 1:30 A.M. when Engine 307 struck Truck 416 causing damage to the truck and the adjacent fence at Track 1H is arbitrary, capricious, excessive and unwarranted (Carrier's File UM-12-09).**
- 2. As a consequence of the violation in Part 1 above, Claimant Willie J. Carson shall now be allowed the remedy prescribed in Rule 57(c)."**

FINDINGS:

Public Law Board No. 5905, 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 June 11, 2009, Carrier notified Claimant to appear for a formal Investigation on June 19, 2009, which was mutually postponed until June 22, 2009, concerning in pertinent part the following charge:

"...to develop all facts and to determine your responsibility, if any in connection with the charge that you allegedly violated Maintenance of Way Rules 0.1, 0.3, 0.4, 0.7, 1.12, 1.15, 1.46, 1.47, 1.50, 1.51, 1.53, 15.16, USS Rules 21.6, 21.20(d), RWP Rules 25.2 and 25.8. This incident occurred when on June 9, 2009 at about 1:30 a.m., Engine 307 struck Truck 416 causing damage to the truck and the

adjacent fence at Track 1H."

On July 2, 2009, Claimant was notified that he had been found guilty as charged and was dismissed from service.

It is the position of the Organization that even though the Claimant admitted his culpability contributed to the June 9, 2009, incident it asserted he was not solely at fault. It argued that a review of the record reveals that Trainman Leep was not maintaining a vigilant lookout, but was instead reviewing work instructions while operating the light engine on Track 1H in a eastbound direction. It further argued that the Claimant made every reasonable attempt to signal the train to stop short of the men working on the track, however, despite his efforts, Trainmen Leep did not see the Claimant because he was reviewing work instructions. Consequently, Leep was unable to stop the light engine short of the Claimant's work location. It concluded that the Carrier's decision to impose the ultimate discipline of dismissal upon the Claimant, in light of the mitigating circumstances present here, is arbitrary, capricious, excessive and unwarranted and because of such it requested that the discipline be set aside and the claim sustained as presented.

It is the Carrier's position that the Claimant was dismissed for his failure to comply with various Safety Rules, which included failing to follow proper federally mandated roadway worker protection rules, failing to utilize positive track protection, fouling live running tracks, and a conscious disregard for personal employee safety, all of which resulted in a truck/train collision. It argued that the discipline was appropriate and it closed by asking that the discipline not be disturbed and the claim remain denied.

The Board has thoroughly reviewed the record and we find no procedural errors occurred during the Hearing and the handling of the case by either party and the Claimant was afforded his "due process" Agreement rights, therefore, the case will be resolved on its merits.

The facts indicate the Claimant had just regained his track foreman rights nine days prior to the instant dispute after having lost them for over a year for disciplinary reasons. On June 9, 2009, at approximately 1:30 a.m. a Maintenance of Way Crew under the supervision of the Claimant was in the process of repairing strip joints on Track 1H just east of Buchanan Street. The crew parked their truck No. 416 facing east on the north side 1H between the rail and the U.S. Steel security fence. The truck was parked foul of 1H, approximately two feet from the rail. It stands un-refuted that the Carrier operates in part inside the U.S. Steel Gary Work facility, and all railway employees have been trained on, and are subject to U.S. Steel's Railroad Operating Rules, one of which states in pertinent part:

"When parking, do not allow any part of the vehicle to extend into walkways or block railroad tracks. Park in designated areas, at least six (6) feet from the

edge of a rail or at least eight and one (8 1/2) feet from the center line of track."

The record further reveals that because the truck was parked foul of the track the crew was also improperly working under the Watchman Lookout Procedure for protection using a Watchman Lookout to stand watch for train or equipment traffic. It was acknowledged during the Hearing that Claimant should have provided positive track protection, such as locking out the track, which was the requirement for this particular situation. Testimony at the Hearing further substantiated that the M of W crew were working on a curve with limited sight distance on a dark rainy night. On page 81 of the Transcript, the Claimant was questioned about the incident as follows:

"Q Mr. Carson, you're a qualified track foreman?

A Yes.

Q And you've been trained on roadway worker protection?

A Yes.

Q You also hold a rule book - Maintenance of Way's rule book?

A Yes.

Q Which identify the rules necessary to perform a job safely?

A Yes.

Q The night of this incident, did you comply with roadway worker protection?

A No. (*Underlining Board's emphasis*)

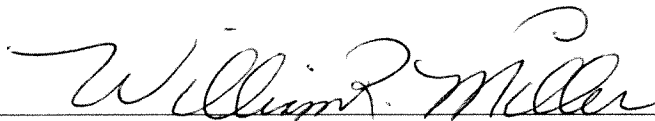
The record substantiates that the Claimant admitted he parked the M of W truck No. 416 two feet from the track 1H, between the track and the U. S. Steel security fence, fouling the track and directed his crew to perform their work under the improper watchman lookout procedure for the circumstances and conditions of that night in hopes they would be able to get "in and out" before other movement transpired on the track. The Organization made a skillful argument in behalf of the Claimant that Trainman Leep's failure to pay full attention to the track and his engine's forward movement was a contributing factor to the subsequent accident and is grounds for mitigation. However, that colorization of the incident overlooks the fact that the primary reason for the accident was the Claimant's failure to abide by Carrier Safety Rules when he chose to foul the track and not secure proper protection. With the Claimant's admission of guilt, it is

clear that substantial evidence was adduced at the Investigation that the Carrier met its burden of proof that the Claimant was guilty as charged.

The only issue remaining is whether the discipline was appropriate. At the time of the incident the Claimant had ten years of service with six disciplinary notations on his record including a prior violation regarding track protection and roadway worker protection. The seriousness of the subject incident with its potential for fatal consequences and/or property damage cannot be overlooked and has been found to be grounds for dismissal by many arbitral panels even in those instances of first offense. The Board cannot find that the Carrier erred in its discipline as it was not arbitrary, excessive or capricious, and it is evident that the Carrier has exercised progressive discipline before the instant discipline was issued. The discipline will not be set aside.

AWARD

Claim denied.



William R. Miller, Chairman



R. J. Mahon, Carrier Member



T. W. Kreke, Employee Member

Award Date: 9/15/11