

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 5905
AWARD NO. 45 (Case No. 45)**

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

vs

ILLINOIS CENTRAL RAILROAD/E.J.E.

William R. Miller, Chairman & Neutral Member
T. W. Kreke, Employee Member
C. K. Cortez, Carrier Member

Hearing Date: July 20, 2011

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

- 1. The fifteen (15) day suspension and ten (10) day deferred suspension imposed upon Ms. R. J. Thompson for Violation of USOR Rules 203, 204, 205, 523, OTS Rules 100, 300 and 804 and the fifteen (15) day suspension and ten (10) day deferred suspension imposed upon Mr. H. Jewell for violation of USOR Rule 523, OTS Rules 300, 600, 804 and L.I.F.E. E-22 for failure to use proper radio procedures, fouling track without protection, not inspecting a passing train, not having a proper job briefing and not completing a job briefing booklet page for the job is unjust, unwarranted and in violation of the Agreement (Carrier's File IC-BMWED-2010-00019).**
- 2. As a consequence of the violation referenced in Part 1 above, we respectfully request that Ms. Thompson and Mr. Jewell be allowed remedy in accordance with Rule 33(i) of the Agreement."**

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 March 5, 2010, Carrier notified Claimants to appear for a formal Investigation on March 8, 2010, which was mutually postponed until March 10, 2010, concerning in pertinent part the following charge:

"...to ascertain the facts, and determine your responsibility, if any, and whether you violated any company rules, regulations or policies in connection with an

incident which occurred on Wednesday, March 3, 2010 at approximately 12:15 PM at MP 16.1, N Norman town Interlocker during which it is alleged R. Thompson may not have used proper radio procedures and it was reported that H. Jewell was observed not wearing his hard hat. It is further alleged you did not inspect a passing train, did not have a proper job briefing, did not complete a job briefing booklet, and did not employ the proper form of on track protection."

On March 18, 2010, Claimant Thompson and Jewell were both found guilty as charged and each was assessed a 15 day suspension and ten days deferred for a period of one year based on multiple Rule violations.

It is the position of the Organization that Claimant Thompson was disciplined for alleged violation of seven Carrier Rules and Claimant Jewell was disciplined for alleged violation of five Rules, none of which were proven. It argued for example, Ms. Thompson was accused of improper radio procedure, but during the Investigation Carrier witness Nichols testified that he only assumed it was Ms. Thompson he heard on the radio and admitted that there are several women employed by the Carrier who also used the radio. Mr. Jewell was disciplined for not positioning himself to maintain proper sight distance while being a watchman which was estimated at 990 feet. There was conflicting testimony presented during the Investigation as to where Claimant Jewell was positioned, but according the Organization he had over 1000 feet of sight distance.

The Organization further argued that the record reveals that both Claimants were disciplined for failure to inspect a passing train, but at the time both were observing their meal period when the train passed and the Carrier cited no Rule requiring the Claimants to forgo or interrupt their meal period to inspect a passing train. Moreover, there was a standing train crew in the immediate vicinity performing an inspection of the passing train. Both Claimants were charged with failure to conduct a job briefing yet both stated that a job briefing was conducted and there were no witnesses that presented anything to the contrary. Both Claimants were also charged with not completing a job briefing booklet page for the job, but neither was asked to show their booklet whereas pertinent pages of the booklets were presented by the Claimants during the Investigation showing that the booklets were completed. The Organization again reiterated that the Carrier did not meet its burden of proof and requested that the discipline be rescinded and the claim sustained as presented.

It is the Carrier's position that Claimants were properly found at fault. According to it the testimony of Work Equipment Supervisor, A. Johnson documented that neither Claimant made a passing train inspection and Claimant Jewell was sitting in the back of the truck without a hard hat. It asserted that at the site of the incident, both Claimants were questioned on the type of track protection they had provided and the Supervisor's testimony proved Claimant Thompson was fouling the track, and neither Claimant had completed a job briefing for the protection they

were to be using, nor did either write it in their respective briefing books. It further argued that Claimant Thompson did not properly identify herself via radio and did not use proper radio procedures. It also asserted that the Claimants were required to perform the proper inspection of the train and the excuse offered that they were on a meal period and were absolved of any responsibility is a poor one at best.

Regarding the quantum of discipline the Carrier argued that it was reasonable and appropriate as Claimant Thompson entered its service in July, 1999, and her service record indicated she received prior discipline for an incident of a boom striking overhead wires in 2007, and for falsification of driver's daily inspection report in 2008, thus, the instant discipline was not arbitrary and/or capricious. It further stated that Claimant Jewell entered its service on October 23, 2006, and even though his service record was clear of prior Rule violation and he was not found to be in violation of the same infractions as Thompson, his lesser length of service and seriousness of the violations warranted the same discipline. The Carrier closed by asking that the claim remain denied.

The Board has thoroughly reviewed the record and we find no procedural errors occurred during the Investigation and the Claimants were afforded their "due process" Agreement rights, therefore, the case will be resolved on its merits.

Review of the record substantiates that on March 3, 2010, Claimants were working near Joliet, Illinois. Shortly after 12 Noon Carrier Supervisors A. Johnson, T. Horn and T. Nichols were conducting a safety audit on the Carrier's property when Claimant Thompson was observed to have been fouling the track near Milepost 16.1 at North Norman Town and not using proper radio procedure and Claimant Jewell was observed not wearing his hard hat and both Claimants did not make a passing train inspection. USOR Rule 523 INSPECTING PASSING TRAINS states in pertinent part:

"When duties and terrain permit, at least two crew members of a standing train and other employees along the right of way must inspect trains on the ground on both sides of the track...." (*Underlining Board's emphasis*)

The Organization argued that both Claimants were observing their meal period when the train passed and there is no Rule requiring them to forgo or interrupt their meal to inspect a passing train. The excuse that the Claimants were absolved of any responsibility to do a "roll by" inspection of the train is contradictory to the underlined portion of the aforementioned Rule. The Board further notes that nothing was offered to suggest that the Agreement provides for a guaranteed uninterrupted meal period. On page 29 of the Transcript, Equipment Supervisor, A. Johnson was questioned on the subject as follows:

"Q Is the employee required to perform a rollby protection of a train during his lunch hour?

A If they're along the right of way, the rule reads, yes. (*Underlining Board's emphasis*)

The testimony above of Equipment Supervisor Johnson was not refuted and is consistent with the language of USOR 523.

Review of the transcript reveals that Supervisor Horn testified on page 43 of the Transcript that nobody was giving the train a "rollby" which was substantiated by Supervisor Nichols on page 99. Horn further testified that he asked Claimant Thompson about a job briefing, specifically as to how could you use a watchman lookout if your watchman was in the truck and appeared to be looking for his hard hat that he did not have on, and both Claimants acknowledged that failure when they said "**ah-ah**". On pages 22 and 24 of the Transcript Supervisor Johnson was questioned about the job briefing and the watchman duties as follows:

"Q Did Ms. Thompson complete a job briefing book for the protection she was using?

A She stated she did not.

Q Did Mr. Jewell complete a job briefing for the protection they were using?

A He stated that he did not.

Q And who was assigned to be the watchman lookout?

A Mr. Jewell."

* * * * *

"Q ...Do you believe that Mr. Jewell acting as the watchman in this particular instance was complying with that rule?

A No."

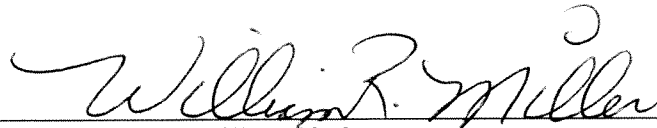
The Organization offered a vigorous and able defense of the Claimants wherein it attempted to show that the three Supervisors that were performing the Safety Audit on March 3rd offered different accounts of what they observed, but close examination of their testimony

reveals that it was consistent on all of the issues in dispute without being rehearsed whereas the testimony of the Claimants was slightly vague and self-serving. It is clear that substantial evidence was adduced at the Investigation that the Carrier met its burden of proof that the Claimants were guilty of all charges against them.

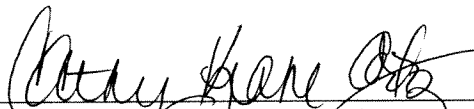
The only issue remaining is whether the discipline was appropriate. At the time of the incident Claimant Thompson was the Employee In Charge (EIC) and bore the greater responsibility. Additionally, her service record indicates she received two prior disciplines, therefore, the Board cannot find that the Carrier erred in its discipline of Claimant Thompson as it was not arbitrary, excessive or capricious. The discipline of Claimant Thompson will not be set aside and the claim in her behalf is denied. Review of Claimant Jewell's service record shows that he had an unblemished record prior to this incident and had less responsibility in this case, therefore, the Board finds that the discipline of Claimant Jewell was excessive and it is reduced to ten days actual suspension with ten days deferred suspension held in abeyance. Claimant Jewell is to be made whole for five days pay at the straight time rate of pay.

AWARD

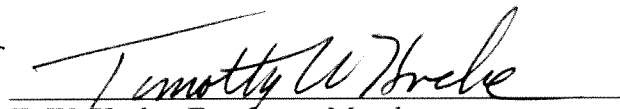
Claim partially sustained in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed by the parties.



William R. Miller, Chairman



C. K. Cortez, Carrier Member



T. W. Kreke, Employee Member

Award Date: Sept 16, 2011