

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD 6302

NMB NO. 196
AWARD NO. 194

PARTIES TO DISPUTE

CARRIER

Union Pacific Railroad

Carrier's File

1526304

AND

ORGANIZATION

Brotherhood of Maintenance of Way Employees
Division of International Brotherhood of Teamsters

System File

D-09-36D

STATEMENT OF CLAIM

1. The Carrier's decision to impose a Level 4 discipline (eighty (80) hour suspension without pay) upon Mr. Jose Centeno for the alleged violation of Rule 42.4 (Track and Time Authority) and Rule 42.4.2 (Using Track and time Authority) in connection with operating a ballast regulator machine outside of the limits of a track and time authority that he was working under on May 13, 2009 is arbitrary, capricious, unwarranted and on the basis of unproven charges and in violation of the Agreement.
2. As a consequence of the violation referred to in Part 1 above, we request that the Level 4 [eighty (80) hour suspension without pay] imposed upon Claimant Centeno be rescinded in its entirety, that he be compensated eighty (80) hours at his respective rate of pay as a System TMO (Tamper Machine Operator – Ballast Regulator - \$23.84 per hour straight-time) and that he be compensated for all work day and rest day per diem loss suffered as a result of his unjustly suspension from service.

STATEMENT OF BACKGROUND

Claimant has an established seniority date of April 2, 1990 within Carrier's Maintenance of Way Department. At the time events gave rise to this subject claim, Claimant was regularly assigned and working as a ballast regulator machine operator on System

Gang 8568. On May 13, 2009 Claimant was working his regular assignment as a ballast regulator machine operator on the South Morrill Subdivision near Milepost 35. According to the record testimony of eyewitness, Foreman Daniel C. Fox, he heard the Employee in Charge (EIC) give Claimant and co-worker, Rene Anaya track and time authority to proceed to Control Point (CP) 035 located at Milepost 34.8. Yet, at 4:35 p.m. Claimant's machine heading west, according to Fox, went beyond CP 035 and proceeded to Milepost 35. Fox related that prior to 4:42 p.m. the time Claimant was given authorization to proceed to Milepost 35, Claimant made a reverse movement eastward in a maneuver to back up to CP 035, the limits of the track and time authority. According to a second eyewitness, Supervisor Eric Magoon who corroborated Fox's account of what had occurred, when he and Fox heard the EIC give Claimant and Anaya track and time authority to proceed up to CP 035, they planned to set up a "stop test" at that location. In addition, according to Magoon, he observed that equipment operated by other employees trailing Claimant's ballast regulator machine such as the Jackson ATS 9812 stopped short of and did not pass CP 035. According to Magoon, the operator of the Jackson ATS 9812 told him that track and time authority extended only to CP 035 and not beyond. The record evidence reflects that immediately following the incident, all members of System Gang 8568 including Claimant and employee Anaya and their respective equipment proceeded to traverse their machines to the designated location and put them in the clear.

The record evidence reflects that after witnessing Claimant and employee Anaya exceed the designated track and authority limits, Fox and Magoon called Track Supervisor Todd Stotts and informed him of the incident. Sometime thereafter, Stotts questioned both Claimant and Anaya in private in his work truck and based on the information obtained, Stotts determined to subject them to a urinalysis drug screening. In turn, Manager of Track Programs (MTP), J. Mike Haverstick was notified of the subject incident and based on information he acquired determined to summon Claimant and Anaya to attend a formal investigation charging them with violation of the General Code of Operating Rules (GCOR), Rules, 42.4 which reads in whole and 42.4.2, which reads in pertinent part as follows:

RULES FOR ON-TRACK OPERATION OF TRACK CARS, ROADWAY MACHINES AND WORK EQUIPMENT

42.4: Track and Time Authority

In CTC territory, track cars and machines may occupy a main track or controlled siding within the specified limits and time periods verbally authorized by the train dispatcher or control operator. Limits will be designated by control points or switches.

42.4.2: Using Track and Time Authority

Track and time authority may be granted to an employee only after all trains moving within the limits have passed the location where the track is to be first occupied, except as outlined in Rule 42.4.3 (Joint Track and Time). When using track and time authority, know the following:

- The track may be used in either direction within the time limits specified.
- Track and time must be obtained before occupying any siding in the CTC territory.
- When the limits are designated *BY A CONTROL POINT* and the permit includes "SWITCH NO," the limits extend only to the signal governing movement through that control point. However, when the track and time permit includes "SWITCH YES," the limits will include that switch, or those switches, and the track in the direction lined between absolute signals governing movement through the control point.

* * * *

- Track and time authority must be released before the expiration of time granted. If additional time is required, obtain authority from the train dispatcher or control operator before the authorized time limit expires. If the train dispatcher or control operator cannot be contacted and the time limit expires, authority is extended until the train dispatcher or control operator can be contacted.

Track cars must be clear of the track limits granted before track and time authority is released.

A formal investigation was held on June 24, 2009 and subsequently, on July 7, 2009, Conducting Manager of the Investigation, MTP J. Mike Haverstick issued the subject Notification of Discipline to Claimant which reads in pertinent part as follows:

I have now carefully reviewed and considered all the testimony contained in the hearing transcript. I have found more than substantial degree of evidence was presented to warrant sustaining the above charges brought against you for your violation of the above-cited rules, [Rules 42.4 and 42.4.2].

[These rules violations require] the assessment of Level 4. The current violation of Level 4, plus your previous Level 0, equates to a Level 4. Therefore, the discipline assessed your record will be a Level 4 discipline.

In accordance with the current [UPGRADE] Discipline Policy, it has been determined you will serve an eighty (80) hour suspension, without pay. Your eighty (80) hour suspension **will begin on July 24, 2009, and will conclude at 2:00 p.m. on July 30, 2009.**

On September 2, 2009, the Organization filed the subject claim.

CARRIER'S POSITION

Carrier submits it has borne its burden of proof in showing, by the well established substantial evidence standard that, on the date in question, May 13, 2009, Claimant violated GCOR Rules 42.4 and 42.4.2 by improperly operating his machine outside the limits of the track and time authority he was working under. Carrier asserts that the testimony proffered by eyewitnesses Foreman Fox and Supervisor Magoon, testimony that contains no apparent bias or ill intention toward Claimant, represents clear and convincing testimony that Claimant proceeded beyond his track and time authority which was at CP 035 to MP 35 before any radio authorization was received by the Claimant.

In noting that Claimant testified contrary to the testimony presented by both Foreman Fox and Supervisor Magoon that, in fact, he had authority to proceed to MP 35 and therefore was not in violation of the cited GCOR Rules, Carrier maintains that in instances where there is conflict surrounding the actual events that occurred, numerous arbitration awards have held that determinations of credibility are to be made by the Carrier. In the case at bar, Carrier notes that in arriving at the determination Claimant committed the violations of the subject cited GCOR Rules, it relied on the testimony of its two (2) eyewitnesses as being more credible over the testimony proffered by Claimant. Carrier points in particular to the testimony by Supervisor Magoon that employee Anaya admitted that he and Claimant did not have authority to proceed to MP 35 and that Claimant proceeded beyond his track and time authority which was CP 035 before any radio authorization was received by Claimant. Supervisor Stotts too, testified that employee Anaya told him that he and Claimant exceeded their issued track and time authority due to confusion. Additionally, Carrier points to the non-contradicted and un-refuted testimony by both Fox and Magoon that Claimant made a reverse movement eastward to return to CP 035 and that approximately seven (7) minutes after the time this reverse movement commenced, Claimant was given time and authority to proceed to MP 35. Specifically, Claimant's violation occurred at 1635 (4:35 p.m.), yet authorization to proceed was not obtained until 1642 (4:42 p.m.). This testimony was supported by employee Anaya's admission to Stotts that he and Claimant had been forced to make a reverse eastward movement with their machines in order to position their equipment within the issued track and time authority. Carrier asserts that Claimant should consider himself lucky that his violation of the two (2) Rules for On-Track

Operations did not result in injury, property damage, or serious bodily harm from a collision had a train or hy-rail vehicle entered the same track limits.

Carrier avers that in the absence of any procedural errors barring Claimant from receiving all due process rights he is entitled to receive such as timely notification of the alleged charges and notice of investigation, his right to Organization representation at the investigation, his right to testify in his own behalf and to produce witnesses in his defense, and the right to cross-exam his accusers, the assessment of Level 4 Discipline for the proven offenses committed under its UPGRADE Discipline Policy which has been ruled by many Boards to be a reasonable policy was proper and appropriate and commensurate with the committed rules violations, meaning it was not excessive, that is, unreasonably harsh, nor arbitrary, capricious, or discriminatory under all the prevailing circumstances.

In conclusion, Carrier respectfully requests the Board to rule that it is not required to vacate the properly assessed progressive discipline of an eighty (80) hour suspension without pay issued to Claimant.

ORGANIZATION'S POSITION

Notwithstanding Carrier's position the instant case was free of any procedural error, the Organization submits that Claimant was not afforded a fair and impartial investigation and that the discipline assessed was arbitrary, capricious, unwarranted on the basis of unproven charges and in violation of the Controlling Agreement. The basis for this assertion is the multiplicity of roles assumed by Manager Track Programs, J. Mike Haverstick who was involved in acquiring the details of the violations of the rules governing on-track operations allegedly committed by Claimant and, his subsequent role as the Hearing Officer and final decision-maker in assessing the discipline of an eighty (80) hour suspension without pay. The Organization argues that Haverstick's multiplicity of roles as complainant, judge, jury and executioner, is sufficient to show that Carrier pre-judged Claimant's guilt thereby failing to provide him with a fair and impartial investigation. The Organization posits that in pre-judging Claimant's guilt of committing the rules violations charged, specifically GCOR Rules 42.4 and 42.4.2, Carrier violated Rule 48, the Rule governing Discipline and Grievances, specifically sub-section (a) which reads in pertinent part the following:

... an employee who has been in service more than sixty (60) calendar days whose application has not been disapproved, will not be dismissed or otherwise disciplined until after being accorded a fair and impartial hearing. * * *

The Organization submits it is a well accepted principle that the Carrier officer who issues the charges to the employee under investigation, here MTP Haverstick, is not

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as the Hearing Officer in judgment of the merits of the case involving the charged employee. However, the Organization notes that even though Carrier was cognizant of this principle as evidenced by the fact it postponed the hearing as initially set and indicated that Supervisor Stotts would be the Hearing Officer when the investigation convened at a subsequent date, nevertheless, without explanation, Haverstick continued in his role as Hearing Officer. The Organization submits that the Board has consistently sustained claims wherein a carrier permitted one of its officers, here Haverstick, who held a prejudgment of guilt against the charged employee, here the Claimant, to perform multiple roles to the extent Carrier permitted in this instant case. The Organization argues that Carrier's actions as hereinabove referenced clearly denied Claimant his contractual and due process right to a fair and impartial hearing and, in so doing, were in direct violation of the Agreement. Consequently, the Organization submits, Claimant is entitled to the remedy requested.

The Organization takes the position that based on the foregoing procedural error of denying Claimant his due process right to a fair and impartial hearing on the alleged charges the Board should not consider the merits of the claim. However, should the Board consider the merits, the Organization submits that Carrier failed to meet its burden of proof to support the charges it leveled against Claimant by any substantial evidence. The Organization asserts that the testimony proffered by both eyewitnesses, Fox and Magoon is suspect at best given that each of their accounts of the incident varied factually. Specifically, Foreman Fox testified that both Claimant and employee Anaya operated their machinery 125 **yards** past CP 035 whereas, Supervisor Magoon testified that they operated their machines 125 **feet** past CP 035. The Organization maintains this difference in distance is significant as it is approximately a football field in length which clearly clouds the accuracy of their testimony and allegations. Moreover, the other two (2) eyewitnesses to the events in question, employee Anaya and Claimant himself, refute the testimony of both Fox and Magoon asserting, in contradiction, that they absolutely did not operate their machines outside the limits of the track and time authority. Given this contradiction in eyewitness testimony, the Organization argues that Carrier could easily have reconciled the contradictions by having produced the following evidence, to wit: 1) elicited testimony regarding the incident from the unidentified EIC Assistant Foreman who held the track and time authority involved here or, in the alternative, elicited the testimony of the Dispatcher who issued the track and time authority to the unidentified EIC and who would have been immediately notified via the indication on his computer control dispatch screen for the CTC track that the machines were, in fact, operating outside their designated track and time authority limits; 2) production of any of the reports that dispatchers and Carrier officials are responsible for filing in connection with incidents involving employees operating equipment outside designated limits of track and time authorities on CTC track; and 3) production of the recorded radio conversation (which Fox and Magoon were not privy to due to a phone call) between employee Anaya and the unidentified EIC Assistant

Foreman that would have confirmed the allegation the EIC gave Claimant and Anaya permission only to proceed to CP 035. The Organization notes however, that Carrier utterly failed to produce such critical and credible substantial evidence during the formal investigation. The Organization submits the only conclusion that can be inferred is the negative inference that Carrier's failure to produce such substantial evidence is simply because no such evidence exists. Hence, the Organization submits, Carrier failed in its burden of proof and consequently, the instant claim must be sustained.

Based on the foregoing argument asserted, the Organization posits that Claimant is entitled to the full remedy requested.

FINDINGS

Public Law Board No. 6302, 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.

The Board finds troublesome as substantiated by the un-contravened record evidence that Carrier seemingly attempted to avert a conflict of interest by replacing MTP Haverstick initially designated as the Hearing Officer to preside over the formal investigation of the incident in question with Supervisor Stotts but then, without explanation permitting Haverstick to continue in the role of Hearing Officer knowing full well he had been involved in the pre-investigation activity of gathering the facts that led to the charges against Claimant he violated GCOR Rules 42.4 and 42.4.2. It has been well established and by now deemed to be a hallowed principle that a Carrier officer involved in pre-investigation activities such as gathering the facts that lead to a disciplinary action should not be the Hearing Officer that conducts the formal investigation of the charged employee as such an occurrence lends itself to the charge, as it did here, that a pre-judgment was made by Carrier of Claimant's guilt of having committed the rules violations alleged against him. It is possible that Haverstick did not pre-judge Claimant's guilt as Carrier asserts indirectly by its claim there were no procedural errors committed, but such a finding would simply constitute conjecture and not be fair to Claimant. Ironically, had Carrier been successful in replacing Haverstick as Hearing Officer with Supervisor Stotts, the same argument could have been asserted by the Organization as Stotts too was involved, and even more directly so than Haverstick in the pre-investigation activity of gathering the facts that led to the allegations and charge against Claimant.

We generally are not predisposed to ruling on claims on procedural grounds where the merits of the case are supported by substantial evidence as we are persuaded they are here in the case at bar, notwithstanding the Organization's position to the contrary.

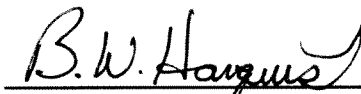
However, we cannot abide the situation where procedurally a Carrier officer assumes the multiplicity of roles as Haverstick did here of being, in the Organization's characterization of roles, complainant, judge, jury and executioner. In so finding, we concur in the Carrier's position that the remedy sought by the Organization goes beyond making Claimant whole.

Accordingly, we rule to expunge from Claimant's work record any reference to a Level 4 disciplinary action and to compensate Claimant for eighty (80) hours of pay at his straight-time hourly rate of \$23.84, as a System TMO (Ballast Regulator Operator). This Award is to become effective within sixty (60) days from the date signed by the Parties.

A W A R D

CLAIM SUSTAINED AS PER FINDINGS


George Edward Larney
Neutral Member & Chairman


B. W. Hanquist
Dissent


T. W. Kreke

Chicago, Illinois
Date: September 12, 2011

**CARRIER'S DISSENT TO AWARDS 194 & 195 OF
PUBLIC LAW BOARD 6302
REFEREE LARNEY**

Carrier cannot concur with the conclusion of the Referee that Claimants' due process rights were violated in this case and that it somehow affected the outcome of the hearing. In this Award the Referee incorrectly determined that Claimants should not be found guilty when in fact the undisputed testimony revealed that Claimants in fact violated GCOR Rules 42.4 and 42.2.2.

Contrary to the Board's findings, the standard in the industry is to find substantial guilt. Regardless of the roles played by the participants in this situation, the record was very clear that Claimants violated vital safety rules that keep all employees safe in their working environment. Carrier managers are not trained in the legal profession and provide the facts at the hearing to determine if the rules were violated.

Given the undisputed record, even if the Carrier had used a different hearing officer, the outcome would not have changed. The Award should not have been sustained per the findings. The only redeeming thing in this award is that it only addresses this specific case and is therefore not establishing precedent. The Carrier dissents to the Award.



Carrier Member PLB 6302

August 29, 2011