

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6302
AWARD NO. 200, (Case No. 206)**

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

vs

UNION PACIFIC RAILROAD COMPANY

William R. Miller, Chairman & Neutral Member
K. D. Evanski, Employee Member
P. Jeyaram, Carrier Member

Hearing Date: April 10, 2012

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

- 1. The discipline [Level 4, including a three (3) day suspension, without pay beginning November 6, 2009 and concluding on November 8, 2009] imposed upon Mr. D. Barber by letter dated December 8, 2009 for the alleged violation of Rule 136.4.2 (Inaccessible Track) in connection with his alleged failure to protect men and equipment on Track 132 in the North Platte Yard on November 4, 2009 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File B-1048U-101/1532936D).**
- 2. As a consequence of the violation referred to in Part (1) above, Claimant D. Barber shall now be '***made whole for the days improperly held from service pending the hearing, November 6, 7, 8, 16, 17 and 18. Claimant must have his per diem allowance reinstated and paid for the days of November 6 through November 18, 2009. Claimant must also be reimbursed at the applicable rate for the round trip mileage from work location at North Platte, NE to Claimant's home at Marshalltown, IA and back in observing the rest days of November 9 through 15, 2009."**

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 undisputed facts indicate that the Claimant has 30 plus years of service and holds seniority as a Foreman in the Track Sub-department. On November 4, 2009, the Claimant was designated as the employee in charge (EIC) responsible for switching some pieces of equipment

in Track 132 located in the East Hump Yard at North Platte, Nebraska. It was alleged that he failed to protect his co-workers and equipment.

On November 12, 2009, Carrier notified Claimant to appear for a formal Investigation on November 18, 2009, concerning in pertinent part the following charge:

"...to develop the facts and place responsibility, if any, that while employed as Foreman at or near North Platte, Nebraska, North Platte Subdivision, at approximately 1145 hours, on November 4, 2009, while working with the 9066 Gang, on Track 132, in the North Platte Yard, you allegedly failed to protect men and equipment by not having the switch lined and locked properly which lead to six (6) railcars being humped into the track personnel and equipment were working in.

These allegations, if substantiated, would constitute a violation of Rule 1.6 (Conduct), Rule 1364.2 (Inaccessible Track), Rule 136.4 (On-Track Safety Procedures), Rule 136.3.1 (Job Briefing for Roadway Work Groups), Rule 40.7 (Chapter 7 Supplements) Supplement 7.13 (Protection of Employees in Bowl Tracks), Rule 41.1 (Foreman), as contained in the General Code of Operating Rules, effective April 3, 2005, in the Chief Engineer Bulletins, effective November 17, 2008, in the Maintenance of Way and Signal Rules, effective November 17, 2008, and in the System Special Instructions, effective June 22, 2009. 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 December 8, 2009, Claimant was found guilty as charged and was assessed a Level 4 discipline with a three day suspension, without pay. Because the Claimant had been held out of service pending the Hearing the three day suspension assessed was retroactive to November 6, through and including November 8, 2009.

It is the position of the Organization that the Carrier failed to meet its burden of proof. It argued that the record reveals that Claimant had been overseeing the movement of Gang 9066 equipment into Track 132 in the North Platte Yard. Shortly, after the gang had completed movement into Track 132 the Claimant was getting a lock to lock out the switch to protect Tracks 125 through 132 when he received a radio call from the Hump Operator advising him that the hump was going to release cars to go into Track 124. Claimant informed the Hump Operator that his men and equipment were in the clear in Track 132 and it was permissible to release cars into Track 124. Unfortunately, the Hump Operator threw the wrong switch and directed the cars into Track 132 instead of 124 which was not the fault of Claimant. It further argued that the

testimony of East Hump Yardmaster M. Stillwell established that the Carrier had placed an inexperienced employee in the position of Hump Operator on the date of the incident and that Yardmaster Stillwell had voiced his concern about the Hump Operator's lack of experience. It concluded that the cars being humped into Track 132 was no fault of the Claimant who had done everything to ensure that the gang was properly protected. Additionally, it asserted that all of the switches in the East Hump Yard are remotely-controlled switches and only the Dispatcher/Control Operator at that location had authority to operate them. The Organization concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the Carrier's position that the testimony indicates that on the date of the incident under charge the Claimant was working as a Foreman, in the North Platte Yard and at approximately 1145 hours while working with the 9066 Gang, on Track 132, he failed to protect men and equipment by not having the switch lined and locked properly, which led to six railcars being humped into the track where personnel and equipment were parked. It argued that Claimant, as the Foreman had means to positively ensure that the gang was protected in the working limits, but failed to utilize those means by having the switch lined and locked properly. It further asserted that even though the Hump Operator may have inadvertently released the cars down the wrong track that does not excuse the Claimant's failure to have provided proper on-track protection, i.e., properly lined out and locked the switch for the protection of his men and equipment for such unforeseen and dangerous circumstances. It closed by stating that the Claimant was fortunate that there were no severe injuries or worse to those employees he was to lead and protect and asked that the claim remain denied.

The Board has thoroughly reviewed the record and determined that the Claimant received a "fair and impartial" Hearing and was afforded his Agreement "due process" rights, therefore, the dispute will be resolved on its merits

The record reveals that on November 4, 2009, Claimant was Employee in Charge (EIC) responsible for ensuring the safety of employees on the gang and machines under his authority. The Claimant's gang was working in the East Hump Yard in North Platte, NE, wherein cars are switched using gravity flow thus it is important for switches to be lined and properly secured to prevent cars from free-rolling into the wrong tracks. Testimony from the Hearing reveals that on the aforementioned date the gang had been performing switching moves and performing work. A clamp had been used during the operations on the switch leading to tracks 125 - 132. It had been put on and removed several times to allow for cars to be moved from track to track. After the gang's last move, the gang took their lunch break and while eating several cars began to roll into track 125, where the gang's machines were parked. Claimant immediately called the Hump Operator to cease humping operations and the Assistant Foreman then applied the clamp to secure the track and prevent additional cars from coming into the tracks.

The Organization asserted that the incident was caused by an inexperienced Hump Operator and at that time the Claimant was searching for a lock when the cars were rolled into the tracks which indicated he was trying to secure the switch. The Organization is correct that the Hump Operator erred, however, that does not absolve the Claimant of his responsibilities. Improperly released cars are one of the specific reasons why the Foreman and/or EIC has to ensure that they have provided proper on-track protection for such unforeseen and potentially dangerous events. It was not refuted that prior to the incident Claimant had been using a Switch Point Clamp rather than a lock to secure other switches during the morning. Testimony substantiated the Claimant was responsible for properly locking and securing the switch leading to tracks 125 - 132 and he failed to clamp the track following completion of the gang's morning duties and did not need to be looking for a lock as the clamp had been used all morning. Substantial evidence was adduced at the Investigation that the Carrier met its burden of proof that Claimant was guilty as charged.

The only issue remaining is whether the discipline was appropriate. Review of the discipline reveals that it was in accordance with the Carrier's UPGRADE Discipline Policy, therefore, the Board finds and holds the discipline will not be set aside because it was not arbitrary, excessive or capricious.

AWARD

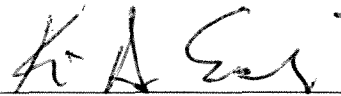
Claim denied.



William R. Miller, Chairman



P. Jeyaram, Carrier Member



K. D. Evanski, Employee Member

Award Date:

June 18, 2012