

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6302
AWARD NO. 201, (Case No. 207)**

**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 ten (10) day suspension without pay] imposed upon Mr. M. Cunningham by letter dated December 2, 2009 for the alleged violation of Rule 136.4.2 (Inaccessible Track), Rule 136.4 (On Track Safety Procedures), Rule 136.3.1 (Job Briefing for Roadway Work Groups) and Rule 41.1 (Foreman) in connection with his alleged failure to protect men and equipment near Track 101 in the North Platte Yard on October 4, 2009 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File B-1048U-102/1532937D).**
- 2. As a consequence of the violation referred to in Part (1) above, Claimant M. Cunningham shall now be '***compensated for all wage loss, and benefit loss incurred as a result of the improper discipline assessed."**

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 at the time of the incident under charge the Claimant has 35 plus years of service and holds seniority as a Foreman. On October 4, 2009, Claimant was working as Foreman for a Consolidated System Gang (Surfacing Crew) at North Platte, Nebraska, near Track 101. It was alleged that he failed to protect his co-workers and equipment.

On October 27, 2009, Carrier notified Claimant to appear for a formal Investigation on November 6, 2009, which was mutually postponed until November 18, 2009, concerning in pertinent part the following charge:

"...to develop the facts and place responsibility, if any, that while employed as Foreman on Gang 9086, at North Platte, Nebraska, near Track 101, North Platte Subdivision, on October 4, 2009, you allegedly failed to protect men and equipment by not having the switch lined and locked properly and derails placed for gang protection.

These allegations, if substantiated, would constitute a violation of Rule 136.4.2 (Inaccessible Track), Rule 136.4 (On Track Safety Procedures), Rule 136.3.1 (Job Briefing for Roadway Work Groups). Rule 41.1 (Foreman), as contained in the General Code of Operating Rules, effective April 3, 2005, the Maintenance of Way & Signal Rules, effective November 17, 2008, and in the Chief Engineer Bulletins, effective November 17, 2008. Please be advised that if you are found to be in violation of this alleged charge the discipline assessment may be a Level 4, and under the Carrier's UPGRADE Discipline Policy may result in up to 10 days off work without pay or up to five days training without pay and you must pass the necessary operating rules exam or equivalent in order to return to work and a Corrective Action Plan must be developed prior to returning to service."

On December 2, 2009, Claimant was found guilty as charged and was assessed a Level 4 discipline with a ten day suspension without pay.

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 was put in the position of having to provide on track protection for members of his work group without sufficient safety appliances to provide full protection while equipment was being moved from one location to another location in the North Platte, NE East Hump Yard. It asserted the Claimant was put in a position where he was required to remove derail protection devices and then leapfrog around the equipment to place the derail appliances in new locations and when Supervisor E. J. Hatch questioned him about the derails he was in the process of moving them. It reasoned that the Claimant was not furnished a sufficient number of derail appliances and under the circumstances he provided the best possible track protection. It concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the Carrier's position that substantial evidence was presented at the Investigation to warrant the assessed discipline. It argued the Claimant failed to make the track inaccessible by placing a derail on the track prior to allowing men and equipment to occupy it as required by the Rules. It further argued that the Organization set forth two arguments to mitigate the Claimant's

guilt. The Organization first asserted that the Claimant did not have sufficient derails to provide protection and secondly that the Claimant was in process of placing a derail when he was observed by Supervisor Hatch. It argued that neither argument is persuasive because first, there was no proof presented that the Claimant could not follow the Rules and make the track inaccessible with the three derails he had in his possession and second, there was no evidence that he ever requested additional derails. It closed by stating that the number of derails does not mitigate the Claimant's guilt and it asked that the claim remain denied.

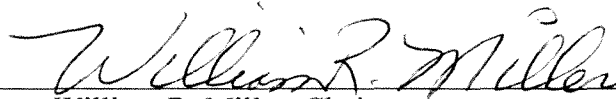
The Board had thoroughly reviewed the record and determined that the Claimant received a "fair and impartial" Hearing and was afforded his Agreement "due process" rights, therefore, the dispute will be resolved on its merits.

The record reveals that on October 4, 2009, Claimant was the Foreman on Gang 9086, in the Hump Yard at North Platte, NE, near Track 101. In a hump yard 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. On the date of the incident the Claimant's gang had set a machine out of service on Track 101 in order to perform service on it. There were cars parked on the track and the Claimant did not place a derail between the parked cars and machine. In addition, the switch leading into the track was not lined and locked. There was no showing that the Claimant did not have sufficient derails as he had been using three all day with no request for additional derails nor was there a showing that Claimant was in the process of placing a derail when he was observed by Supervisor Hatch. On page 85 of the transcript the Claimant confirmed that he did not request additional derails because they were not needed at that time and on page 72 of the transcript he further confirmed that he had not placed a derail between the machine and the parked cars when Supervisor Hatch observed him as he was busy contacting multiple people. Contrary to the Organization's argument the Claimant was not "leapfrogging" around to get the derail in place. Substantial evidence was adduced at the Investigation that the Carrier met its burden of proof that Claimant was guilty as charged.

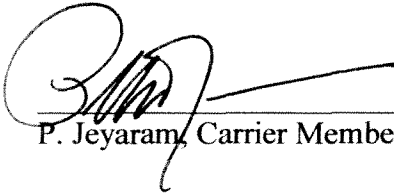
The only issue remaining is whether the discipline was appropriate. Review of the discipline reveals that it was in accordance with the Carrier's UPGRADE Discipline Policy, therefore, the Board finds and holds the discipline will not be set aside because it was not arbitrary, excessive or capricious.

AWARD

Claim denied.



William R. Miller, Chairman



P. Jeyaram, Carrier Member



K. D. Evanski, Employee Member

Award Date: June 18, 2012