

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6302
AWARD NO. 215, (Case No. 224)**

**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: September 19, 2012

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

- 1. The dismissal of Track Machine Operator A. L. Wimmer for violation of Rules 1.6, Part 3, 1.15 and 1.13 as contained in the General Code of Operating Rules for failure to show for duty on October 4, 2010 is based on unproven charges, unjust, unwarranted and in violation of the Agreement (System File D-11-04/1548580).**
- 2. As a consequence of violation referred to in Part 1 above, Mr. Wimmer shall be compensated for any and all straight time and overtime hours of wage loss suffered at his respective rate(s) of pay as a TMO machine operator, commencing from the date of his dismissal, December 3, 2010, to continue until such time as he will be restored to active service with the Carrier. He shall be reinstated at the earliest available opportunity to do so, with all seniorities held to be restored intact."**

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.

On October 7, 2010, Carrier notified Claimant to appear for a formal Investigation on October 21, 2010, which was mutually postponed until November 19, 2010, concerning in pertinent part the following charge:

"...to develop the facts and place responsibility, if any, that while employed as MW Operator on Gang 6370, at Salt Lake City, Utah, near Milepost 742.5, at

approximately 0600 hours, on October 4, 2010, you allegedly failed to show for duty.

These allegations, if substantiated, would constitute a violation of Rule 1.6, Part 3 (Insubordinate), Rule 1.13 (Reporting and Complying with Instructions), and Rule 1.15 (Duty-Reporting or Absence), as contained in the General Code of Operating Rules, effective April 7, 2010. A review of your previous discipline history indicates that this is the third offense of the same offense in a 36-month period. 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 3, 2010, Claimant was notified that he had been found guilty as charged and was assessed a Level 5 discipline and dismissed from service.

It is the Organization's position that the record reflects the undisputed fact that Claimant overslept and was unable to make it to work at his scheduled start time of 6:00 a.m. on Monday, October 4, 2010. However, despite the fact that Claimant overslept, once he woke up and realized he was not going to be able to make it to work on time, at approximately 5:58 a.m., he contacted his Supervisor to inform him that he had overslept. The Organization argued that Claimant's error was excusable because he had expended a total of 79 hours of service for the Carrier in connection with his regular assignment on Gang 6370 [(40) hours and the overtime service performing system gang track surfacing work (39) hours]. According to it the Claimant had completed two regular work weeks worth of service in a short period of time and the imposition of discipline especially in the form of dismissal was inappropriate. It concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the position of the Carrier that there is no dispute the Claimant failed to report for duty on October 4th and a review of his work history shows that he was absent for his assignment without authorization on February 24, 2010, April 14, 2010, and October 4, 2010. All three of these instances are a violation of the same Rule and not only did they occur within 36 months, but they occurred within an eight month period. The Carrier also addressed the Organization's argument that the Claimant's no show was excusable because he had worked so much overtime in a short period of time. It asserted that was not excusable because 39 hours of the time worked by Claimant was voluntary overtime. It further argued that Claimant's failure to show up for work was a violation of Rule 1.15. Union Pacific Railroad Policy and Procedures for Ensuring Rules Compliance in the Progressive Discipline Table states in part that *"...if an employee commits three repetitions of the same Level 3, 4 or 4C rule infraction during a 36 month period the discipline will be assessed at Level 5 -- Permanent Dismissal."* It closed that

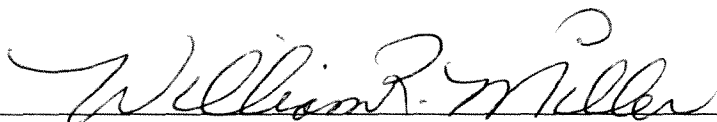
Claimant had continually failed to protect his assignment and permanent dismissal was appropriate and it asked that the discipline not be disturbed and the claim remain denied.

The record indicates that on October 4th the Claimant called his Supervisor two minutes before his starting time, advising him, that he overslept and would be late for work. There is no dispute between the parties, and the record substantiates, that this was the Claimant's third violation of being either tardy or failing to report for duty within a 36 month period. In the first two instances Claimant was assessed a Level 4 discipline status for his violations. Under the Carrier's Progressive Discipline Policy the Claimant was subject to discipline up to and including dismissal for a third violation. The evidence is persuasive that the Claimant was tardy on three occasions, however, it is noted that on one date it was for a very short time period. Nonetheless, substantial evidence was adduced at the Investigation that Claimant was guilty as charged.

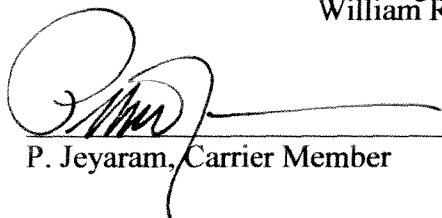
The only issue remaining is whether the discipline was appropriate. At the time of the incident the Claimant had five plus years of service with a good work record. The record reflects that the Claimant was forthright about his tardiness. The Board does not excuse tardiness, but in this instance it is determined that dismissal was excessive, therefore, the Board finds and holds that it is reduced to a lengthy suspension which is in accordance with the Carrier's Progressive Disciplinary Policy and is corrective in nature. Claimant is to be reinstated to service with seniority intact and all benefits unimpaired, but with no back pay. Claimant's return to service is made on a "Last Chance Basis" with a strong forewarning that the Claimant needs to correct his tardiness and/or absenteeism and adhere to all Carrier Rules.

AWARD

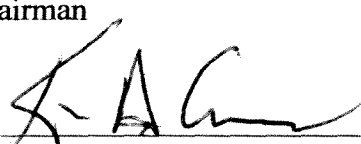
Claim partially sustained in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed.



William R. Miller, Chairman



P. Jeyaram, Carrier Member



K. D. Evanski, Employee Member

Award Date: 10/30/12