

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6402
AWARD NO. 153, (Case No. 174)**

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

vs

**UNION PACIFIC RAILROAD COMPANY (Former Missouri Pacific
Railroad Company)**

William R. Miller, Chairman & Neutral Member
T. W. Kreke, Employee Member
K. N. Novak, Carrier Member

Hearing Date: February 23, 2011

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

- 1. The Level 3 discipline imposed upon Machine Operator F. Piedra for alleged violation of Rule 42.11.1 (Speed when Passing Through Switches or Derails) in connection with the derailment on December 13, 2009 of one (1) axle of the rail heater car to which he was assigned and operating at the time is based on unproven charges, unjust, unwarranted and excessive (System File UP-501-JF-10/1528295D).**
- 2. As a consequence of the violation outlined in Part 1 above, we request '...the removal of the Claimant's unwarranted assessment of a Level 3 Discipline, and the removal of the Claimant's unwarranted and unjustified suspension from active service of the Union Pacific Railroad, from his Personnel Record and the reinstatement of the Claimant to active service with all seniority unimpaired, to be paid for all time lost, as the Carrier removed the Claimant from active service beginning on February 22, 2010 through and including February 26, 2010, at the Claimant's respective straight time rate of pay and any and all overtime acquired by Gang # 9115, beginning on February 22, 2010 through and including February 26, 2010, all time lost to be credited towards Railroad Retirement, vacation, hospitalization and all expenses to be paid, to include any meals and 'mileage at the rate of \$.50 a mile acquired by the Claimant attending the Formal Investigation on January 26, 2010, from the Claimant's place of residence, 7 Lindsay Lane, Bloomington, IL 61701 to the Union Pacific Railroad Depot, 3000 Terminal Road, Alexandria, Louisiana, on Tuesday, January 26, 2010, 8:00 A.M. and back to the Claimant's place of residence***'."**

FINDINGS:

Public Law Board No. 6402, 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 January 11, 2009, Carrier notified Claimant to appear for a formal Investigation on January 26, 2010, concerning in pertinent part the following charge:

"...to develop the facts and place responsibility, if any, that while employed as Machine Operator on Gang 9115, at Knoxville, Arkansas, near Milepost 433.6, at approximately 9:10 a.m., on December 13, 2009, you allegedly failed look to ensure that a switch was properly lined for your movement before passing through the switch, resulting in the derailment of one (1) axle of the heater car.

These allegations, if substantiated, would constitute a violation of Rule 42.11.1 (Speed When Passing Through Switches or Derails), as contained in the General Code of Operating Rules, Maintenance-of-Way Rules, 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 3, and under the Carrier's UPGRADE Discipline Policy may result in up to five (5) days off work without pay or up to one (1) day training without pay and a Corrective Action Plan must be developed prior to returning to service."

On February 11, 2010, Claimant was notified that he had been found guilty as charged and his record was assessed with a Level 2 UPGRADE discipline and a five day suspension.

The facts indicate that the Claimant holds seniority as a Roadway Machine Operator with more than 19 years of service with no indication of any prior discipline. At the time of the incident he was regularly assigned and working on System Rail Gang 9115 as an Operator of a Rail Heater Car.

There is no dispute between the parties that on December 13, 2009, one axel of the rail heater car which the Claimant was operating derailed in the north siding switch in the vicinity of Mile Post 433.6 near Knoxville, Arkansas, nor is there any disagreement that the north siding switch was improperly lined for the movement of the Claimant's machine resulting in the derailment.

It is the position of the Organization that the spirit of Rule 21 was not met in the instant case because there was no indication that the Carrier made any effort to comply with its guidelines in charging the Claimant within 15 days of the incident or holding the Hearing within 30 days. It further argued that only two people witnessed the event, Supervisor Miller and the Claimant and the Carrier at its own peril chose not to have Miller present for the Hearing as a material witness and instead paraded witnesses who were not present at the incident and on that basis Claimant's testimony as to what transpired must be considered factual. It further argued that Supervisor Miller acting as a ground man signaled Claimant to make the reverse movement which he did resulting in the derailment. According to the Organization, Miller was at fault for the derailment. It concluded by requesting that the discipline be set aside and the Claim be sustained as presented.

It is the Carrier's position that it did not procedurally violate Rule 21 as the timelines are only guidelines. It further argued that despite the Organization's argument that Supervisor Miller should have been present for the Hearing the Claimant was not denied a fair and impartial Investigation because the Claimant admitted that he did not check the alignment of the switch and that as the Operator he was responsible for checking such things. It closed by asking that the discipline not be disturbed and the Claim remain denied.

The Board has thoroughly reviewed the record and we find no procedural errors which require setting aside the discipline as the Claimant was afforded his "due process" Agreement rights. However, we would point out that the Organization's argument that the Carrier's failure to have Supervisor Miller present for the Hearing as a material witness was not without some merit and might have been grounds for rescinding the discipline if the Claimant had not acknowledged partial blame for the incident. On page 25 of the Transcript the Claimant was questioned and testified as follows:

"Q Okay. Mr. Piedra you state that you were going backwards. when you approached the switch, did you stop and get off to check to see if the switch was lined for your move?

A No sir, because all the machines they already went there by that way."

On page 33 of the Transcript the Claimant continued to testify as follows:

"Q Mr. Piedra, you stated earlier that you've operated a machine or been a machine operator for most of your career, if I remember correctly, is that-is that not correct?

A Yes sir.

Q When you're operating machine- a machine Mr. Piedra, as a machine operator, are you responsible to look for things when you're traveling ahead, as well as behind you?

A Yes sir."

And finally in his closing statement, on page 34 of the Transcript the Claimant stated the following:

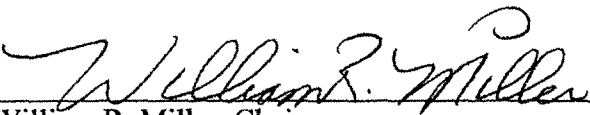
"Yes sir, I have one. You asked me if I'm responsible and the machine operator- like I'm a machine operator, you're right, I'm responsible." (Underling Board's emphasis)

The Board is not convinced that Supervisor Miller did not have some culpability in the incident, but that did not relieve the Claimant of his responsibility to ensure that the switch was properly aligned. With the Claimant's admission of guilt, it is clear that substantial evidence was adduced at the Investigation that the Carrier met its burden of proof that the Claimant was guilty as charged.

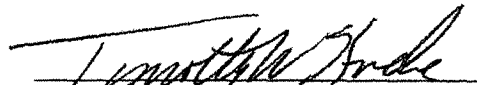
The only issue remaining is whether the discipline was appropriate. The Board cannot find that the Carrier erred in its discipline as it was not arbitrary, excessive or capricious as it was in accordance with the Carrier's UPGRADE Policy. The discipline will not be set aside.

AWARD

Claim denied.


William R. Miller, Chairman


K. N. Novak, Carrier Member


T. W. Kreke, Employee Member

Award Date: June 27, 2011