

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6402
AWARD NO. 156, (Case No. 177)**

**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 Track Welder R. Garcia for violation of Rule 1.13 (Reporting and Complying with Instructions) in connection with his alleged failure to comply with instructions issued by Director Track Maintenance (DTM) P. Kreifels and Track Supervisor D. Barrett to report time only on the days he was actually working and not on scheduled off days is based on unproven charges, unjust, unwarranted and excessive (System File UP-203-WF-10/1530693D).**
- 2. As a consequence of the violation outlined in Part 1 above, 'We are now requesting that the charges be dropped and that Mr. Garcia have his personal record cleared of all charges. Also that he be reinstated with all back pay, seniority and vacation rights unimpaired and all other rights due to him by the collective bargaining agreement.' (Employee's Exhibit 'A-3')."**

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 March 9, 2010, Carrier notified Claimant to appear for a formal Investigation on March 18, 2010, concerning in pertinent part the following charge:

"...to develop the facts and place your responsibility, if any, in connection with your alleged failure to comply with instructions issued to you by DTM Phil Kreifels

and Track Supervisor Donald Barrett to report time only on the days you were actually working and not on your scheduled off days, on February 28, 2010."

On March 26, 2010, Claimant was notified that he had been found guilty as charged and his record was assessed with a Level 3 UPGRADE discipline and a five day suspension.

There is no dispute between the parties that on February 28, 2010, the Claimant came in on his off day and reported time worked which was contrary to DTM Kreifels and Track Supervisor Barrett's instructions.

It is the position of the Organization that Claimant's immediate supervisor (Track Supervisor B. Andrews) instructed him to come to work on February 28th, on his off days to input final payroll information for his gang for the work half and it was not the fault of the Claimant that Kreifels and/or Barrett did not advise Andrews that they did not want the Claimant coming to the office on his rest days to input payroll information. According to the Organization the Claimant was placed in the classic "Catch 22" situation where if he failed to follow Andrews instructions he was insubordinate and if he followed those directives then he violated Kreifels and Barrett's instructions. It argued the situation was not the making of the Claimant, but was the fault of Carrier Supervisors having their wires crossed and Claimant should not be made to pay for their mistake. It concluded by requesting that the discipline be set aside and the Claim be sustained as presented.

It is the Carrier's position that Claimant disobeyed directives and input payroll information on February 28, 2010, and claimed one hour and thirty minutes overtime after being specifically directed not to do such by the DTM. It further argued that even if Track Supervisor Andrews directed him to perform those updates on his rest days (which it denied happened) the Claimant was well aware that per DTM Kreifels, he was only to take orders from Track Supervisor Barrett, therefore, the discipline was appropriate. It closed by asking that the discipline not be disturbed and the Claim remain denied.

The Board has thoroughly reviewed the record and determined that no procedural errors occurred during the Hearing and the Claimant was afforded his "due process" Agreement rights.

The facts indicate that Director Kreifels testified on pages 10 and 14 of the Transcript that he instructed the Claimant on January 28, 2010, that he did not want him to come in and turn in time when he was not working. Subsequently, Kreifels discovered that the Claimant had continued to turn in time on days he was not scheduled to work and because of that Kreifels met with the Claimant on February 24th with Supervisor Barrett in attendance and specifically told him not to turn in time worked on his rest days, but rather he was to enter the time once he arrived back to work on the following Tuesday (See Transcript, pages 13 - 14 and 49). Review

of Claimant's testimony reveals that he did not effectively refute Kreifels recollection of the two meetings.

Testimony also reflects the fact that Track Supervisor Barrett testified that he witnessed Kreifels instructions to the Claimant on February 24th not to enter any time on his off-days. He further stated that the Claimant was told by Kreifels that he (Barrett) was in charge of approving payroll time and if the Claimant had any questions, he was to contact him (See Transcript, pages 25, 33 and 34). Again, review of Claimant's testimony substantiates that he did not refute Barrett's testimony.

Additionally, Supervisor Andrews testified on pages 69 and 83 of the Transcript that at no time did he instruct Claimant to enter time on his rest days and instead stated on page 60 of the Transcript he advised the Claimant to enter his time when he returned to work on Tuesday. On pages 57 and 69 of the Transcript he further testified that after the Claimant told him he was under the direct supervision of Barrett he instructed the Claimant that he should contact that Supervisor. Andrews further stated that at no time during his conversation did the Claimant tell him about the meetings he had with Director Kreifels regarding the input of payroll time on off-days (See Transcript, pages 64, 69 and 83).

Claimant's testimony contradicts much of Andrews testimony and according to the Organization, Supervisor Andrews' questionable testimony should be disregarded in its entirety. Absent that unreliable testimony, the Organization asserted the Board is left with the undisputed testimony of the Claimant that he was instructed by Andrews to come into work on February 28, 2010, in order to input payroll data so that the second work half of the Claimant's welding gang could be "closed out" in the Carrier's computer system. Simply stated the Organization argued that Andrews countermanded Kreifel's directives and Claimant had no choice, but to follow Andrews' orders. On the other hand, the Carrier argued that Claimant's testimony was self-serving and less than plausible.

The Organization's defense of the Claimant was vigorous and inventive and assuming for the sake of argument the Board decided to discount Supervisor Andrews' testimony the Claimant still had a major obstacle to overcome, namely the testimony of Track Supervisor Barrett. On pages 33 and 34 of the Transcript Barrett was questioned as follows:

"Q: Were you the employee charged with keeping the time for Mr. Garcia?

A: Approving the time, yes.

Q: Okay. That -- approving it. And was Mr. Garcia told that if he had any questions about doing time or putting in time that he was to contact you

by Mr. Kreifels? (*Underling Board's emphasis*)

A: Yes."

On page 71 of the Transcript the Claimant confirmed the aforementioned testimony of Supervisor Barrett, that he understood he was only to take his instructions from Barrett per Kreifels directives issued to him on February 24th when he testified as follows:

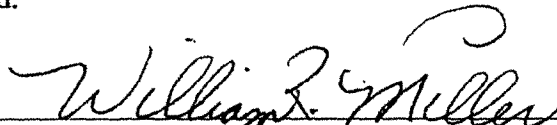
"A: ...The only thing he had said after that meeting on that date was that from now on you listen to this man Donald Ray and no one - - nobody else...."
(*Underlining Board's emphasis*))(Note: Donald Ray is Supervisor Barrett)

The record is clear that if the Claimant felt he was caught between counter instructions he should have contacted Track Supervisor Barrett for clarification and because he failed to do such he violated Director Kreifels and Supervisor Barrett instructions not to enter payroll time during his scheduled off-days. 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 Discipline 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