

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6402
AWARD NO. 165, (Case No. 186)**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
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: July 20, 2011

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

- 1. The Level 3 discipline imposed upon Machine Operator M. H. Abrego, Jr. for violation of Rule 1.13 (Reporting and Complying with Instructions) and Rule 41.2 (Operators) of the General Code of Operating Rules (GCOR) in connection with failure of the bearings is unjust, unwarranted and in violation of the Agreement (System File UP-223-WF-10/1538227).**
- 2. As a consequence of the violation referenced in Part 1 above, we respectfully request that Mr. Abrego, Jr. be allowed remedy in accordance with Rule 22 of the Agreement."**

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 August 6, 2010, the Carrier advised Claimant to appear for a formal Investigation on July 5, 2010, which was mutually postponed until August 18, 2010, concerning in pertinent part the following charge:

"...to develop the facts and place responsibility, if any, while employed as a Machine Operator, on Gang 9113, at Seguin, Texas, near Milepost 175, at approximately 1000 hours, on July 5, 2010, you allegedly failed to lubricate the front axle housing of SS0106, resulting in the failure of the bearings."

On September 2, 2010, Claimant was notified that he had been found guilty as charged and assessed a Level 3 (training) discipline notation.

It is the position of the Organization that the Claimant with an unblemished record dating from September 17, 1984, as a Machine Operator was assigned and working as such operating Speed Swing SS0106 on Gang 9113 headquartered at Sequin, Texas, when the incident giving rise to this dispute occurred. It argued that according to the Operator's Manual the front and rear differential gear oil level should be checked and oil added if necessary every 40 hours of operation. It further argued there is no evidence that the Claimant failed to check the gear oil level as specified in the Manual or add oil if necessary, nor is there any evidence as to when the previous check may have been performed or how many hours the machine was operated following the last check. It asserted that testimony developed during the Investigation places no blame on the Claimant for the failure of the front axle bearings on July 5, 2010, based upon the testimony of Work Equipment Mechanic Sanchez on pages 25 - 27 of the transcript. With respect to Claimant's alleged violation of Rule 1.13 account of not turning in his daily Maintenance and Inspection Reports as instructed it asserted that he could not be found guilty of such as he was never charged with failure to timely submit said reports. It concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the Carrier's position that the Claimant violated Rule 1.13 when he failed to turn in his "white copy" of the operator's log book each day, after being directed by a Supervisor to do so. It further asserted that the Claimant violated Rule 41.2 when he failed to properly care for equipment by not maintaining and lubricating the Speed Swing; as evidenced by the failed axle bearing on the equipment as established by the missing notations within the Claimant's Operator's Log. It argued that the testimony of Work Equipment Supervisor Monson and Equipment Mechanic Sanchez substantiated that the Claimant failed to turn in operator's log sheets to the Foreman on a daily basis and machine SS0106 experienced a bearings failure due to the fact they had run dry of lubricant. It closed by stating that the discipline assessed was appropriate and it asked that the claim remain denied.

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

Turning to the merits, the facts reveal that Claimant did not turn in all of his log records in a timely manner. The Carrier asserted Claimant was instructed to do so on a daily basis by his Supervisors and because he did not do such he violated Rule 1.13 (Reporting and Complying with Instructions) for the time period under review. However, examination of the Notice of Investigation reveals that the Claimant was not charged with that allegation, therefore, it will not be considered by the Board and instead we will turn our attention as to whether or not he failed to lubricate the front axle housing of SS0106.

Rule 41.2 (Operators), specifically covers the charge being examined and it states in pertinent part the following:

"Operators of roadway machines and work equipment are responsible for the efficient operation and proper care of equipment. Operators of roadway machines, work equipment and track cars must;

- 1. Operate, maintain and lubricate equipment according to manufacturers specifications.**
- 2. Conduct and document thorough inspections prior to operating their equipment...."**

Even though the Board previously determined that the question of whether or not the Claimant turned in log book sheets on a daily basis would not be reviewed, we do find that those documents have relevance to the charge under examination. Review of the Claimant's Operator Logbook for July 2, 2010, shows that under the section titled Drive Assembly there is an unchecked box for Pump drives, wheel bearings and axle housing. On page 33 of the transcript, the Claimant was questioned as follows:

"Q -you have in front of you, which is the Operator's Manual, a copy regarding the axle assembly?

A Uh huh.

Q By looking at that exhibit, can you see where it determines how often you're supposed to lubricate the hypoid gear oil?

A It states every 40 hours.

Q Every 40 hours? So, do you believe you check the front and rear differential gear oil every 40 hours of operation?

A Not all the time. I try to, I try to but sometimes I don't. They don't give me the time." (Underlining Board's emphasis)

On page 34 the questioning of Claimant continued as follows:

"Q And just to re-clarify, you did state that you checked the front axle housing level on July 2nd, and the level was acceptable at that time?

A Yes, sir. Both- both differentials I checked on that July 2nd.

Q And on July 2nd, did you document in your log book that you checked the axle housing?

A No, sir. I was trying to get that done and catch up with the spike pullers, and I didn't want to be writing in a log book and traveling at the same time....
(Underlining Board's emphasis)

The Organization made a strong argument in behalf of the Claimant asserting that Work Equipment Mechanic Sanchez testified that he could not answer if the Claimant properly lubricated his machine. Despite the Organization's able defense of the Claimant, the Claimant was his own nemesis. He first testified that he did not check the front and rear differential gear oil every 40 hours of operation and he then turned around and stated that on July 2, 2010, he did check the differential, but did not have the opportunity to mark the appropriate box for that date, even though he checked off 52 other items and made specific notes regarding issues with the machine. Claimant's testimony is best described as being self-serving and it does not refute the fact that he violated that portion of Paragraph 2 of Rule 41.2 which states in pertinent part: **"Conduct and document thorough inspections prior to operating their equipment...."** Substantial evidence was adduced at the Investigation that the Claimant failed to abide by the aforementioned Rule as he did not document maintenance of machine SS0106.

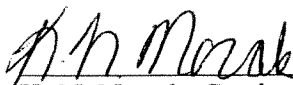
The only issue remaining is whether the discipline was appropriate. At the time of the incident the Claimant was a long term employee with a clean record. The Claimant's assessed notation was in accordance with the Carrier's UPGRADE Policy which is progressive in nature. It is clear the Carrier took into consideration Claimant's past good work record and did not assess any time off, therefore, the Board finds and holds the discipline will not be set aside because it was not arbitrary, excessive or capricious.

AWARD

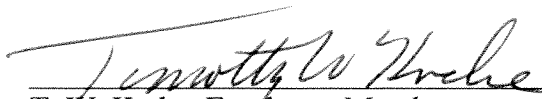
Claim denied.



William R. Miller, Chairman



K. N. Novak, Carrier Member



T. W. Kreke, Employee Member

Award Date: 10/18/11