

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6402
AWARD NO. 171, (Case No. 192)**

**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: January 18, 2012

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

- 1. The ten (10) day suspension imposed upon Machine Operator F. D. Sykes for violation of Rule 1.13 (Reporting and Complying with Instructions) and Rule 41.2 (Operators) as contained in the General Code of Operating Rules and Maintenance of Way rules in connection with allegedly failing to secure the turntable on his machine before traveling is based on unproven charges, unjust, unwarranted and in violation of the Agreement (System File UP-508-JF-11/1544771).**
- 2. As a consequence of the violation referenced in Part 1 above, Mr. Sykes shall have his record cleared of this matter and compensated for all time lost beginning February 8 through February 22, 2011, including holiday pay for President's Day, February 21, 2011."**

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 December 14, 2010, Carrier notified Claimant to appear for a formal Investigation on January 11, 2011, concerning in pertinent part the following charge:

"...to develop the facts and place responsibility, if any, that while employed as Machine Operator on Gang 9183, at Midlothian, Texas, you allegedly failed to properly secure the turntable on your machine before traveling. While machine

was in tow the turntable bled down causing it to strike a crossing, resulting in damage to the machine and the crossing.

These allegations, if substantiated, would constitute a violation of Rule 1.13 Reporting and Complying with Instructions, and Rule 41.2 Operations, as contained Maintenance-of-Way Rules, effective November 17, 2008."

On January 26, 2011, Claimant was found guilty as charged and because he had a previous Level 3 assessment on his record coupled with the present Level 3 violation that equated to a Level 4 which was a 10 day suspension, without pay and requirement to develop a Corrective Action Plan prior to his return to work.

The facts indicate that on November 8, 2010, the date of the incident, Claimant was assigned as the Machine Operator of the Spike Puller machine working on Gang 9183 at Midlothian, Texas. Claimant's machine encountered an issue with its hydraulic system and had to be taken out of service. The Claimant was directed to prepare the machine for towing in order to be repaired. While in route the turntable bled down and struck a rail crossing causing damage to the crossing and the machine.

It is the position of the Organization that the Hearing Officer improperly held the dual role of Charging and Hearing Officer and the Carrier failed to produce all witnesses that could have provided relevant testimony and the witnesses that were produced had no direct first-hand knowledge of the incident and on that basis alone the discipline should be set aside as he was denied a "fair and impartial" Hearing. Turning to the merits it argued that the Claimant did everything required of him as the Operator of the Spike Puller with the assistance of Mechanic Cocrell to ensure the machine was secured and ready to be towed by Mr. Woodard. The Organization concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the Carrier's position that the Claimant was afforded "due process" and his rights were not hindered during the holding of the Hearing and there is no merit to the Organization's procedural arguments. It further argued that the record substantiated that the Claimant failed to properly perform his duties as an Operator because he failed to ensure the turntable was properly secured resulting in the accident that damaged both the machine and the crossing. The Carrier closed by asking that the claim remain denied.

The Organization made a strong argument that Claimant was denied "due process" because two employees who had first-hand knowledge of the incident of November 8, 2010, were not called. Review of the record makes it clear that Operator Woodard and Mechanic Cocrell had first-hand knowledge of the incident. A statement from Woodard was entered into

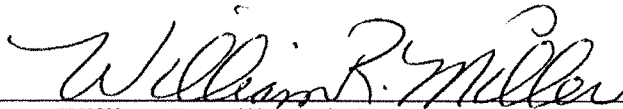
the record wherein he explained that he was instructed to tow the Claimant's machine and in pertinent part he wrote the following:

"...The ok was given to me by the operator of the spike puller and the mechanic."
(Underlining Board's emphasis)

The Carrier had a responsibility to call all witnesses that had relevant information. If Woodard and Cocrell had been called as witnesses both could have clarified the events of November 8, 2010, as to how the turntable was secured on the Claimant's Spike Puller machine. Absent the testimony of Mechanic Cocrell who helped to secure the machine for towing we have the un-rebutted testimony of the Claimant that the machine was properly prepared for towing. Carrier's failure to call both of the aforementioned employees as material witnesses, especially Cocrell, not only denied the Claimant his right to a "fair and impartial" Hearing it substantiated the fact that the Carrier did not meet its burden of proof (See Fourth Division Award No. 4700). Therefore, the Board finds and holds that the discipline is rescinded and the claim is sustained as presented.

AWARD

Claim is 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


K. N. Novak, Carrier Member


T. W. Kreke, Employee Member

Award Date: 4-5-2012