

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6402
AWARD NO. 172, (Case No. 193)**

**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 Carrier violated Rules 1, 2, 21, 25, 29 and 31 of the Agreement on beginning on October 4, 2010 and continuing when it improperly disqualified Claimant J. Walker, Jr. from his position of switch tie gang foreman and refused to allow him to exercise his seniority over a junior foreman (System File UP-529-JF-10/1544492).**
- 2. As a consequence of the violation referenced in Part 1 above, we request Mr. Walker shall be compensated for eleven (11) hours each day and holidays at his respective straight time rate of pay and any and all overtime acquired by Gang 9198 for the difference in the rate of pay between his present classification rate of pay and foreman beginning October 4, 2010 and continuing until he is allowed to exercise his seniority by displacing or bidding to a foreman's position or until this matter is settled."**

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.

The facts indicate that the Claimant has been in the service of the Carrier since September 11, 1974. At the time of the dispute, Claimant was assigned as a Gang Switch Foreman on Gang 9198 working under the supervision of Track Supervisor J. Ritch.

On October 3, 2010, three separate work gangs (tie, surfacing and switch gangs) were performing track maintenance work at or near Mile Post 120.47 located in the Lufkin Subdivision. At approximately 1635 hours, Track Supervisor Ritch, while performing a hy-rail inspection of the gang's work in that area, discovered that a main line switch located at Mile Post 120.47 that provided entrance into the track where Gang 9198's equipment was being parked was left in reverse (open) position and the derail that was also protecting the track was not in the derailing position. On the following day October 4, 2010, Track Supervisor Ritch sent the Claimant a letter asserting that Claimant had left equipment in an unprotected state because he had left the switch open and the derail in off position and because of that he was immediately disqualified from his position of Switch Gang Foreman.

It is the position of the Organization that the Claimant was entitled to a formal Investigation as the disqualification was tantamount to discipline. It further argued that the record reveals the Carrier failed to investigate: (1) whether or not the Claimant was actually the employee responsible for ensuring whether or not the main line switch located at Mile Post 120.47 was suppose to be in either the normal (closed) or reverse (open) position at the time; (2) whether or not the Claimant was physically responsible for putting the derail in the derailing position on the track where his gang's equipment was stored; (3) whether or not the Claimant was actually the employee in charge of the on-track protection (i.e., the Form B) that was in place at the time Track Supervisor Ritch performed his hy-rail inspection of the location where the tie surfacing and switch gangs were performing track maintenance work and; (4) whether or not the Form B that was in effect at the time Track Supervisor Ritch was in the area had been cleared or not. Furthermore, it argued the employee in charge of the on-track protection (EIC) was Foreman Galvin and it relied upon Track Supervisor Ritch's Disqualification Letter of October 4, 2010, as proof for that assertion because within the body of that letter it refers to Foreman Galavan as EIC over the aforementioned gangs. Additionally, it argued that the Claimant was specifically disqualified from his position as a Switch Tie Gang Foreman, therefore, he should have been allowed to displace on any other Foreman position that was not a Switch Tie Gang Foreman and because he was not allowed to do such he was forced to exercise his seniority to a lower rated position. It concluded that the disqualification should be removed from his record and he be reinstated to the position and made whole for all loss of monies experienced.

It is the Carrier's position the Claimant was not entitled to a formal Investigation as the disqualification was not discipline. It argued the Claimant was the Foreman in charge of the 9198 work group and checked out of the Form B at 1545, but failed to properly protect the employees under his authority. He left a switch in the open position and derail in off position and because of that a train coming through the Form B could have run right into the gang and/or equipment, thus he was properly disqualified. It also argued that the Organization's argument regarding its alleged failure to allow the Claimant to displace a different foreman position has no merit because it did not provide any Agreement support for alleged Foreman distinctions. It is

also noted that on the property the Carrier attached to its first level declination of January 10, 2011, a statement from Manager Track Programs, R. Sanchez which stated in pertinent part the following:

"Mr. Walker did indeed leave equipment in an unprotected state clearing trk and clearing out of form b, but left switch open and left derail in off position. As foreman of this Gang it is his responsibility to insure men and equipment are protected from trains or other equipment and he failed to do so. The only recourse was and is to disqualify Mr. Walker of the position of foreman and that is what Mr. Ritch has chosen to do, and rightfully so...."

(Underlining Board's emphasis)

Simply put the Carrier asserted that the Claimant was disqualified from all Foreman positions and was notified of that fact, which is attested to by Sanchez's statement. It closed by asking that the claim remain denied.

The Organization argued that the disqualification amounted to discipline and because of that a formal Investigation was required. For the same reasons expressed in Award No. 170 of this Board the case will be resolved on its merits.

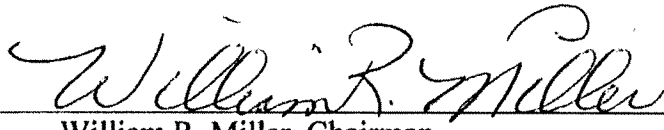
The Carrier has the right to set reasonable expectations for its employees including working safely because failure to do such can have catastrophic results. Review of the record substantiates that on the date of the incident under dispute the Claimant was the Foreman in charge of the 9198 work group. As previously noted, safety is a primary issue that every employee must be concerned with, especially those in positions of authority. Claimant was responsible to ensure all employees and equipment under his authority were protected from trains and other machines. His duties included making sure that the gangs had proper track authority and cleared the track when necessary. On October 3, 2010, Claimant cleared a Form B at 1545 hours and failed to ensure the proper position of the mainline switch at M.P. 120.47 (dark territory) and to properly set the derail. The act of leaving open (reverse position) the mainline switch and leaving the derail in the non-derail position subjected employees and equipment under his authority to potential danger as any train coming through the Form B could have run into the gangs. Because the Claimant did not fulfill his responsibilities to protect the safety of his employees, he was properly disqualified.

The Organization also argued that the Claimant should have been allowed to displace onto other foreman positions, including, but not limited to Maintenance Gang, Rail Gang, Surfacing Gang, Switch Gang, Tie Gang, etc. On the surface that argument might appear to have some merit except that the record shows that the Claimant was disqualified due to a track and time protection failure and those same skills were not refuted on the property as being essential

to all foremen's positions, therefore, the Board finds and holds that the disqualification of the Claimant was in accord with the Agreement as was its decision to not allow the Claimant to displace onto another foreman position. Although it has no impact upon this decision, the Board is pleased to note that Claimant was able to re-qualify and subsequently displaced to a Foreman's position on March 8, 2011, however, that does not alter our determination that the claim will remain denied.

AWARD

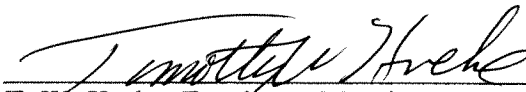
Claim denied.



William R. Miller, Chairman



K. N. Novak, Carrier Member



T. W. Kreke, Employee Member

Award Date: 4-5-2012