

PUBLIC LAW BOARD 6302

NMB NO. 174
AWARD NO. 160

PARTIES TO DISPUTE

CARRIER

Union Pacific Railroad

AND

ORGANIZATION

Brotherhood of Maintenance of Way Employees
Division of International Brotherhood of Teamsters

Carrier's File
1508574

System File
S-0848U-351

STATEMENT OF CLAIM

1. Carrier violated the Agreement when it wrongfully dismissed from service, Machine Operator, Jimmy Parker, herein Claimant for violating General Code of Operating Rules (GCOR) 1.6(1), 1.6(4), 42.2.2, 42.9, and 1.3, when on May 22, 2008, while operating a machine he failed to stop the machine in half of the distance seen to be clear which resulted in a collision with another machine. In failing to stop he had also failed to acknowledge the stop signal given to him and was further found to have not been wearing his seatbelt while operating the machine.
2. As a consequence of Carrier's wrongful dismissal of Claimant from service predicated on the GCOR Rules violations set forth in Point 1 above, the Organization requests that all charges against Claimant be dropped, that the discipline assessed and any reference to the investigation be removed from his personnel record pursuant to Rule 48 of the July 1, 2001 Agreement, that he be reinstated to active service with seniority and all other rights unimpaired, and that he be compensated for all time lost.

STATEMENT OF BACKGROUND

On May 22, 2008, the date of the incident that led to the charges against Claimant and his dismissal from service, Claimant was assigned on Gang 9066 at Sahuarita, Arizona on the Nogales Subdivision, operating Anchor Squeezer Machine, AASQ 2905. Claimant submitted that three (3) to four (4) days prior to May 22, 2008, he reported experiencing brake problems on his machine and was informed prior to May 22nd that the brakes had been repaired. Claimant related that every morning before operating the machine, brakes need to be checked but on the morning of May 22nd, his Anchor

Squeezer Machine as well as the other machines were parked on a side line bumper to bumper in reverse, thus making it impossible to check whether the brakes were properly working when operating the machine going in a forward direction. Claimant asserted that before operating the machine on the morning of May 22nd, he checked the brakes in the reverse position and in that position the brakes were properly working. At approximately 7:05am while operating his Anchor Squeezer Machine and traveling on the track to his assigned work location following behind other other equipment, Claimant entered onto a downgrade in the track wherein, he failed to adhere to a stop signal given by the operator of the Spiker Driver Machine in front of him which resulted in his failure to stop his machine in half the distance seen to be clear and, in turn, resulted in running his machine into the back end of the Spiker Driver Machine (SDAG 614). Claimant explained that upon entering the track on the downgrade his machine picked up speed without his applying any acceleration and when he went to apply the brakes they malfunctioned. Claimant further explained in an effort to avoid a collision under the circumstances, he attempted two (2) maneuvers, the first, standing on the brakes and second, putting the machine in reverse. Neither maneuver stopped his machine which collided with the Spiker Machine going approximately twenty-five miles per hour (25mph).

The record evidence reflects that, although Claimant sustained minor injuries none of the three (3) occupants in the Spiker Machine sustained injuries. Claimant was administered a drug test which, in the absence of any charge of being under the influence is inferred to have proven negative. The record evidence further reflects that Claimant sought medical assistance for his injuries which included an injury to his right shoulder, bruising to his right elbow and right knee, swelling over his right eye and a bump on his head which injuries he sustained as a result of being thrown across the controls on the front of his machine and his helmet hitting and breaking the machine's mirror overhead. According to a damage report upon inspecting Claimant's machine at the scene of the accident, the following was recorded:

"After removing the AASQ 2905 from the track (because the engine would not restart), we found that the collision was hard enough to break 5 of the 8 engine mount bolts which caused the engine to drop down coming to a rest on the crankshaft pulley. Other damage included the front half of the frame was bent down about 2 inches, a bent bumper, a bent engine cover and last but not least broke the starter.

In conjunction with the accident, Claimant was charged with having violated the following General Code of Operating Rules:

GENERAL RESPONSIBILITIES

1.13: Reporting and Complying with Instructions

Employees will report to and comply with instructions from supervisors who have the proper jurisdiction. Employees will comply with instructions issued by managers of various departments when the instructions apply to their duties.

1.6: Conduct

- 1. Careless of the safety of themselves or others
- 4. Dishonest

Any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported. Indifference to duty or to the performance of duty will not be tolerated.

RULES FOR ON-TRACK OPERATION OF TRACK CARS, ROADWAY MACHINES AND WORK EQUIPMENT

42.2.2: Other Speed Requirements

Track cars and machines must be operated at a speed that will allow the operator to stop in $\frac{1}{2}$ the distance the track is seen to be clear.

* * * *

42.9: Signal to Stop

When two or more track cars are moving on the same track, the operators of all cars must agree upon and use a predetermined signal to stop that is easily seen and understood.

The operator of a track car that follows must watch for signals and must acknowledge a signal with the same signal.

Based on an investigation of the foregoing charges, Carrier found Claimant guilty of all charges and assessed the Level V disciplinary action of dismissal, notwithstanding that at the time, Claimant had an unblemished work record for the eight (8) years he was employed by Carrier.

While the Organization argues Carrier failed in its burden to prove Claimant violated Rules 1.13, 1.6 (1), 1.6(4), and 42.2.2, it readily concedes he violated Rule 42.9 by failing to acknowledge the stop signal given by the machine operator ahead of him. Although conceding this violation, at the same time the Organization submits that when the brakes on his machine failed, Claimant was focused on stopping his machine and, as a result, he did not divert his attention from that task to acknowledge the stop signal. The Organization further submits that in so doing, Claimant undertook the safest course

of action in attempting to evade the subject accident. The Organization asserts Carrier failed to show by any evidence that Claimant was careless, that is, in violation of Rule 1.6(1) in his actions noting he had checked the brakes as best he could the morning of the accident but was prevented from checking the brakes in going forward before traveling to work in his machine, and that he did everything in his power to avoid colliding with the machine in front of him. Moreover, Carrier's assertion the brakes were found to be operative following the accident must be questioned as the brakes were tested only after repairs were made to Claimant's machine, thus leaving myriad the possibilities as to the reason the brakes malfunctioned at the time of the accident. The Organization notes that Carrier's charge Claimant was dishonest in violation of Rule 1.6(4) arises as a result of Claimant not being truthful in divulging when questioned about not wearing his seat belt must be rejected as Claimant asserts he was never asked about wearing his seat belt and thus, could not have been dishonest about this aspect of the accident. As to the charge Claimant violated Rule 1.13, the Carrier failed to proffer any probative evidence that Claimant failed to report to and comply with instructions from supervisors relative to any aspects of the subject accident. As to the charge Claimant violated Rule 42.2.2, the Organization counters that Claimant attempted to operate his machine at a speed that would allow him to have stopped in $\frac{1}{2}$ the distance the track is seen to be clear except for the fact that he was on a downgrade and without applying any acceleration his machine picked up speed and, as it did, Claimant pumped the brakes but the brakes malfunctioned thus preventing him from stopping.

The Organization submits that while Claimant was shown to have violated Rule 42.9 nevertheless, the circumstances were such that the discipline associated with the commission of this Rule violation should be moderated especially in light of the fact that Carrier failed in its burden to prove the other four (4) charges and, additionally in light of the fact of Claimant's unblemished work record over his eight (8) years of employment.

FINDINGS

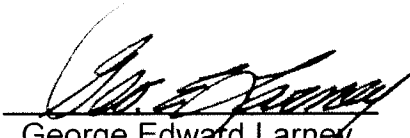
Public Law Board No. 6302, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

The Board is persuaded by the position set forth by the Organization that the discipline assessed Claimant for the one (1) proven violation he committed and the failure of Carrier to support by probative evidence that Claimant committed the other four (4) Rules violations he was charged with, was harsh and excessive under all the prevailing circumstances. Accordingly, the Board orders Carrier to reinstate Claimant with seniority unimpaired but without back pay and without compensation for any other

benefits he may have been entitled to receive had he not been dismissed from service. As for adjustments the Organization has requested to Claimant's personnel record relative to the investigation and the removal of discipline assessed, the Board leaves to the Parties to grapple with this issue.

AWARD

Claim Sustained as per Findings


George Edward Larney
Neutral Member & Chairman


D. A. Ring
Carrier Member


T.W. Kreke
Employee Member

Chicago, Illinois

Date: March 3, 2010