

NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD 6302

NMB NO. 186
AWARD NO. 173

PARTIES TO DISPUTE

CARRIER

Union Pacific Railroad

Carrier's File

1523151

AND

ORGANIZATION

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

System File

D-0948U-209

STATEMENT OF CLAIM

1. The seven (7) day (seventy-seven [77] hour) suspension imposed upon Assistant Foreman G. Hill for violation of Rules 1.1; 1.1.1; 1.13; 41.1 and Engineering Track Maintenance Field Handbook Section 3/1/2 – Table 3-C in connection with the derailment that occurred on the Nampa Subdivision near Mile Post 216.27 on May 10, 2009 is unjust, unwarranted, an abuse of managerial discretion and in violation of the Agreement (System File D-0948U-209 / 1523151).

2. As a consequence of Part 1 above, "... we request that the level three (3) discipline, as upheld by Mr. James A. Curtiss, and the seventy seven (77) hour suspension be reversed and Mr. Hill be made whole as if there had been no discipline issued and no suspension from service. His record shall be expunged of any mention of this discipline matter. Additionally, Mr. Hill shall be paid for all hours that he would have worked absent the suspension, including overtime." (Employees' Exhibit "A-2")

STATEMENT OF BACKGROUND

On May 10, 2009, Claimant was working as Assistant Foreman on Gang 8566 at Pocatello, Idaho, Nampa Subdivision. As Assistant Foreman, Claimant was in charge of the work group and was assigned the duty of gauging and installing ties. According to Carrier, Track Gang Foreman, M.W. McClure instructed Claimant to perform tie installation in the New Way Switch at Mile Post 216.27 and when that switch was safe for train movement to begin changing ties in the switch at Mile Post 216.16. Specifically, McClure's instruction to Claimant was to make sure that the railroad ties were safely affixed (e.g. "spiked"). While still in the midst of performing the work at Mile Post 216.27, a majority of the crew was sent to begin work at Mile Post 216.16 leaving Claimant and two (2) other members of the crew to complete the remaining tie work. Subsequent to the departure of the majority of crew members to work at Mile Post 216.16, at about 3:00 pm Claimant authorized train movement and cleared Train (UP) 5084 to proceed through the work area at 10 miles per hour, but as there were six (6) ties in a row that were unspiked on the gauge side of the rail, a derailment of seven (7) cars resulted. On May 28, 2009, Claimant was notified by Carrier to report for a formal hearing with respect to the following relative to the derailment:

"... to develop the facts and place responsibility, if any, that while you were employed as Assistant Foreman, on Gang 8566, at Pocatello, Idaho, near Milepost 216.27, Nampa Subdivision, at approximately 1500 hours, on May 10, 2009, you allegedly authorized the UP 5084 East to go over track in which you were working. Before clearing the train through the work area you allegedly failed to recognize that six (6) ties in a row were unspiked on the gauge side of the rail which led to the rail tipping and causing seven (7) cars to derail."

The notice of hearing also informed Claimant he was being charged with the following rules infractions in connection with the allegations concerning his actions associated with the resultant derailment.

General Code of Operating Rules

1.1 Safety: "Safety is the most important element in performing duties. Obeying the rules is essential to job safety and continued employment."

1.1.1 Maintaining a Safe Course: "In case of doubt or uncertainty, take the safe course."

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”.

Maintenance of Way Rules

41.1 Foreman: Foreman must:

- Supervise and engage in all work performed by their gang
- Make reasonable efforts to perform work that does not:
 - - Result in an unstable or unsafe track condition;
 - - Create an unreasonable hazard to employees working on or near the track.
 - - Result in a negative environmental impact, including damage from fires.
- Make required reports.
- Call on other foremen for assistance, if necessary.

Note: The foreman in whose territory the work is being performed is in charge.

Foreman must not exceed their allowance of men or overtime unless authorized, or there is an emergency.

Engineering Track Maintenance Field Handbook

Rule 3.1.2 Table 3-C (Installation and Spacing)

Maintain a minimum number of ties at the designated spacing in each 39 feet of track as determined by the tie and track type

<u>Track Type</u>	<u>Max. No. of Consecutive Ties Left Unspiked</u>	<u>Max. Allowable Train Speed</u>
Tangent	3	25
Curve	2	25

By letter dated June 24, 2009, Claimant was notified he had been found guilty of all charges. Additionally, Claimant was informed of the following:

“This rule violation requires the assessment of Level 3. The current violation of Level 3, plus your previous Level 4, equates to a Level 4. Therefore, the discipline assessed your record will be a Level 4 discipline.

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In accordance with Union Pacific Railroad's Policy and Procedures, a Level 4 Discipline requires a seven (7) day actual suspension (77 hours). Your seven (7) day suspension will begin on July 8, 2009 and will conclude on July 14, 2009, inclusive."

CARRIER'S POSITION

Contrary to the Organization's general argument that it disagrees with the investigation outcome of having found Claimant guilty of all charges, Carrier submits that it proved by substantial evidence adduced at the investigation that Claimant did, in fact, by the exercise of very poor judgment in authorizing the subject train movement without first making sure the ties in question were properly spiked, especially because Claimant has been a foreman for 32 of the 36 years he has been employed, was ultimately responsible as the employee in charge for the derailment of the seven (7) cars. Carrier maintains that the fact circumstances leading to suspending Claimant for seven (7) days are not in dispute and that absent any procedural issues raised by the Organization relative to the investigation ultimately finding Claimant guilty of violating multiple operating rules, the only argument the Organization advances in its defense of Claimant distills down to an assertion that determining Claimant warranted the assessment of a Level 4 discipline is in violation of its Discipline Policy and Procedures in that, GCOR Rule 1.13 among the rules violations charged rises only to a Level 3 disciplinary action. Carrier takes the position that while it does not dispute the Organization's claim that the operating rules other than GCOR 1.13 Claimant was found guilty of violating warrant only the assessment of Level 2 discipline, the imposition of Level 4 discipline was warranted on the basis of its UPGRADE policy in that Claimant was already at Level 4 as a result of prior discipline at the time he committed the multiple rules infractions associated with the subject derailment incident. Accordingly, Carrier urges the Board to deny the subject claim in its entirety.

ORGANIZATION'S POSITION

The Organization asserts that Carrier failed to prove by substantial evidence that Claimant was guilty of the multiple rules violations it charged him with in connection with the seven (7) car derailment but especially the finding that he was guilty of violating GCOR Rule 1.13 which is the only rules violation that would substantiate the imposition of a Level 3 disciplinary action but certainly not a Level 4 disciplinary action. The fact that Carrier assessed Claimant a Level 4 disciplinary action where a Level 4 disciplinary action was not warranted, reflects that Carrier was in violation of its own Disciplinary Policy in that the object of a disciplinary action is to be corrective of workplace conduct as opposed to being punitive. Not only was the assessment of a Level 4 disciplinary action improper under all the given circumstances it was also unwarranted as the

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Organization further submits that the record evidence is completely void of any evidence whatsoever that Claimant failed to comply, as he is obligated and required to do by GCOR Rule 1.13, with instructions given to him by his supervisor, here, Supervisor McClure. The Organization argues that contrary to the finding Claimant violated GCOR Rule 1.13, the testimony adduced at the investigation as recorded by the transcript bears out that Claimant did not question McClure's instructions to pull employees away from his work group to work on another switch. However, the decision to divert a majority of the Gang's members from the switch work at Milepost 216.27 to perform the work on ties at switch Milepost 216.16 left Claimant short of both manpower and tools, which decision the Organization submits, prevented completion of the work on ties prior to the train movement in question. The Organization posits that had the Gang been left intact to complete the assigned tie installation work at the New Way Switch, the work in question would have been completed before the train passed through the work area. The Organization further asserts that Claimant suffered disparate treatment in having been disciplined in that there were two (2) other employees in charge overseeing the switch work in question yet, Claimant was the only employee in charge that was assessed discipline in connection with the derailment. In conclusion, the Organization maintains that an objective analysis and evaluation of the evidence adduced at the investigation will lead the Board to find said evidence fails to justify the suspension assessed Claimant and, accordingly find to sustain the claim.

FINDINGS

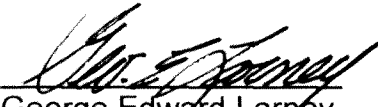
Public Law Board No. 6302, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given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

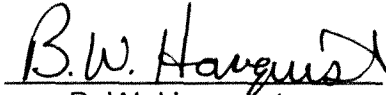
Upon a thorough review of all evidence and argument, it is the Board's determination that Carrier proved by a showing of substantial evidence that Claimant, among the other Employees in Charge (EIC) was alone responsible for the subject seven (7) car derailment. Even though he was left with less manpower and tools to complete the tie work at Mile Post 216.27, this fact, by itself, did not obviate in any way his responsibility to make sure the work area was safe for the train movement he alone authorized. Given his 36 years of service with the Carrier, 32 years of which has been as an Employee in Charge, he possessed the knowledge and the expertise to determine whether the ties in question were properly spiked before he authorized the train movement in question regardless at what speed the train was moving at. Furthermore, the derailment that occurred was proof enough that while Claimant consented to a reduced crew to complete the work at New Way Switch which reflected his compliance with the instructions given to him by Track Gang Foreman McClure, the part of the instruction he failed to comply with was to insure the safety of any train movement

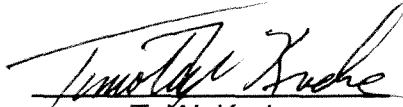
through the work area and, in that regard, Claimant was guilty of violating GCOR Rule 1.13. As such, the Board finds that Carrier did not violate its own Discipline Policy by assessing Claimant a Level 4 seven (7) day suspension as his infraction of the Operating Rules cited warranted the imposition of Level 3 disciplinary action which was then coupled with the fact that, at the time, by prior discipline assessed him, Claimant was already at Level 4. Accordingly, the Board rules to deny the claim in its entirety.

AWARD

Claim Denied


George Edward Larpey
Neutral Member & Chairman


B. W. Hanquist
Carrier Member


T. W. Kreke
Employee Member

Chicago, Illinois

Date: Oct 4, 2010