

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6302
AWARD NO. 221, (Case No. 233)**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
DIVISION - IBT RAIL CONFERENCE**

vs

UNION PACIFIC RAILROAD COMPANY

William R. Miller, Chairman & Neutral Member
K. D. Evanski, Employee Member
P. Jeyaram, Carrier Member

Hearing Date: December 20, 2012

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

- 1. The discipline [Level 3 two (2) day suspension] imposed on Mr. D. Cardenas by letter dated May 4, 2011 in connection with allegations that he failed to secure his load on February 26, 2011 while driving Boom Truck Unit #65623 causing damage to a new jack beam, brackets and sensors was without just and sufficient cause, unwarranted and in violation of the Agreement (System File T-1148U-503/1557711).**
- 2. As a consequence of the violation referred to in Part 1 above, the Carrier must expunge these charges from the Claimant's record and compensate him for all wage and benefit loss suffered as a result of the Carrier's improper discipline."**

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.

On March 15, 2011, Carrier notified Claimant to appear for a formal Investigation on March 25, 2011, which was mutually postponed until April 19, 2011, concerning in pertinent part the following charge:

"...to develop the facts and place responsibility, if any, that while employed as System Boom Truck Driver on Gang 8589, at Oakridge, Oregon, on February 26, 2011, while driving Boom Truck Unit #65623 moving machine components from Oakridge, Oregon, to Cascade Locks, Oregon, you allegedly failed to secure your load resulting in damage to a new jack beam, brackets and sensors.

These allegations, if substantiated, would constitute a violation of Rule 74.3 Driver Responsibility, Rule 74.5 Tools and Material, and Rule 1.19 Care of Property, as contained in the General Code of Operating Rules, effective April 7, 2010, Safety Rules, effective July 30, 2007, and System Special Instructions, effective April 7, 2010. Please be advised that if you are found to be in violation of this alleged charge the discipline assessment may be a Level 3, and under the Carrier's UPGRADE Discipline Policy may result in up to five (5) days off work without pay or up to one (1) day training without pay and a Corrective Action Plan must be developed upon return to work."

On May 4, 2011, Claimant was notified that he had been found guilty as charged and was assessed a Level 3 discipline of two days suspension without pay, one of those days to be training without pay.

It is the Organization's position that the Claimant was denied his right to a "fair and impartial" Investigation because the Carrier had an inaccurate date, February 26, 2011, of the alleged violation on its Notice of Investigation and subsequently assessed punishment for the incorrect date which was a day that the Claimant was not hauling machine components. It stated that on the procedural errors alone the discipline should be set aside and the claim sustained without even reviewing the merits. If, however, the Board chose to address the merits it will discover the Carrier did not meet its burden of proof. It argued that on February 25, 2011, the day the alleged violation took place, the Claimant testified he did properly tie down the Jack Beam that he was hauling. He testified without rebuttal that he performed a proper walk around and observed that the equipment was tied down properly. He stated the load shifted during his travels on February 25th and when it happened he stopped immediately and notified the Carrier of the minimal damage. He further explained that he used straps rather than chains to secure the load because the chains would have damaged the hydraulic hoses and brackets when tightened down on the Jack Beam and unfortunately the straps gave a little and the load shifted. It concluded that Claimant properly performed his duties and the accident was unavoidable and it requested that the discipline be rescinded and the claim sustained as presented.

It is the position of the Carrier that the Claimant received a "fair and impartial" Hearing as he was fully apprised of the nature of the charges made. The Investigation was held in a timely manner and the Claimant and his representative were given every opportunity to produce witnesses and evidence at the Hearing. Turning to the merits it argued that the transcript verifies that the Claimant failed to properly secure his load which was contrary to the Rule cited in the Notice of Investigation and was attested to by the Claimant on pages 52, 55 and 56 of the transcript. According to it, that admission of guilt was more than sufficient to establish that the Carrier did not err in its finding that the Claimant was guilty. Lastly, it argued that the discipline assessed was in accordance with the Carrier's disciplinary policy. It closed by asking that the discipline not be disturbed and the claim remain denied.

The Board has thoroughly reviewed the record and assessed the Organization's procedural arguments and determined that the Claimant was not confused by the typographical error on the Notice of Investigation or any other alleged procedural errors. It is determined that the Claimant received a "fair and impartial" Hearing and was afforded his Agreement "due process" rights, therefore, the dispute will be resolved on its merits.

The facts indicate the Claimant is a Truck Driver and on February 24, 2011 he loaded a Jack Beam onto Boom Truck Unit #65623 that he transported on February 25th from Oakridge, Oregon to Cascade Locks. There is no dispute he tied the new Jack Beam down with one strap that resulted in its movement wherein it was damaged costing the Carrier \$700.00. On page 56 of the transcript the Claimant admitted that the equipment he hauled was damaged.

On page 47 of the transcript M. A. Watchman, Work Equipment Supervisor was questioned about how the load should have been secured as follows:

"A I asked him, you know, if he was the person that drove this truck up to Cascade Locks, and he said it was. And I told him, you know, you can clearly see that this work head had moved back and forth. And he's like well yeah I know, I know I screwed up. And I told him, you know, we need to secure our load. That's- you know, I can't stress that enough, I mean because it's public safety that this, you know, if something was to fall out. And he's like yeah I know I screwed up....

Q Okay, so- so you're talking about securing a load. Does that mean one strap, two straps, five straps, or what does it mean? Does it mean whatever it takes to secure? I mean what- what does that mean?

A It means that the load should not shift. I mean for something that heavy and that big, it should have been a four-point tie down. And-

Q When you- when you say a four-point tie down, what does that mean?

A That means on the four ends of the jack beam itself it needs to be tied which way so where it will- you know, it guaranteed it won't- it won't move.

Q So all four corners of the-

A Yes.

Q -the piece of equipment should be tied in opposite direction to- to- okay.

A Yes, and plus, that's got wheels on it, so you know, it can shift so that's why you- you really need to stress or that- that four point tie-down.

Q Okay. All right. What- what- what did David say when you had that conversation with him?

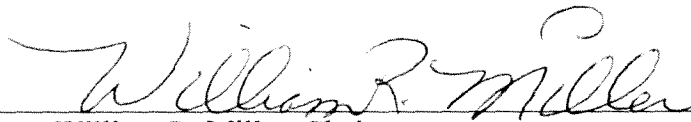
A He just said you know, he knew screwed up and-" (Underlining Board's emphasis)

Review of the aforementioned testimony reveals that it was not effectively refuted. Substantial evidence was adduced at the Investigation that the Carrier met its burden of proof that Claimant failed to properly secure his load.

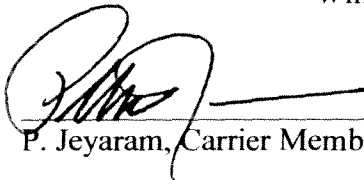
The only issue remaining is whether the discipline was appropriate. At the time of the incident the Claimant had approximately 13 years of service with a clean record. However, Claimant's offense had the potential for dire consequences to the traveling public if the one strap that was hooked had come loose, therefore, the Board finds and holds that the discipline assessed was in accordance with the Carrier's UPGRADE Discipline Policy.

AWARD

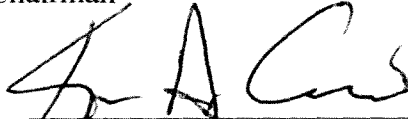
Claim denied.



William R. Miller, Chairman



P. Jeyaram, Carrier Member



K. D. Evanski, Employee Member

Award Date: 4/18/13