

**NATIONAL MEDIATION BOARD  
PUBLIC LAW BOARD NO. 6302  
AWARD NO. 222, (Case No. 234)**

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

**vs**

**UNION PACIFIC RAILROAD COMPANY**

William R. Miller, Chairman & Neutral Member  
K. D. Evanski, Employee Member  
J. T. Wayne, Carrier Member

Hearing Date: June 5, 2013

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

- 1. The discipline (dismissal) imposed on Mr. D. Erbert by letter dated August 10, 2011 for alleged violation of Rule 1.6 Conduct (4) Dishonest in connection with allegations that he was dishonest in reporting an accident and subsequent injury while operating Ballast Regulator (BR 0405) on System Tie Gang 9063 on June 26, 2011 was without just and sufficient cause, unwarranted and in violation of the Agreement (System File M-1148U-254/1561160).**
- 2. As a consequence of the violation referred to in Part 1 above, the Carrier must remove this discipline from Mr. Erbert's record and compensate him for all losses as outlined in Rule 48(b)."**

**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 July 1, 2011, Carrier notified Claimant to appear for a formal Investigation, on July 26, 2011, concerning in pertinent part the following charge:

**"...to develop the facts and place responsibility, if any, in connection with the charge that you were allegedly dishonest when you reported an alleged accident and subsequent injury while operating as a Ballast Regulator (BR0405) on System Tie Gang 9063, on the Provo Subdivision, on June 26, 2011, at approximately 1330 hours, near Milepost 636.00, on the #2 Mainline.**

**These allegations, if substantiated, would constitute a violation of Rule 1.6 (4) Conduct (Dishonest), as contained in the General Code of Operating Rules, 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 5, and under the Carrier's UPGRADE Discipline Policy may result in permanent dismissal."**

On August 10, 2011, Claimant was notified that he had been found guilty as charged and was assessed a Level 5 discipline and dismissed from service.

It is the Organization's position that the Carrier failed to provide the Claimant with a "fair and impartial" Investigation. It argued that a review of the transcript reveals that the Hearing Officer failed to substantively rule on numerous objections made by the Organization during the Investigation and he inserted his opinion in regard to medical evidence that was introduced by the Claimant's representative and allowed hearsay evidence in the form of written statements from employees not in attendance at the Investigation without affording the Organization an opportunity to cross-examine the employees who provided the written statements. The Organization argued that the claim should be sustained without reviewing the merits because the Claimant was denied "due process". If, however, the Board chose to examine the merits it argued that the Carrier did not meet its burden of proof. It argued the Claimant properly reported the incident involving his ballast regulator machine to his Foreman and filled out the personal injury report he was instructed to fill out by the Carrier after the incident to the best of his ability, thus, there was no dishonest behavior. Lastly, it argued that if the Carrier had proven the Claimant was in violation, which it did not do, the punishment was excessive for an employee with four years of unblemished service. It concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the position of the Carrier there were no procedural errors that would warrant removal of the assessed discipline and the Claimant was afforded a "fair and impartial" Investigation. The Carrier further asserted that substantial evidence was provided at the Hearing that Claimant was not honest when reporting an injury and the facts that caused the alleged injury as it was unable to locate any obstructions that the Claimant said he had allegedly struck with his machine. For example: Claimant's personal injury report reveals an inconsistency in the Claimant's statements. The Claimant on his Personal Injury and Occupational Illness Report (form 52032) reported that he was wearing his seatbelt at the time of the first impact. However, the Claimant testified on page 74 of the transcript that he was not wearing his seatbelt the entire time, but only began to wear it after the first impact. It further argued that several employees testified there were no objects on the track or right-of-way large enough to stop the Ballast Regulator with the force the Claimant suggested. It concluded the Claimant was dishonest in his recollection of the June 26, 2011, incident and it asked that the discipline not be disturbed and the claim remain denied.

The Board has thoroughly reviewed the record and is not persuaded that any alleged procedural violations rise to the level to sustain the claim without reviewing the merits or that Claimant was denied his "due process" Agreement rights.

On June 26, 2011, the Claimant was assigned to Gang 9063 as a Ballast Regulator Operator on Main Track #2 near Mile Post 636.00 on the Provo Subdivision when he reported that soon after passing that location he hit two large rocks. Claimant alleged that when the machine hit the first rock the machine came to a sudden stop and his head abruptly snapped forward. After that initial stop, Claimant exited the machine to inspect his machine for damages after which he contacted Foreman Pavlock to inform him of what had occurred. Foreman Pavlock asked the Claimant if he was okay and if the situation was an emergency. Claimant told Mr. Pavlock there was no emergency and continued on operating the Ballast Regulator Machine. Shortly, thereafter, the Claimant stated his machine came into contact with another rock on or near the track and according to him that second impact caused him to lurch out of his seat, resulting in additional injuries to his neck. Claimant also reported that when he fell forward his leg hit the cooler, which then cracked the windshield of his machine. Claimant asserted that after hitting the second rock he utilized a component on his machine to move the rock away from the track. Claimant again notified his Foreman of what had transpired and was again asked if he would like to go to the emergency room. Claimant was subsequently taken to a local hospital by Track Supervisor W. Swartwood where he was prescribed two pain medications and then released. Approximately two and one half hours later, Mr. Swartwood instructed the Claimant fill out a personal injury report.

The record reveals that Mr. G. Carpenter, Track Supervisor was called in immediately after the incident and was the first employee on the scene. Supervisor Carpenter, who is a qualified Ballast Regulator Operator, inspected the Claimant's machine and found no signs of hard impact on the wing or the inner door nor did he find any rocks in excess of 75 to 100 pounds, or railroad ties that were skewed or damaged by the regulator (See page 45 and 46 of the transcript). On page 42, Mr. Carpenter was questioned as follows:

**"Q: Did you do the investigation into this alleged incident?**

**A: I did the track investigation, yes.**

**Q: Would you please give us the facts of the investigation?**

**A: The day when it happened, June 26th, I was notified about 1600. I drove to the area where it happened, walked in approximately a mile and a half. And from there, found out the milepost where this happened. I walked the track for another mile back to Milepost 6- I walked from Milepost 637.50 to Milepost 635.50 to see if there were any struck ties or any buried**

**rocks. And I could not find any scarred ties or buried boulders."**

Review of the record further indicates that on the following day Track Supervisor Swartwood returned to the location of the incident and walked the same territory Track Supervisor Carpenter had walked on June 26th. On pages 24 and 25 of the transcript, Mr. Swartwood testified he examined the railroad ties for evidence of an impact by the Claimant's machine and looked for rocks large enough to disturb the operations of a Ballast Regulator and found nothing that could have caused the impact that the Claimant described.

A statement from Safety Captain on Gang 9063, D. Smith, stated in pertinent part:

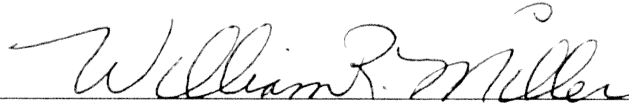
**"On June 26, 2011, I ran the regulator that was involved in the injury to Don Erbert. Approx. 16:45 I took over the regulator when he was taken to the hospital for care. When I got in the machine I noticed the seat was lifted to height in which I could barely touch the floor. I continued to get the regulator ready to go when I realized the seat was not going to settle into a comfortable position from the weight of my body. (*I weigh approx. 220 lbs., Don's weight is approx. 223 lbs., we are the same height*). That is when I had started to measure up the position of my knee in relation to the cooler in the front right hand side of the cab. I swung the seat side to side and found that it was physically impossible for my knee to have any contact with the cooler I would not be able to be seat belted in. I would actually have to slide all the way forward in the seat with my butt barely on the front edge to have my knee make contact with the cooler...."**  
(*Underlining Board's emphasis*)

The aforementioned testimonies and statement were not effectively refuted. Substantial evidence was adduced at the Investigation that the Claimant was injured on June 26, 2011. Despite that injury the evidence shows that Claimant's recollection of the incident was not accurately reported, however, the Board is not persuaded that the Claimant intended to deceive or be dishonest when he made his report of that accident.

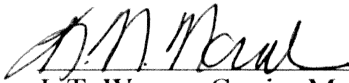
The only issue remaining is whether the discipline was appropriate. At the time of the incident the Claimant had four plus years of service with an unblemished record. Based upon the Claimant's good work record, the Board finds and holds that the discipline was excessive and is reduced to a lengthy suspension, which is corrective in nature and in accordance with the Carrier's UPGRADE Discipline Policy. Claimant is to be reinstated to service with seniority intact, all benefits unimpaired, but with no back pay. Claimant is also forewarned that after reinstatement he needs to adhere to all Carrier Rules and directives.

**AWARD**

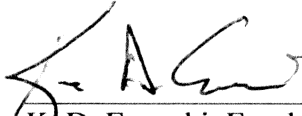
Claim partially sustained in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed.



William R. Miller, Chairman



J. T. Wayne, Carrier Member



K. D. Evanski, Employee Member

Award Date: 8-5-13