

NATIONAL MEDIATION BOARD

**PUBLIC LAW BOARD NO 6402
AWARD NO. 128, (Case No. 149)**

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs

UNION PACIFIC RAILROAD COMPANY

**William R. Miller, Chairman & Neutral Member
T. W. Kreke, Employee Member
B. W. Hanquist, Carrier Member**

Hearing Date: September 23, 2009

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Carrier's discipline (dismissal), issued by letter of June 5, 2008, of Mr. B. Syfert, in connection with alleged violations of Company Rule 1.6 (1) (Conduct - (Careless of the safety of themselves or others)), Rule 1.6 (2) (Conduct - (Negligent) and Rule 70.3 (Job Briefing) was unjust, arbitrary, capricious, based upon unproven charges and in violation of the Agreement (System File MW-08-82/1505932D MPR).
2. As a consequence of the Carrier's violation outlined in Part (1) above, Mr. Syfert shall now be compensated for all lost time, his seniority rights unimpaired, including all his vacation rights beginning May 4, 2008."

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.

On May 9, 2008, Carrier notified Claimant to appear for a formal Investigation on May 23, 2008, concerning the following charge:

"Please report to the Union Pacific Miller Yard Office, at 8150 South Central Expressway, Dallas, Texas, on Friday, May 23, 2008, at 1:00 p.m., for investigation and

hearing to develop the facts and place responsibility, if any, that on May 4, 2008, you were allegedly careless of your safety and that of others when you made a train movement without confirming that everyone was in the clear causing serious injury to machine operator Bradley Nobles.

Your alleged actions indicate possible violation of Rule 1.6 (1) (Conduct (Careless of the safety of themselves or others)), Rule 1.6 (1) (2) (Conduct (Negligent)), and Rule 70.3 (Job Briefing), as contained in the General Code of Operating Rules, effective April 3, 2005, and in the Safety Rules, effective July 30, 2007."

On June 5, 2008, Claimant was notified that he had been found guilty as charged and was dismissed from service.

As background to this case the Board has discovered that the parties are in agreement that the Claimant was working as a Foreman and was assigned to Unloading Gang 9188 in the Texas District when this dispute arose. He held a Foreman seniority date of June 12, 1997, and has been employed with the Carrier since October 31, 1988, and his record indicates no prior discipline.

On May 4, 2008, at approximately 7:00 a.m., Claimant and his crew were to unload ties from a gondola with the help of a work train. Claimant held two job briefings with his three crew members and after the second briefing he then left to go to the lead locomotive to have a job briefing with the work train crew. After Claimant departed from his crew, one of his members (B. Nobles) climbed upon the work train where his " tracker" machine was sitting which unloads ties from gondolas. Following the discussion of the day's work with the train crew, the train made a westward movement with the Claimant's consent causing Employee Nobles to fall off the car severely injuring himself. There is no argument that Claimant did not call his crew prior to the movement of the train.

It is the Organization's position that the Carrier erred in dismissing the Claimant. It argued that the record established that the Claimant had two job briefings with his crew. The first was a very extensive job briefing and the second was wherein he instructed them to "sit tight" which according to it meant that the crew was not to foul any track, red zone, or train. It pointed out that the testimony from Crew Members indicate that they were not put in danger and understood Claimant's instructions. It further argued, it is reasonable to conclude that Mr. Nobles was made aware of the same instructions and the Carrier has provided no evidence to support the assertion that Nobles did not understand those instructions. Therefore, according to it, the record further establishes that Nobles for no explained reason chose not to follow those instructions and was subsequently hurt because of his self-inflicted mistake which was no fault of the Claimant. It concluded that the Carrier failed to prove that Claimant acted carelessly for his safety and that of his crew members, or that he was negligent in his duties, and requested that the Claim be sustained as presented.

It is the position of the Carrier that Claimant was afforded a fair and impartial Investigation wherein it presented substantial evidence during the Hearing, including an admission by the Claimant,

that he failed to notify his employees that the train was going to move before it actually moved. It further argued that the assessment of dismissal in this instance was not arbitrary, capricious, or an abuse of its managerial discretion to discipline as it befitted the serious nature of the Claimant's Rule violations. Therefore, it concluded that discipline was appropriate and asked that the dismissal not be disturbed.

The Board has thoroughly reviewed the record and finds that the crux of the debate in this case is whether or not the Claimant should have confirmed that his crew was in the clear prior to the train movement or was his previous job briefing to them sufficient protection as he had instructed them to "sit tight" and stay out of danger.

The record confirms that the Carrier has a standing policy regarding "red zones" which is defined as specific areas (zones) of restriction around working equipment and trains which does not allow employees to enter without express permission. Testimony at the Hearing verifies that Employee Nobles entered the red zone without permission when he climbed on to the train and was subsequently injured.

When questioned by Hearing Officer Martinez on page 34 of the transcript Crew Member Crossley testified as follows:

"Q Okay, Mr. Crossley, during the job briefing, who was all present at that job briefing there at 9:05?

A You had four men. You had the foreman, which is Brad Syfert. You had the machine-machine operator, Brad Nobles. You had another machine operator Alvin Larkins, and me, R. E. Crossley.

Q Okay. And do you know if Mr. Nobles received the same instruction that you received that day to- to sit tight?

A That's correct. We was all sitting there.

Q Okay, did they- were you told by Mr. Syfert that day to- to stay in the clear and remain in the clear?

A Sit tight, that's- that's what the statement was.

Q Okay, but there wasn't a statement saying to stay in the clear, remain in the clear?

A Sit tight. That means don't go, don't do nothing.

Q Okay, then why did Mister- do you know why Mr. Nobles took it upon himself to move over to the train and crawl on it?

A Don't - don't have a clue. Don't have a clue." (Underlining Board's emphasis)

On page 43 of the transcript Crew Member Larkin was questioned on the same subject by the Hearing Officer and he responded as follows:

"Q Okay, and- and what- what uh- what was said in the second job briefing?

A We- Mr. Syfert discussed with us, you know, what we- again, some of what we got to do and then he just said, sit tight, he was going to talk to the train crew. And that was our last communication with him.

Q Okay, he- he told you guys to sit tight. Did he tell you to remain clear of the main track?

A Well, sit tight, assuming just stay clear. That- that's what I took it to mean. And that's what we normally just sit tight, meant for us to just stay where we were until he gave further notice.

Q Was Mr. Nobles present then?

A Yes he was.

Q Okay, Why- why did Mr. Nobles deviate from the instructions that were given?

A I don't know." (Underlining Board's emphasis)

It is clear from the aforementioned testimony that the two of the Claimant's crew members understood that when he told them to "sit tight" it meant stay clear of the train and out of the "red zone". It is also logical to conclude that the third crew member Mr. Nobles heard the same instructions and should have understood them. On its surface it would appear that Claimant fulfilled his duties in accordance with his responsibilities. However, Rule 70. 3: Job Briefing states in pertinent part the following:

"Use the Job Briefing process:

- * ...When changes occur to the work plan or conditions change.**
- * When working in groups be aware of the work and movement of other group members and equipment."**

On page 54 Claimant was questioned by Assistant Hearing Officer Noll who asked:

"Q Mr. Syfert, in respect for job briefing, Rule 70.3, where it states there on the fourth bullet, when working in groups be aware of the work and movement of other group members and equipment, Mr. Nobles did not

try to contact you in any way of his movement after you had informed him to sit tight?

A No.

Q Were you aware of where- where your other three employees - Mr. Larkin, Mr. Crossley, Mr. Nobles - were when the train started to move?

A Well apparently not. I thought I was. (Underlining Board's emphasis)

It is apparent that the Claimant understood that even though he instructed his work crew to stay in the clear of the train that he did not know for a certain that they were in the clear and out of any potential danger. The record further indicates that the crew had radio service in its truck which is where he told them to stay and that the Claimant had a hand held radio as well. Claimant was inadvertently negligent when he did not "double check" on the whereabouts of his crew and advise them that working conditions were going to change account of the train being moved. Claimant's error coupled with Noble's failure to follow his instructions to stay in the clear resulted in Noble's injuries. The Carrier has proven that Claimant, as an Employee in Charge (EIC) was partially culpable in his crew member's injuries and of violating its Safety Rules.

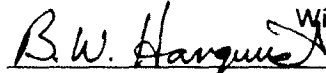
The only issue remaining is whether the dismissal was appropriate. The Carrier is correct when it argued that this matter was a serious violation, however, the Board determines that a review of this case leads to the conclusion that a substantial suspension was in order, but that the penalty of permanent dismissal was so severe as to amount to being excessive. The discipline has served its corrective purpose and in accordance with seminal precedence such as Third Division Award 9512 (Frank Elkouri) and many other Awards, we are authorized to mitigate the punishment. At the time of the incident the Claimant had 19 plus years of service with an unblemished record and it is apparent from the testimony that his mistake was not purposeful, but rather an oversight which would have been avoided if all of his crew members had followed his instructions. Therefore, the Board finds and holds that the dismissal should be reduced to a suspension of 12 months beginning on the day he was removed from service May 4, 2008, and running through and including May 4, 2009. Claimant is to be reinstated with seniority intact and all other rights unimpaired and made whole at the straight time rate for all regular days of service lost since May 4, 2009.

AWARD

Claim sustained in accordance with the Findings.

The Carrier shall make this Award effective within 30 days of the date hereof.


William R. Miller, Chairman


B. W. Hanquist, Carrier Member


T. W. Kreke, Employee Member

Award Date: 11-4-09

11-4-09