

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6402

AWARD NO. 135, (Case No. 156)

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

vs

**UNION PACIFIC RAILROAD COMPANY (Former Missouri Pacific
Railroad Company)**

William R. Miller, Chairman & Neutral Member

T. W. Kreke, Employee Member

B. W. Hanquist, Carrier Member

Hearing Date: August 17, 2010

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

1. The Level 3 [five (5) day suspension] assessed Assistant Foreman B. R. Redix, Sr. for his alleged violation of Rule 1.13 (Reporting and Complying with Instructions) and Rule 1.10 (Games, Reading, or Electronic Devices) in connection with his alleged failure to comply with instructions when instructed by your supervisor not to wear an ear bud while on the track on June 17, 2008 was without just and sufficient cause and based on unproven charges (System File MW-08-104/1507683).
2. As a consequence of the violation(s) referred to in Part 1 above, Assistant Foreman B. R. Redix shall now have his record cleared of this incident and be compensated for all wage loss suffered."

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 July 18, 2008, Carrier notified Claimant to appear for a formal Investigation on July 24, 2008, concerning in pertinent part the following charge:

"...to develop the facts and place responsibility, if any, that while employed as a Machine Operator, on Gang No. 9164, on June 17, 2008, you allegedly failed to comply with instructions when instructed by your supervisor not to wear an ear

bud while on the track.

These allegations, if substantiated, would constitute a violation of Rule 1.13 (Reporting and Complying with Instructions), Rule 1.10 (Games, Reading, or Electronic Devices), as contained in the General Code of Operating Rules, effective April 3, 2005. Please be advised that if you are found to be in violation of this alleged Level 3 charge the discipline assessment may be a Level 4...."

On August 7, 2008, Claimant was notified that he had been found guilty as charged and his record was assessed with a Level 3 UPGRADE discipline and a five day suspension.

The facts indicate that on June 17, 2008, Claimant was working as Assistant Foreman on Tie Gang No. 9164 under the supervision of Track Supervisor T. W. Epperson. It was alleged by Epperson that he noticed Claimant had an "ear bud" (i.e., ear piece used to talk on his personal cell phone) in his ear. Epperson instructed Claimant to remove the "ear bud" from his ear. Claimant complied with the order and returned to work. Approximately three or four hours later Supervisor Epperson returned to Claimant's work area and again allegedly found Claimant wearing his ear bud for his personal cell phone. Subsequently an Investigation was called because the Claimant allegedly failed to comply with instructions when instructed by his Supervisor not to wear an ear bud while on the track.

It is the Organization's position that the Hearing was not held in a timely manner and the Carrier did not meet its burden of proof. It argued that the record reflects that Supervisor Epperson was confused on his dates as to when he allegedly saw the Claimant with the ear bud the second time. Additionally, it asserted that the Claimant has a clear record and it concluded by requesting that the discipline be set aside and the Claim be sustained as presented.

It is the position of the Carrier that Claimant was guilty as charged and contrary to the Organization's assertion Claimant had previously been disciplined for other violations of the Carrier's Rules. It further contended that no procedural violations arose during the handling of the case. It closed by asking that the discipline not be disturbed and the Claim remain denied.

The Board has thoroughly reviewed the record and we find no procedural errors which require setting aside the discipline as the Claimant was afforded his "due process" Agreement rights.

Turning to the merits the Claimant testified on page 19 of the Transcript regarding Supervisor Epperson's instructions on June 17th regarding the "ear bud" as follows:

"Q Okay. But you did have a conversation about your- about wearing your ear bud or- Bluetooth?"

A That is correct.

Q Okay. Did he tell you to remove it?

A That is correct."

Claimant continued to testify that he did not put the ear bud back in his ear on that day, but then subsequently refuted himself when again asked about the date in dispute as he stated the following:

"A Eventually put it back on to talk to one of the assistant foremens that we had been doing for a while.

Q Okay. And if- Mr. Epperson contact you at that time and see you with it again?

A That is correct."

The aforementioned testimony coupled with Supervisor Epperson's testimony on pages 8 and 9 of the Transcript confirms that Claimant did not comply with Epperson's instructions and was in violation of the Rules he was charged with. It is clear that the Carrier met its burden of proof with substantial evidence.

The only issue remaining is whether the discipline was appropriate. The Board cannot find that the Carrier erred in its discipline as it was not arbitrary, excessive or capricious as it was in accordance with the Carrier's Upgrade Policy. The discipline will not be set aside.

AWARD

Claim denied.



William R. Miller, Chairman



B. W. Hanquist, Carrier Member



T. W. Kreke, Employee Member

Award Date: October 4, 2010