

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6402

AWARD NO. 136, (Case No. 157)

**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 4 [five (5) day suspension] assessed Truck Driver D. R. Williams for his alleged violation of Rule 42.4 (Track and Time Authority), Rule 136.4 (On-Track Safety Procedures) and Rule 136.3 (Job Briefings) in connection with his alleged failure to have a proper job briefing on track protection, work location and duties on July 22, 2008 was without just and sufficient cause and based on unproven charges (System File MW-08-109-A/1508723).
2. As a consequence of the violation(s) referred to in Part 1 above, Truck Driver D. R. Williams 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 31, 2008, Carrier notified Claimant to appear for a formal Investigation on August 7, 2008, concerning in pertinent part the following charge:

"...to develop the facts and place responsibility, if any, that while employed as Welder on Gang 9433, at approximately 1615 hours on July 22, 2008, near Milepost 319.19, you allegedly failed to have a proper job briefing on track

protection and work location and duties.

These allegations, if substantiated, would constitute a violation of Rule 42.4 (Track and Time Authority), Rule 136.4 (On-Track Safety Procedures) and Rule 136.3 (Job Briefings), as contained in the General Code of Operating Rules, effective April 3, 2005, in the Maintenance of Way and Signal Rules, effective April 1, 2004, and the Chief Engineer Instruction Bulletins, effective January 1, 2003. Please be advised that if you are found to be in violation of this alleged charge the discipline assessment may be a Level 4...."

On August 27, 2008, Claimant was notified that he had been found guilty as charged and his record was assessed with a Level 4 UPGRADE discipline and a five day suspension.

It is the Organization's position that the Carrier failed to prove its charges and did not provide a fair and impartial Hearing. On the merits it argued that the Carrier could not overcome the fact that it presupposed that the Claimant had a reason to challenge the Track and Time information which had been disseminated to him by his Foreman. The Organization acknowledges that a subordinate has the right to challenge instructions, but in this dispute there was no reason for the Claimant to believe it was necessary to present a challenge to the Track and Time information as it was reasonable to believe that the Foreman's information was accurate. 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 failed to have a proper job briefing at approximately 1615 hours on July 22, 2008, near Milepost 319.19 which resulted in the Claimant working while being unprotected along with Gang 9433 account of not gaining protection from the Dispatcher. It also argued that there were no procedural errors. It argued that Claimant testified on pages 33, 34 and 40 of the Transcript that he assumed that he had the proper Track and Time Permit acquired by Foreman Gonzales, but that does not relieve him from being certain that he is working under protection. Additionally, it argued that he had the means to positively ensure that he had the proper working limits prior to fouling the track. It closed by stating that it recognized that because the Claimant was a long time employee with a good work record it only assessed a five day suspension instead of the normal ten day suspension associated with a Level 4 discipline, therefore, it asked that the discipline not be disturbed and the Claim remain denied.

The Board has thoroughly reviewed the record and will first address the procedural objections raised by the Organization which do not in this instance provide grounds for disturbing the discipline. The record reflects that the Claimant was afforded his "due process" rights as the Organization and Claimant understood the charges and were fully prepared.

The Board further finds that testimony substantiates that Claimant while employed as a Welder on Gang 9433, on July 22, 2008, near Milepost 319.19, did not have a proper Job Briefing on track protection, work location, and duties, but instead a conversation wherein Foreman Gonzales told him he was going to secure protection. On page 36 of the Transcript, Claimant was questioned as follows:

"Q As a roadway worker, are you required to know what your Track and Time limits are?

A Yes. I'm-I'm required. That's why we-that's why we discussed it before he-before he got Track and Time.

Q And after- did you discuss it after he got Track and Time?

A After he got Track and Time, he never come back to me. He went to- he went to the truck to one- one of the gang truck. Got up on the truck and started working. Started taking down molds [phonetic] and stuff like that.

Q Did you ask him if he had Track and Time?

A Well, yes, when I got over there to him. Well, I asked him before we got all the way to him. I called him on the radio. I said, we do have Track and Time. Is that correct? He said, yes.

Q At that time, did you ask him what the limits were of his Track and Time?

A No. I didn't ask him the limit at that time because we all had discussed it earlier we was going to work at 319.9- 319.19.

Q So, you don't have any kind of copy of where your Track and Time limits were before you entered the track?

A He- he didn't- he did not give me- he didn't come back to me and give me a-a copy."

On page 37 of the Transcript the questioning continued and the Claimant testified as follows:

"Q What were the limits of the Track and Time he gave you?

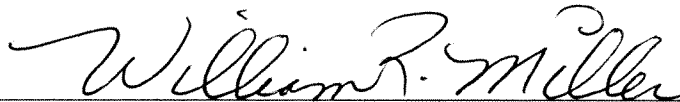
A I assume he had the Track and Time that we discussed." (Underlining Board's emphasis)

Contrary to the Organization's skillful defense in portraying this case as one involving whether or not the Claimant had a reason to challenge the Foreman's veracity regarding Track and Time Limits, the Claimant's aforementioned testimony confirms that the real issue was that he was working under an assumption that the Foreman had secured protection based upon their earlier conversation. Testimony proves that Claimant did not confirm whether or not Gonzales secured the protection after they parted because when they were both in the truck the Claimant was aware that the Foreman had not yet secured protection from the Dispatcher. Therefore, when it became time to actually go to work at Milepost 319.19, he should have either contacted the Foreman or Dispatcher to verify that protection was in place. It is clear the Carrier proved the charges by substantial evidence.

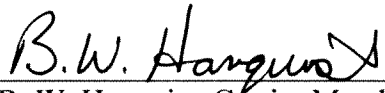
The only issue remaining is whether the discipline was appropriate. At the time of the accident Claimant had over 32 years of blemish free service which the Carrier took into consideration when it reduced the Level 4 discipline from ten days to five days. This was a serious rule violation given the fact that trains and equipment had the ability to travel into Claimant's work zone which could of had serious consequences resulting in injury or death. The Board finds no reason for further mitigation, as the discipline was not arbitrary, excessive or capricious and was in accordance with the Carrier's UPGRADE Policy. The discipline will not be set aside.

AWARD

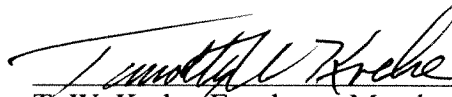
Claim denied.



William R. Miller, Chairman



B. W. Hanquist, Carrier Member



T. W. Kreke, Employee Member

Award Date: October 4, 2010