

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6402

AWARD NO. 137, (Case No. 158)

**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 to Welder D. B. Richardson for his alleged violation of Rule 42.4, Rule 136.4 and Rule 136.3 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-08-109/1509737D).
2. As a consequence of the violation outlined in Part 1 above, Welder D. B. Richardson 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 and that Claimant admitted his error. It further argued that Claimant had the means to positively ensure that he was working under protection which he did not do. It closed by stating that it recognized that because 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 notes that this case is companion case to Award No. 136 of this tribunal. The arguments made by the parties are identical in both cases as they involve the same incident, with the only exception being different Claimants. We have 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.

Review of the Hearing substantiates that the Claimant testified on pages 34 and 36 of the Transcript that he was working at Milepost 319.19, outside of the authorized limits and on page

35 he admitted that he was required to know what On-Track Protection he was working under rather than working under the assumption that Foreman Gonzales had secured the protection. Despite the Organization's skillful defense in portraying this case as one involving whether or not the Claimant had reason to challenge the Foreman's veracity regarding Track and Time Limits, the Claimant's testimony proves that he was working under an assumption that the Foreman would secure protection rather than verifying 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 incident Claimant had over 29 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 UPRGRADE 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