

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6402

AWARD NO 139, (Case No. 160)

**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 Carrier's decision to impose a Level 4 Discipline, ten (10) day actual suspension, upon Mr. D. L. Renfro, Sr. for his alleged violation of Rule 42.2.2 - Other Speed Requirements in connection with his failure to control the speed of the machine that he was operating and failure to stop short of a red flag near Mile Post 232.86 on May 19, 2008 is excessive, unwarranted and in violation of the Agreement (System File MW-08-111/1509738D).
2. As a consequence of the violation outlined in Part 1 above, we request that the Level 4 discipline assessment be removed from the Claimant's personal record and that he receive compensation for all time lost (straight time and overtime hours) and for round trip mileage."

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 June 12, 2008, Carrier notified Claimant to appear for a formal Investigation on June 30, 2008, which was mutually postponed and subsequently held on July 28, 2008, concerning in pertinent part the following charge:

"...to develop the facts and place responsibility, if any, that while employed as a

MOW Machine Operator, on Gang No. 9112, at Grandview, Texas, near Milepost 232.86, Fort Worth Subdivision, on May 19, 2008, you allegedly failed to control the speed of the machine you were operating and failed to stop short of a red flag.

These allegations, if substantiated, would constitute a violation of Rule 42.2.2 (Other Speed Requirements), as contained in the General Code of Operating Rules, effective April 3, 2005, the Maintenance of Way and Signal Rules, effective April 1, 2004, and the Revised System Special Instructions, effective July 30, 2007. In addition to your current discipline status of a Level 3, please be advised that if you are found to be in violation of this alleged Level 4 charge the discipline assessment may be a Level 4."

On August 15, 2008, Claimant was notified that he had been found guilty as charged and his record was assessed with a Level 4 discipline and a ten day suspension.

The facts not in dispute are that the Claimant was hired by the Carrier on December 8, 2003. At the time of the incident he was assigned as a Machine Operator (rail heater car) on Gang No. 9112 headquartered at Grandview, Texas, located on the Fort Worth Subdivision.

The rail heater is an on-track piece of equipment/machine that consists of a front mechanized unit where the operator of such sits and operates the machine; two consecutive "pup" tanks are attached thereto, which are filled with propane; and a 200 gallon water tank is trailing the propane tanks.

On May 19th, the Claimant was operating a rail heater car on Gang No. 9112, near Mile Post 232.86. He was traversing his machine northbound on a main line track to get in the clear. Prior to that move being made Supervisor D. Ehlers decided to perform an efficiency test or stop test and had placed a red flag on the west rail on the edge of the ties. While the Claimant was moving his machine in a northerly direction he did not immediately recognize the flag and his machine stopped two feet beyond the red flag.

It is the Organization's position the red flag was discolored/faded or burgundy in color and it was approximately 20 inches in height and because of its placement near the track structure and its discoloration Claimant did not recognize what the object was, but as soon as he realized what it was, he immediately applied the brakes of the machine. Unfortunately, the machine began to slide, eventually stopping with two feet of the front end of the machine beyond the flag. It concluded that the discipline was excessive and it requested that it be set aside and the Claim be sustained as presented.

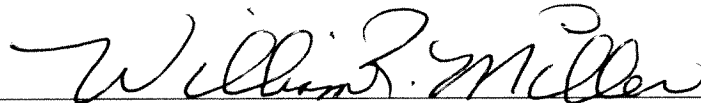
It is the position of the Carrier that Claimant failed to control the speed of the machine he was operating and did not stop short of a red flag. According, to the Carrier he was careless when he failed to stop his machine in half the distance seen to be clear. Additionally, it argued that Claimant acknowledged that he failed to stop short of the displayed red flag. Lastly, it argued that the discipline was appropriate and it asked that the discipline not be disturbed and the Claim remain denied.

The Board has reviewed the record and determined that the Claimant admitted on page 30 of the Transcript that the front end of his machine got past the red flag by about two feet. His excuse for not stopping was that he did not recognize the red flag account of its alleged discoloration. Testimony by other witnesses indicated that that the flag was dirty, but a definite red. Despite the flag's possible discoloration the Claimant should have recognized the flag and the fact that he admitted that he failed to stop short of it makes it clear that the Carrier met its burden of proof that he was guilty as charged.

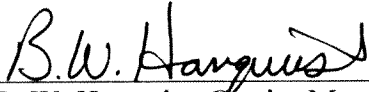
The only issue remaining is whether the discipline was appropriate. The record indicates that prior to the instant dispute Claimant had been charged with the same infraction some six months earlier, at which time he waived his right to a Hearing and accepted the Level 3 discipline. The Carrier's discipline policy requires that when an employee is at a Level 3 and commits a second Level 3 offense, the cumulative discipline to be assessed should be a Level 4. The Carrier adhered to its Upgrade Policy, therefore, the Board finds that the discipline was proper as it was not arbitrary, excessive or capricious. The discipline will not be set aside.

AWARD

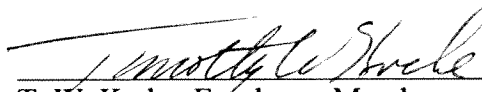
Claim denied.



William R. Miller, Chairman



B. W. Hanquist, Carrier Member



T. W. Kreke, Employee Member

Award Date: October 4, 2010