**NATIONAL MEDIATION BOARD**
**PUBLIC LAW BOARD NO. 6402**
**AWARD NO. 183, (Case No. 204)**

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

**vs**

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

William R. Miller, Chairman & Neutral Member
K. D. Evanski, Employee Member
K. N. Novak, Carrier Member

Hearing Date: September 18, 2012

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

1. **The discipline (dismissal) imposed on Mr. L. Glover by letter dated July 19, 2011 for alleged violation of Rule 1.6 Conduct (1) Careless of Safety, Rule 1.1 Safety, Rule 1.1.1 Maintaining a Safe Course, Rule 1.1.2 Alert and Attentive, Rule 1.13 Reporting and Complying with Instructions, Rule 1.20 Alert to Train Movement, Rule 42.1.7 Safe Passage, Rule 41.2 Operators, Rule 70.1 Safety Responsibilities, Rule 70.3 Job Briefing and Rule 136.7.1 Operating Roadway Machines Safely in connection with allegations that Mr. Glover failed to check and maintain proper clearances when a machine collided with the underside of a bridge on May 20, 2011 was without just and sufficient cause, unwarranted and in violation of the Agreement (System File UP430LL W11/1553426).**

2. **As a consequence of the Carrier's violation referred to in Part 1 above, the Carrier must remove the discipline from Mr. Glover's record and compensate him for all losses, including straight time and overtime wages, benefits, seniority rights and any other losses suffered as a result of the Carrier's unjust and improper discipline."**

**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 and did participate therein.

On June 7, 2011, Claimant was directed to attend a formal Investigation on June 29, 2011, concerning in pertinent part the following charge:

> **"...to develop the facts and place responsibility, if any, on the following charges: While working on the TMDS-5050, on Gang 1154, at Jonesboro Subdivision, near Milepost 261.25, at approximately 2211 hours, on May 30, 2011, while traveling the TMDS-5050 under a bridge, you allegedly failed to check for proper clearances and maintain clearances, resulting in the machine to collide with the underside of the bridge.**
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> **These allegations, if substantiated, would constitute a violation of Rule 1.6 Conduct (1) Careless of Safety, Rule 1.1 Safety, Rule 1.1.1 Maintaining a Safe Course, Rule 1.1.2 Alert and Attentive, Rule 1.13 Reporting and Complying with Instructions, Rule 1.20 Alert to Train Movement, Rule 42.1.7 Safe Passage, Rule 41.2 Operators, Rule 70.1 Safety Responsibilities, Rule 70.3 Job Briefing, and Rule 136.7.1 Operating Roadway Machines Safely, as contained in the General Code of Operating Rules effective April 7, 2010, and Maintenance of Way Rules, effective November 17, 2008, Safety Rules, effective July 30, 2007, System Special Instructions, effective April 7, 2010, and Chief Engineer Bulletins."**

On July 19, 2011, Claimant was found guilty as charged and was assessed a Level 5 discipline and dismissed from the service of the Carrier.

It is the Organization's position the Carrier failed to respond to its claim letter of July 26, 2011. It argued that the Carrier's response to this assertion was that it answered the appeal with an offer of leniency dated August 2, 2011, which the Organization stated is misplaced. It is misplaced because the August 2nd document is not a denial of the July 26th claim as it did not provide any reference to the claim letter; nor did it provide a reason for disallowing the claim; and it was not authored by the Director of Labor Relations to whom the appeal was sent. It argued there is no conceivable way that the offer of leniency can be construed as an official denial of a claim or appeal. On that basis alone it reasoned that the claim should be sustained without reviewing the merits of the dispute. It relied upon several Awards including one from this Board which stand for the principle that the time limits for handling of claims must be strictly enforced in accordance with the parties' Agreement.

On the merits the Organization argued the Claimant did everything possible to help avoid the collision with the bridge. It argued Claimant bled down the machine to a squatted position as far as it would go. It further argued that the Claimant's gang wanted to clear up on a passing siding that would have eliminated the need to travel under the subject bridge, but the Dispatcher and Corridor Manager told them they would be unable to hold the siding and that they would

have to travel to Pine Bluff Yard. That fact combined with the fact that the train crew did not show up until after nightfall left the employees to make a move in the dark. It further pointed out that the Carrier's height detector did not identify the train as being too high, but the employees still proceeded with caution. The Maintenance of Way employees took all reasonable precautions under the circumstances and the Claimant told the train crew to bring the train to a halt long before the impact at the bridge. However, as was established at the Hearing, the train crew did not have air connected to the 27 gondola cars they were pulling, which the Claimant was unaware of. That combined with the fact that the train crew delayed in reacting on Claimant's stop directive resulted in the incident and the Carrier did not prove otherwise. It concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the position of the Carrier that the claim was timely responded to and there were no procedural errors. It argued that the facts indicate that substantial evidence was presented to demonstrate that the Claimant violated all the Rules listed in the charges as he failed to check for proper clearances and maintain clearances. He also failed to alert his direct Supervisor of the fact that the Tracker would not retract and they were being asked to tie up in the yard. He further failed to have a full job briefing with the train crew to understand and know all conditions specifically that the train did not have air. It reasoned had the Claimant abided by the Carrier's Rules, the accident would have never happened. It closed by asking that the discipline not be disturbed and the claim remain denied.

The Board notes that this is a companion case to Award No. 184, Case No. 205 involving the same incident. There is no significant difference in the two cases except for the fact that the Claimant in this case was a Machine Operator and the Claimant in the other case was a Foreman. Both employees were charged with most of the same Rules violations with some slight variations due to the fact that other employee was a Forman.

The Board will first address the question raised by the Organization as to whether or not the Carrier responded to its claim letter of July 26, 2011. The Organization asserted that the Carrier's offer a Leniency Agreement on August 2, 2011, does not equate to being a denial letter as it did not address the claim. The Organization is correct that the August 2, 2011 Leniency Agreement offer makes no specific mention of its claim letter of July 26, 2011. That offer concluded by stating that if the waiver was not accepted then the offer was withdrawn in its entirety and the Claimant would remain in dismissed status. The Board agrees with the Organization that the August 2, Leniency Agreement did not deny its claim, however, a second Leniency Agreement offer of September 9, 2011, was also made that specifically referenced BMWE File: UP430LLW11 which was the Organization's file number for its July 26th claim. In the closing of the September 9th Leniency Letter it stated that if the waiver was not accepted, then the offer was withdrawn in its entirety and your claim is denied in its entirety. The second offer of Leniency was still within the required 60 days to answer the appeal. The Board does not

find the Organization's time limit argument to be persuasive because the second offer of leniency timely denied the claim. The case will be resolved on its merits.

There is no dispute between the parties that the Claimant and Foreman Seiler were unloading ties with a work train and Claimant was operating a TMDS-5050 Tracker on top of a empty gondola. Claimant and Foreman Seiler intended to tie-up the work train in a siding, but were informed by a Dispatcher and Corridor Manager they would need to go to Pine Bluff Yard which required the train to be operated through a bridge.

The Claimant and Foreman Seiler were unable to fully squat the Tracker down prior to making their movement, but they believed it was likely that the Tracker would clear the bridge. Claimant rode up on the car with the Tracker to monitor whether it would clear. Because the Tracker could not be fully retracted it collided with an overhead bridge span and caused damage to the machine and bridge.

The Organization raised several arguments in behalf of the Claimant. For instance, it asserted that contrary to what the Carrier alleged the Claimant participated in multiple job briefings, which were substantive and on-point with the duties they were performing. Despite those multiple job briefings the record is clear that the Claimant and Foreman Siler needed a meeting with the train crew so that everyone understood, the Tracker was not fully retracted and the train had no air so that all realized the potential problems. On page 49 of the transcript the Claimant testified in pertinent part as follows:

> **"A ...I noticed the girders about a half a car length and I assumed they had air on the cars ...**

On page 71 of the transcript the Claimant further confirmed that he and Foreman Siler did not know the train was operating without air which substantiated that the Claimant did not have an adequate job briefing with the train crew.

The Organization also suggested that the detector did not warn the crew of the lower spans in the bridge, but the Carrier effectively countered that argument when it pointed out that the detector is just one tool for helping the employees, but it was not meant to be a catch all for all potential problems nor did it absolve the Claimant and his Foreman from carefully inspecting the situation and explaining the problem to everyone involved.

The record is clear that the Dispatcher and the Corridor Manager informed the Claimant and Foreman Seiler they could not take the siding, however, the record is equally clear that the Claimant and Foreman Seiler did not explain the problem with the Tracker or request assistance.

Rather than ask for suggestions and/or advice from the Dispatcher and/or the Manager the Claimant and Mr. Seiler chose to move the train on their own volition.

The Organization made a valiant effort in behalf of the Claimant, but it could not overcome the Claimant's admission that he did not have a job briefing with the train crew to find out what type of braking they were using to stop the train nor could it explain why the Claimant and Foreman Siler did not explain the problem they were having with the Tracker to their superiors. Substantial evidence was adduced at the Investigation that the aforementioned errors made by the Claimant contributed to the accident and Claimant was guilty as charged.

The only issue remaining is whether the discipline was appropriate. At the time of the incident Claimant had ten plus years of service with a good work record. It is evident that the Carrier believed the Claimant was a valuable employee when it twice offered a Leniency Reinstatement Agreement. That offer was rejected and is not considered binding, however, the Board believes that dismissal in this instance is excessive, therefore, the Board finds and holds that the Claimant will be reinstated to service with seniority intact and benefits unimpaired with no back pay. The Board also forewarns the Claimant that after reinstatement to service he needs to be careful to adhere to all Carrier Rules and Safety Rules.

## AWARD

Claim partially sustained in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed.

William R. Miller, Chairman

K. N. Novak, Carrier Member

K. D. Evanski, Employee Member

Dissent to Follow

Award Date: 4/4/12

LABOR MEMBER'S DISSENT
TO
AWARDS 183 AND 184 OF PUBLIC LAW BOARD NO. 6402
(Referee Miller)

A dissent is required in Awards 183 (Case 204) and 184 (Case 205) of PLB No. 6402 because the Majority erred when it did not even address the issue of the Carrier's failure to provide a fair and impartial investigation to Foreman Seiler and compounded that error when it wrongly concluded that both Claimant Seiler and Claimant Glover contributed to the cause of an accident involving a train hitting the underside of a bridge.

## LACK OF A FAIR AND IMPARTIAL INVESTIGATION.

The incident under investigation involved a train with twenty-seven (27) gondola cars and one (1) tracker machine hitting the underside of a bridge. While there is no mention of it in the Majority's opinion, the Organization's primary argument in connection with Foreman Seiler was that the Carrier failed to provide a fair and impartial investigation because it did not provide the train crew as witnesses at the formal investigation. A request for the train crew as witnesses was made prior to the investigation (Employes' Exhibit "A-2", Case 205) with a clear offer of proof that the train crew was directly involved and thus necessary to establish all the facts during the investigation. When the Carrier failed to produce those witnesses at the investigation, the Organization objected (Tr.PP.15,16&17, Case 205). In connection with this objection, the hearing officer did not reject the Organization's challenge that the witnesses were directly involved and had pertinent information, but instead contended that it had no responsibility to call witnesses. The hearing officer's ruling on the Organization's objection can be seen at Page 16 of the transcript (Case 205) and, in pertinent part, reads:

> "Mr. T. C. Kirk: Well again, I'll refer you to that you will provide the witnesses at your expense and you will provide the witnesses at your cost and you will contact the witnesses that you need. The Company has no- has no responsibility to provide those witnesses."

Following the Carrier's decision of guilt, the Organization's July 26, 2011 claim letter (Employes' Exhibit "A-5", Case 205) and its November 15, 2011 claims conference letter (Employes' Exhibit "A-8", Case 205) again reiterated the Organization's position that the Carrier failed to provide Foreman Seiler a fair and impartial investigation. In addition to the Organization's recitation of its position during the hearing and at every level of the claim handling, it was also a primary argument within its submission wherein it asserted that the Carrier is

responsible to present all witnesses with pertinent information and to develop all facts relevant to the incident(s) under investigation. The submission cited NRAB First Division Award 19910, Second Division Award 2923, Third Division Award 20014, 23097, 31547, 33609, Award 40 of PLB No. 4081, Award 586 of PLB No. 5383, Award 2 of PLB No. 5681 and Award 43 of PLB No. 5942 (See Organization's submission, Pages 12-14, Case 205). Additionally, the Organization cited Award 171 of this Board, which was authored by this same Neutral, and held:

> "The Carrier had a responsibility to call all witnesses that had relevant information. If Woodard and Cocrell had been called as witnesses both could have clarified the events of November 8, 2010, as to how the turntable was secured on the Claimant's Spike Puller machine. Absent the testimony of Mechanic Cocrell who helped to secure the machine for towing we have the un-rebutted testimony of the Claimant that the machine was properly prepared for towing. Carrier's failure to call both of the aforementioned employees as material witnesses, especially Cocrell, not only denied the Claimant his right to a 'fair and impartial' Hearing it substantiated the fact that the Carrier did not meet its burden of proof (See Fourth Division Award No. 4700). Therefore, the Board finds and hold that the discipline is rescinded and the claim is sustained as presented." (Employes' Exhibit "C-11")

The Majority's opinion offered no explanation for its failure to follow a prior decision of this Board. Consequently, this Board member is at a complete loss in understanding how such an issue could be ignored when a review of the Carrier's correspondence reveals that nowhere during the on-property handling or in its submission did the Carrier assert that the train crew employes did not have pertinent firsthand knowledge of the incident. To the contrary, the Carrier's correspondence directly implicates the train crew as having relevant information. In this regard, attention is directed to the Carrier's December 5, 2011 post claims conference letter which, in pertinent part, reads:

> "*** The Claimant also failed to have a full job briefing with the train crew to understand and know all conditions specifically that the train did not have air. ***" (Employes' Exhibit "A-9", Case 205)

The Carrier made this identical assertion in its submission starting at Page 2. If that was not enough, the Carrier tacitly conceded that the train crew was necessary to establish facts when it entered into the record an unsigned, undated, bullet point that allegedly summarized the "Engine Tape Downloads from UP 4138 (Lead unit on WSGSGT 30)" (Transcript Exhibit 4, Case 205). These downloads were supposedly from the train in question and allegedly contained the information from the train crew's handling of the train at the time of this incident. Given that this document does not provide an entire copy of the downloads or identify the transcriber, it is of no

evidentiary value except to emphasize the fact that the Carrier tacitly acknowledged the operation of the train by the train crew was at the center of this issue. Thus, it is repugnant to the concepts of fundamental fairness that the Carrier failed to call those witnesses to the investigation and just as repugnant that the Majority did not address the issue.

Furthermore, a review of the record of either of these cases shows that the Carrier was not interested in developing all the facts and simply wanted to place blame for this accident on the two (2) Maintenance of Way employes who were the Claimants in these two (2) cases. This was readily apparent because neither of the Carrier Supervisors who performed the so-called investigation of the accident and testified at the formal hearings (i.e., Messrs. Schupp and Sullivan) bothered to question or interview the train crew at any time relative to either case. First, we direct attention to the transcript where Supervisor Sullivan testified that he did not question the train crew. The pertinent part of the transcript reads (Tr.P.58, Case 205):

"Q And you did not question any of the train crew. Is that correct?

A No sir."

Second is Supervisor Schupp's testimony which, in pertinent part, reads (Tr.P.110, Case 205):

"Q And I think you told me, if I'm not mistaken, and you can tell me now, did you talk to anybody in the train crew?

A No, I did not speak to the train crew."

As the above-listed awards held, a fair and impartial hearing requires the Carrier develop all relevant facts and present all witnesses with firsthand knowledge of the incident under investigation. The Majority's decision does not even consider the Organization's argument in Foreman Seiler's case that there was not a fair and impartial hearing, but instead goes on to find that both Claimants provided an admission of guilt. However, even if that were the case (which it was not) the fact is the Carrier is still contractually required to provide a fair and impartial hearing prior to assessing any discipline. This is a requirement of the clear and unambiguous language of Rule 22(a)(1)which, in pertinent part, reads:

"An employee who has been in service more than sixty calendar (60) days whose application has not been disapproved will not be dismissed or otherwise disciplined until after being accorded a fair and impartial hearing. ***"

It is axiomatic that all facts must be established during the formal investigation because the discipline process includes a multitude of factors that would not only fully flush out guilt or

innocence, but would shed light on due process, the measure of culpability, mitigating factors and disparate treatment, among others issues. These are all necessary elements in determining if discipline is appropriate and if so, the quantum of discipline to be assessed. Consequently, the Carrier's failure to produce the train crew as witnesses established beyond question that this was not a fact finding investigation, but a Carrier prosecution and the Majority erred when it did not even address the issue of Foreman Seiler's contractual right to a fair and impartial hearing.

## MAJORITY'S FACTUAL DETERMINATIONS ARE WRONG.

As if the Majority's failure to enforce Foreman Seiler's right to a fair and impartial hearing were not enough of a blunder, the Majority failed in its factual determinations in both cases. The Majority held:

> "The Organization made a valiant effort in behalf of Claimant, but it could not overcome the Claimant's admission that he did not have a job briefing with the train crew to find out what type of braking they were using to stop the train nor could it explain why the Claimant and Foreman Siler (sic) did not explain the problem they were having with the Tracker to their superiors. Substantial evidence was adduced at the Investigation that the aforementioned errors made by the Claimant contributed to the accident and Claimant was guilty as charged." (Award 183 of PLB No. 6402, Page 5)[1/]

In this regard, the Majority's finding on the job briefing issue will be addressed first and its findings on the Claimants' failure to contact a superior second.

## THE CLAIMANTS DID NOT PROVIDE AN ADMISSION OF GUILT AND A FAILURE TO DISCUSS AIR BRAKES AT A JOB BRIEFING DID NOT CONTRIBUTE TO THE ACCIDENT.

The Majority's opinion is wrong because it asserts there was an admission of guilt when that was not the case. Neither Claimant ever conceded that it was their responsibility to extract

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1/ Award 184 of PLB No. 6302 defers to these factual determinations.

information within the train crews expertise at a job briefing in connection with the air brakes. Maintenance of Way employes are not qualified train operators. The fact that these things are beyond the Claimants' normal duties and expected knowledge is echoed by the Charging Officer's testimony in answering questions from the hearing officer which, in pertinent part, reads (Tr.P.37, Case 205):

> "Q Mr. Schupp, you ever been an Engineer on a train, controlled the locomotive?
>
> A No sir.
>
> Q And you have absolutely no knowledge of how to operate a locomotive whatsoever so you- is that true?
>
> A That is true."

While the Maintenance of Way supervisor admits he has no knowledge of the operation of trains, the Majority in this case essentially found the Maintenance of Way crew responsible for identifying and extracting information that is within the trains crew's expertise and responsibility. Moreover, it was testified to by another supervisor, (i.e., Supervisor Sullivan) that the normal operating procedure for the train crew is to have air to the cars. This is evident by Mr. Sullivan's answer to Claimant Seiler's questioning (Tr.P.51, Case 205):

> "Q But that's not what the train crew did for me when I asked them to do that. But it- generally when you tell them prepare to stop, they almost always set air.
>
> A Uh huh."

The premise of the Majority's decision is unreasonable because it assumes that the Claimants have expertise in an area of specialization beyond their normal responsibilities and that they should have had knowledge that the train crew was not operating the train in normal fashion. In this regard, the basic elements of just cause require the Carrier demonstrate that the Claimants were trained in train operation and braking and they ignored that training. The Claimants were not so trained and to meet its burden of proof the Carrier was required to show a rule or procedure supporting its position that it was the Claimants' responsibility to understand and extract train operating and braking procedures that were within the train crew's expertise and responsibility. The Carrier did not identify any such training, rule or procedure. There is no way to determine why the train crew did not explain to the Claimants that it was not using the normal procedure of

having air for the train braking systems because the Carrier did not call those employes to the investigations; in fact the Carrier did not ever question those employes.

Moreover, the fact that the train crew did not mention its decision not to set air to the cars is really irrelevant in connection with the actual accident inasmuch as it is undisputed that the train crew was given the direction by the Claimants to "Be prepared to stop" (Tr.P.65, Case 205). Despite being given that instruction, the train crew was unable to stop the train thereby causing the accident. Claimant Seiler's testimony when being questioned by the hearing officer in pertinent part reads (Tr.P.65, Case 205):

> "A When we got to the bridge, I had the train crew slow down to a slow walk and told them to proceed prepared to stop, listening to the operator in the back on the machine.
>
> Q Okay. And when- when you say- what was your expectations of the train crew at that point in time when you said to be- slow down and be prepared to stop. What was your expectation?
>
> A Running slow with the air set on the cars that are at walking speed. That way if they needed to stop, they can stop way quicker.
>
> Q To the best of your knowledge, did you observe any of these actions by the train crew take place in order to follow your instructions?
>
> A No, I did not.
>
> Q And specifically, what instructions did they not follow?
>
> A Being prepared to stop."

We also direct attention to the closing statement of the Organization representative (Tr.P.122, Case 205):

> "And it is the position of the organization that had they not hesitated that this collision could've been avoided. The responsibility of this entire incident should fall on the train crew for poor train handling, and not applying brakes when they should have."

Thus, even though the train crew's determination not to have air attached to the brakes very possibly contributed to the accident, once the train crew was given the instruction to be prepared to stop it was incumbent upon the train crew to calculate tonnage, braking distance and other pertinent factors and bring the train to a stop under the procedures it chose to operate it under. The Majority's opinion that the Claimants alleged failure within the job briefing to discuss the train crew's use of air brakes contributed to the accident is simply not proven because there is no evidence that the alleged failure to discuss the air brakes caused the accident, or that the accident would not have occurred had a discussion about air brakes taken place. The Majority's findings are based on speculation and assumption and are contrary to the only firsthand accounts provided at the investigation by the Claimants that it was the train crews train handling that was the direct cause of the impact.

**CLAIMANTS WERE NOT REQUIRED TO CONTACT THEIR SUPERIOR IN CONNECTION WITH THE TRACKER AND THEIR FAILURE TO DO SO DID NOT CONTRIBUTE TO THE CAUSE OF THE ACCIDENT.**

Lastly, we address the Majority's second factual determination that the Claimants contributed to the cause of the accident because they failed to contact a superior in connection with the problem they were having with the tracker.

The first problem with this finding is that it changes the well-established principle that the burden of proof in discipline cases is on the Carrier. This was not a matter of the Organization explaining the Claimants' decision not to contact a superior. In determining a rule violation, it was incumbent upon the Carrier to establish that the Claimants were in fact required to contact their superior under the circumstances. In determining whether the Claimants' actions contributed to the accident it was incumbent upon the Carrier to establish that the accident would not have occurred had the Claimants contacted a superior. However, the Carrier did not establish those facts. Instead, the facts of record establish that the train crew was responsible for the accident and there is no proof that if the Claimants had contacted their superior the accident would have been prevented. Moreover, the relevant supervisor did not testify that he would not have permitted the move with the tracker the way it was and even if he had it would have been nothing more than second-guessing the Claimants' actions. The Claimants were given an assignment and the Carrier determined that they could carry out that assignment without direct supervision. But, even if it were Claimants' error in not contacting their superior, the Majority's conclusion that the failure to contact a superior was a contributing cause of the accident is not based on facts established in

the record. Again, the actual cause of the accident as testified to by both Claimants, who provided the only firsthand account of what transpired, was the train crew's poor handling of the train. Because the Carrier refused and otherwise failed to produce the train crew witnesses, the Claimants' testimony remained unrefuted and were the only facts established in the record. The Majority's rejection of the facts is based on mere speculation and assumption and thus wrong.

For all the reasons stated above, this decision is palpably erroneous and is of zero precedential value and, I emphatically dissent.

Respectfully submitted,

Kevin D. Evanski
Employe Member
PLB No. 6402