

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6402
AWARD NO. 187, (Case No. 208)**

**BROTHERHOOD OF MAINTENANCE OR WAY EMPLOYEES
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 [Level 3 five (5) day suspension] imposed on Mr. M. Franklin, Jr. for alleged violation of Rule 80.1 (Avoiding Slips, Trips and Falls), Rule 80.2 (Precautions About Slips, Trips and Falls), Rule 1.1 Safety, Rule 1.1.1 (Maintaining a Safe Course), Rule 1.1.2 (Alert and Attentive) and Rule 70.1 (Safety Responsibilities) in connection with allegations that while employed as a machine operator he failed to take the safest course and avoid slips and falls on June 13, 2011 was without just and sufficient cause, unwarranted and in violation of the Agreement (System File UP267AWF11/1555103).**
- 2. As a consequence of the violation referred to in Part 1 above, the Carrier must remove the discipline from Mr. Franklin's record and compensate him for all losses, including wages, benefits, seniority rights and any other losses suffered as a result of the Carrier's 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 July 19, 2011, Claimant was directed to attend a formal Investigation on July 26, 2011, concerning in pertinent part the following charge:

"...to develop the facts and place responsibility, if any, that while employed as Machine Operator on Gang 9167, at Eustace, Texas, on June 13, 2011, you

allegedly failed to take the safest course and avoid slips, trips, and falls, resulting in you injuring your left knee.

These allegations, if substantiated, would constitute a violation of Rule 80.1 Avoiding Slips, Trips, and Falls, Rule 80.2 Precautions About Slips, Trips and Falls Rule 1.1 Safety, Rule 1.1.1 Maintaining a Safe Course, Rule 1.1.2 Alert and Attentive, and Rule 70.1 Safety Responsibilities, as contained in the General Code of Operating Rules, effective April 7, 2010, and in the System Special Instructions, effective April 7, 2010, and Safety Rules, effective July 30, 2007."

On August 12, 2011, Claimant was found guilty and was assessed a Level 3 discipline with an actual five day suspension.

It is the Organization's position that on June 13th Claimant and other members of Gang 9167 were working in the vicinity of Eustace, Texas. At approximately 4:30 a.m., while it was still dark, Claimant arrived at the mainline location where his gang had concluded their previous day's work and had tied up their production machines for the night. Claimant then started his first morning duty and proceeded to stock each of the gang's machines with water and ice. In performing his task, Claimant walked down the right-of-way and stopped at each machine, depositing water and ice as he went along. As he worked down the line of machines, his path took him through ballast referred to as a "potato roll". As explained by one of the Carrier's witness, this ballast had been deposited on both shoulders of the right-of-way at the conclusion of the previous work day and was done to facilitate an early start to the next day's production work since the ballast would not need to be brought up in the morning and it also helped stabilize the track.

According to the Organization, as Claimant moved from machine to machine, he knew and understood that it was necessary to walk with caution. He walked in a manner that had been prescribed by the Carrier on numerous occasions - with his heel down while ensuring that he had as stable footing as possible before continuing forward. Despite being careful Claimant twisted his left leg in an awkward position. Initially he attempted to continue working, but the pain in his leg was so bad that he was eventually taken to a hospital and then directed to go home and recuperate. The Organization argued that the accident was unavoidable and was no fault of the Claimant. It concluded by requesting that the discipline be rescinded and the claim sustained as presented.

The Carrier's rendition of the incident is nearly identical to that of the Organization and will not be reiterated for the sake of brevity. However, the key difference is the position of the Carrier is the Claimant failed to take the safest course of action while performing his duties. It

argued that Claimant while distributing the water and ice stepped over the ballast with his right leg with his left leg back underneath him. Due to the leg contortion, the Claimant pulled and twisted his left leg whereas if he had chosen a different path he could have avoided the accident. It closed by asking that the discipline not be disturbed and the claim remain denied.

There is no dispute between the parties that the Claimant was injured on June 13, 2011, while distributing water and ice to various machines being used by Gang 9167 in the vicinity of Eustace, Texas. The dispute centers on whether or not the Claimant used the safest route available while performing his duties. Track Supervisor, W. E. Robinson testified on pages 10 - 12 of the transcript there was an alternate safer route the Claimant could have used which was shown through a reenactment of the accident.

A review of Supervisor Robinson's testimony reveals that the reenactment was conducted approximately 11 hours after the accident. The accident occurred at approximately 4:30 a.m., in the dark, while the reenactment was done in full sunlight. The reenactment was conducted by persons not present when Claimant was injured and was based upon the Claimant's comments, who did not participate because he was at home injured. Additionally, it was conducted after Gang 9167 had worked for the day, moved their machines and changed the footing and ballast at the worksite of Claimant's injury. The Carrier intended to duplicate the accident as accurately as possible, however, the fact that it was done during the daylight hours and after the pathway ballast had been revamped and corrected, changed the topography of the right-of-way and the actual visual perception the Claimant faced in the darkness of June 13th. The Board is not convinced that the reenactment accurately reflected the conditions of the actual work site at the time of the incident.

Claimant testified on pages 15 - 18 of the transcript that while he performed his duties on the date in question he was observant of the footing and he walked in a careful and prudent manner and he did not notice any circumstances that indicated his route to be abnormally unsafe. Claimant's testimony was not effectively rebutted.

In Award No. 127 of this Board, it was determined in pertinent part:

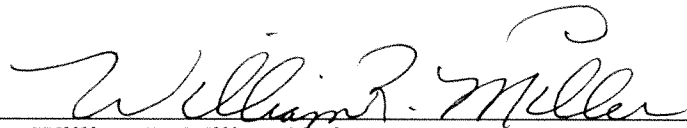
"Testimony of both the Claimant and co-worker Gregurich confirms that they assessed the situation and determined that the pathway they chose to traverse on their way to the CAT Tamper appeared to be safe and Claimant did not attempt to jump the water (See testimony of Gregurich, on pages 21 & 22 and Claimant, on pages 53 - 56 of the Transcript). No one else was present at the time of the incident, nor is there any other first-hand evidence which contradicts the aforementioned testimony. Carrier witnesses testimony is speculative in nature and assumes that there must have been a safer way to get to the CAT Tamper because of the fact that

Claimant was injured. Many tribunals have ruled that some injuries are unavoidable and the fact that Claimant was injured in this instance does not prove that he violated the Carrier's Safety Rules. The record is clear the Carrier did not meet its burden of proof that Claimant was inattentive or careless in the performance of his duties."

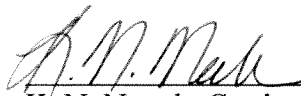
The reasoning and logic of Award No. 127 is applicable in this dispute and shall be followed. It is determined that the Carrier did not meet its burden of proof that Claimant worked in a unsafe manner or that he was not careful in avoiding an injury. Therefore, the Board finds and holds that the claim is sustained in accordance with part 2 of the Statement of Claim.

AWARD

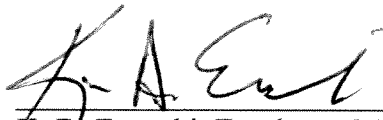
Claim sustained in accordance with the Findings and Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed.



William R. Miller, Chairman



K. N. Novak, Carrier Member



K. D. Evanski, Employee Member

Award Date: 4/11/12