

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6402
AWARD NO. 189, (Case No. 211)**

**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
P. Jeyaram, Carrier Member

Hearing Date: December 20, 2012

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

- 1. The discipline (dismissal) imposed on Mr. E. Wright for alleged violation of Rule 1.6 Conduct (1) Careless of the Safety of Themselves or Others, and (2) Negligent in connection with allegations that he failed to put down ramps for the unloading of a tamper off a semi-trailer on June 6, 2011 was without just and sufficient cause, unwarranted and in violation of the Agreement (System File UP432LLW11/1557471).**
- 2. As a consequence of the violation referred to in Part 1 above, the Carrier must remove the discipline from Mr. Wright'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 thereon and did participate therein.

On June 15, 2011, Claimant was directed to attend a formal Investigation on June 29, 2011, which was mutually postponed until July 6, 2011, concerning in pertinent part the following charge:

**"...to develop the facts and place responsibility, if any, on the following charges:
While employed as M/O DTL Fr Loader Operator on Gang 9295, near Houston,**

Texas, in the Eureka Yard, on the Eureka subdivision, at approximately 1430 hours on June 6, 2011, you allegedly assisted in unloading a tamper from the semi trailer without putting down the ramps, which are needed to safely unload this machine, resulting in the machine to land on the rail, the transmission brackets to break, and the transmission to fall to the ground.

These allegations, if substantiated, would constitute a violation of Rule 1.6 Conduct (1) Careless of the Safety of Themselves or Others, and (2) Negligent, as contained in the General Code of Operating Rules, effective April 7, 2010.

Please be advised that if you are found to be in violation of this alleged charge, the discipline assessment may be a 5, and under the Carrier's UPGRADE Discipline Policy may result in permanent dismissal."

On July 25, 2011, Claimant was notified that he had been found guilty as charged and was assessed a Level 5 discipline and dismissed from service.

The facts indicate that on June 6, 2011, the Claimant was asked to help unload a tamper from a semi-truck on Gang 9295 in the Eureka Yard on the Eureka Subdivision. Ramps are normally used to lower the machine onto the rail, but in this instance they were not used. In the process of unloading the tamper it dropped onto the rail causing the transmission bracket to break and the transmission to fall to the ground and because of that a formal Investigation was called.

It is the Organization's position that the Carrier did not meet its burden of proof because a Track Supervisor, Foreman and the Tamper Operator that off-loaded the machine in question participated in the pre-off-loading discussion where the Claimant explained ramps should be used to off-load the machine and they should not try to unload on a curve and he raised the question as to whether there was another spot in the yard that could be used where the tracks were straight and it would be safer. It asserted that the other employees including two superiors decided that the machine should be off-loaded at its current location and the Claimant was required to assist the Supervisor and Foreman in their plan. It also argued that Manager of Track Programs Britt acknowledged that it would have been the Supervisor's responsibility to stop the employees before they unloaded the tamper if the process being used was improper or unsafe. It further argued that Mr. Britt implied Supervisor Rivera was not responsible because he was not present when the tamper was off-loaded, which it disputed stating that Claimant provided un-refuted testimony that Rivera was present and actively engaged in the unloading of the tamper. It suggested that it is unreasonable that Rivera actively participated and condoned the process for performing the work and the Carrier then charged and dismissed Claimant for following instructions. Simply put the Claimant was treated disparately as none of the other employees

involved in the off-loading incident were charged. It concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the position of the Carrier that the record shows that on the date in question Claimant assisted semi-truck driver, C. Thomas, to unload a Jackson 6700 Tamper from the truck's lowboy trailer. It asserted that the proper way to unload a tamper is by aligning the trailer with a straight piece of track. After aligning the trailer with the track, ramps are used to lower the machine onto the rail. In the instant case, the trailer was aligned on a curved piece of track, even though there were straight sections that could have been used in the Yard. It argued that on page 20 of the transcript the Claimant acknowledged that he knew the tamper should not have been unloaded on a curved track and it was wrong to unload the tamper without ramps, and yet he chose to go along with it anyway. It reasoned that the Claimant was negligent to unload the tamper in that situation when he knew it was unsafe and against the Rules. It closed by asking that the discipline not be disturbed and the claim remain denied.

The Board has thoroughly reviewed the transcript and record of evidence and it is determined that the Investigation and appeal process met the guidelines of the Agreement and Claimant was afforded all of his "due process" Agreement rights.

The Board notes that since the parties presented their respective arguments in the instant case the Carrier in its letter of December 27, 2010, chose to reinstate the Claimant to service with seniority intact and all other benefits unimpaired leaving the Board to determine whether the discipline reduced to a lengthy suspension was appropriate and whether or not the Claimant is entitled to back pay for any or all time held out of service.

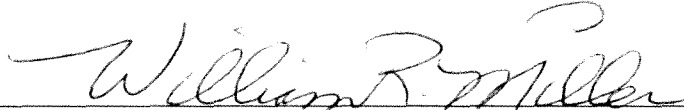
Review of the record indicates that the Organization's recitation of the events of June 6, 2011, are accurate that Track Supervisor Rivera, a Foreman and the Tamper Operator that off-loaded the machine in question participated in the pre-off-loading discussion where the Claimant explained to the group that ramps should be used to off-load the machine (See Transcript, pages 20 and 25) and where he further raised the question as to whether or not there was a straight section of track where the machine could be off-loaded (See Transcript, page 25) since that would be safer for unloading. After hearing the Claimant's comments the Supervisor, Foreman and Tamper Operator rejected those suggestions and decided to off-load the machine at the location it was setting. At that juncture the Claimant followed managerial directions and assisted in the unloading of the machine pursuant to those directives. The record further reveals that the Claimant offered un-refuted testimony that Supervisor Rivera was on site and assisted in preparing for the off-loading by placing wood so that the tamper would have some cushion to come off the semi-trailer (See Transcript, page 22). Manager Track Programs Britt testified on page 13 of the transcript that if a Supervisor was at the location of the off-loading it was his responsibility to stop the employees before they unloaded the tamper if the process being used

was improper or unsafe. Britt implied that Supervisor Rivera was not responsible in this instance because he did not believe he was present when the tamper was off-loaded, however, he acknowledged that he did not witness the event. Absent any testimony to the contrary from Supervisor Rivera, or anyone else, the Claimant's un-rebutted testimony that Rivera was in charge of the unloading process as the ranking Officer must be considered to be factually correct. The record clarifies that the Claimant made a genuine effort to persuade his superiors to use other measures in the off-loading process that were rejected. The question then becomes did the Claimant still have some accountability since he did not believe the off-loading process was proper, but followed management's directions rather than refusing to adhere to those instructions. In view of the fact that the Claimant offered a viable alternative for the handling of the off-loading of the tamper and it was not accepted by Supervisor Rivera the Board has determined that the Claimant acted reasonably and the Carrier did not meet its burden of proof.

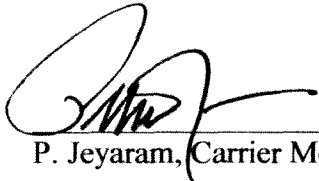
The Board finds and holds that the discipline is rescinded in its entirety and is removed from the Claimant's personal record and the claim is sustained in accordance with part 2 of the statement of claim.

AWARD

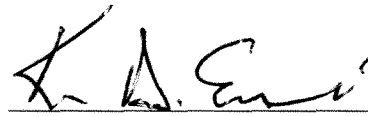
Claim sustained in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed.



William R. Miller, Chairman



P. Jeyaram, Carrier Member



K. D. Evanski, Employee Member

Award Date: March 20, 2013