

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6402
AWARD NO. 198, (Case No. 221)**

**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: June 4, 2013

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

- 1. The discipline (dismissal) imposed on Mr. J. Usher by letter dated December 30, 2011 for the alleged violation of Union Pacific Railroad Rule 1.6 Conduct (2) Negligent, Rule 1.13 Reporting and Complying with Instructions, Rule 41.2 Operators in connection with allegations that he failed to properly inspect and remove a machine from service due to RMM defects was without just and sufficient cause, unwarranted and in violation of the Agreement (System File UP288WF11/1561159).**
- 2. As a consequence of the violation referred to in Part 1 above, the Carrier must remove the discipline from Mr. Usher'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 December 1, 2011, Claimant was directed to attend a formal Investigation on December 13, 2011, which was mutually postponed until December 20, 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 9112, at Bowie, Texas, near Milepost 544, at approximately 1400 hours, on November 17, 2011, you allegedly failed to properly inspect and remove your machine from service due to RMM defects per UPRR Rules and Policies. Your alleged negligence of not removing your machine from service contributed to the serious injury of a coworker.

These allegations, if substantiated, would constitute a violation of Rule 1.6 Conduct (2) Negligent, Rule 1.13 Reporting and Complying with Instructions, Rule 41.2 Operators, Rule 41.3 Mechanics/Machinists, as contained in the General Code of Operating Rules, effective April 7, 2010, and Repair Compliance, Page 3 of the Safety Policy for Roadway Maintenance Machines & Hy-Rails, effective March 1, 2007. Please be advised that if you are found to be in violation of this alleged charge the discipline assessment may be a Level 5, and under the Carrier's UPGRADE Discipline Policy may result in permanent dismissal."

On December 30, 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 November 16, 2011, two employees, Mr. Alvarado and Mr. Torres, were performing service on a heater car pup. The employees utilized the speed swing normally operated by the Claimant to lift the heater car pup in order to make repairs. Mr. Alvarado was under the heater car pup tightening bolts with a wrench. The speed swing was left unattended and the parking brake failed. The speed swing rolled down the grade and dragged the heater car pup over Mr. Alvarado causing injury to his chest, ribs and lung. Carrier investigated the accident and discovered that for the previous 75 days a Roadway Maintenance Machine (RMM) defect had been noted wherein it was stated that the emergency or parking brake was not working.

The RMM Policy requires RMM defects to be repaired within seven days, unless parts are unavailable. It further states that once parts are received repairs must be made within seven days and that: **"In no case may non-compliant machines be kept in service longer than 30 calendar days."**

There is no dispute between the parties that the Claimant received training on the RMM Policy through his Rules training and that he had noted the defects of the emergency brake on the machine in question and that he had not taken the machine out of service.

It is the Organization's position that the Claimant was denied a "fair and impartial" Investigation because the Hearing Officer improperly fulfilled a multiplicity of roles throughout the formal Investigation process (preliminary investigator, complainant, judge, jury and

executioner) to ensure that the Carrier's predetermined decision of guilt and dismissal was carried out. It argued the claim should be sustained without reviewing the merits as Carrier violated Claimant's "due process" rights. Turning to the merits it argued that the Claimant cannot be found in violation of the RMM Policy for three reasons. First, employee J. Mack was the assigned Machine Operator on Speed Swing SS-0102 between September 1, 2011 through November 4, 2011, and Mr. Mack operated the machine in excess of 30 days and never removed it from service whereas the Claimant operated the machine for four days in a safe manner. Second, the record established that not taking machines out of service was the Carrier's accepted practice wherein employees inspected machines and documented potential safety hazards/defects in the machine's assigned log book, but continued to operate the machine if it could be operated safely, thus deferring any maintenance of the machine until Supervisors believed it was necessary. Third, there is no dispute that the Carrier was well aware of Speed Swing SS-0102's long standing parking brake defect and the record also shows that on November 10th Track Supervisor Shark operated the machine and before operating the machine he did not perform an inspection and properly fill out the machine's assigned log book nor did he take the machine out of service. Lastly, it argued that if the Carrier had met its burden of proof (which it did not) the dismissal was excessive and disparate as others who used the machine were not treated in the same manner. It concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the position of the Carrier there were no procedural errors in the handling of the Claimant's case and he was afforded a "fair and impartial" Investigation. It asserted the record is clear that the Claimant had been properly trained regarding the RMM Policy and it pointed out that the policy was on the back of the log book the Claimant had in his possession every day he operated the machine. It argued that the Claimant admitted at the Hearing that he did note the defects in the log book and that he did not take the machine out of service.

The Carrier emphasized that the Claimant noted a RMM defect for four days prior to the accident. He also had the log book and should have reviewed what the previous Operator had noted. He was the Operator of the machine and responsible for the machine. He knew of the defect and he failed to report the defect to his Supervisor or take the machine out of service and because of that failure he was properly dismissed. It closed by asking that the discipline not be disturbed and the claim remain denied.

The Board next turns its attention to the Organization's procedural argument that the Hearing Officer improperly fulfilled multiple roles in an effort to ensure that the Claimant would be found guilty, namely that because he was the Charging Officer's superior he could not be neutral as he had knowledge of the incident prior to the formal Investigation, therefore, he should have recused himself as the Hearing Officer. Examination of the transcript fails to reveal a bias of the Hearing Officer and in fact the Hearing Officer did sustain an objection by the

Organization made regarding Rule 42.3 (See page 54 of the transcript). The Board is not persuaded by the Organization's procedural argument that the claim should be sustained without reviewing the merits. In summary 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.

It was alleged that the Claimant violated the RMM Policy that states in pertinent part:

"Repair Compliance (Refer to UPRR Rules 41.2 and 41.3)

- 1. Employees shall identify non-complying RMMs and hy-rails by using specific procedures outlined in the sections below. If the RMM or hy-rail is repaired immediately, a record of the repair must be made in the operator's logbook.**
- 2. Once UPRR is aware of a non-complying condition, the following timetable will be in effect:**
 - * If parts are needed, they must be ordered before the end of the next business day.**
 - * Equipment must be repaired within 7 calendar days, unless parts are not available. If the RMM or hy-rail is not repaired within 7 calendar days, the operator must take the equipment out of service.**
 - * If parts must be ordered to make a repair, the equipment must be repaired within 7 calendar days upon receipt of those parts.**

Note: In no case may a non-compliant machine be kept in service longer than 30 calendar days. If the equipment is not repaired in accordance with this section the operator must take the equipment out of service...."

Review of the record indicates that Mr. J. A. Mack, was the Operator of the Speed Swing SS0-0102 between September 1, 2011 through November 4, 2011. On pages 43 and 44 of the transcript Mr. Mack was questioned as follows:

"Q: Mr. Mack, are you familiar with this machine, speedswing noted in the investigation?

A: Yes sir.

Q: And had the Carrier known about this machine? Did you note it- note it in your previous log book, that this machine needed to be repaired?

A: Yes sir.

Q: Did- were there parts ordered for this machine, that you know of?

A: Not that I knew of.

Q: Who did you notify to- for the defects?

A: Let the foreman and the supervisor know.

Q: Supervisor meaning who?

A: Doug and the mechanics, also.

Q: So Mr. Sharp knew about this prior to- prior to November 17th? When did you notify him, approximate date?

A: I don't have any idea. It was multiple times. I-I've run the machine for a year.

Q: So from September 7th- first- on, Mr. Sharp, according to your testimony, knew about this- the machine being in bad order?

A: Yes." (*Underlining Board's emphasis*)

Operator Mack's testimony was not effectively refuted that he noted within the machine's assigned log book on each work day that the parking brake - amongst various other mechanical components of the machine was defective (i.e., "E. Brake don't hold" or "parking brake don't hold"), thus, there is no dispute that the defect was noted by Mr. Mack in excess of 60 calendar days. Additionally, it was not rebutted that Mr. Mack reported the parking brake defect to Gang 9112 Track Supervisor D. Sharp and repair mechanic(s) on multiple occasions over a one year plus time period, which included the time between September 1, 2011 and November 4, 2011. The record further reflects that on November 10, 2011, Track Supervisor D. Sharp operated Speed Swing SS-0102 and he did not remove the machine from service in order to have the parking brake repaired, despite knowing that the machine had been defective in excess of one year. Machine Operator D. E. Conaway confirmed with his testimony on pages 39 and 40 of the transcript that Supervisor Sharp operated the machine in question on November 10, 2011.

Additionally, the record indicates that the Carrier assigned the Claimant as a Relief Operator on Speed Swing SS-0102 for four days prior to November 16, 2011. The record further shows that on each date the Claimant was assigned to operate the speed swing, he performed proper inspections of the machine and documented the parking brake as being defective within the machine's assigned log book. Furthermore, there is no dispute that the Claimant turned the

documented inspection/log book "white sheet" in to the job brief trailer and mechanic (See pages 50 and 51 of the transcript).

On November 16, 2011, while the Claimant was off duty, Work Equipment Mechanic S. Torres and employee U. Alvarado were changing out an axel on a heater car and were using Speed Swing SS-0102 to accomplish that task. Unfortunately, during that endeavor Mr. Alvarado was injured as the emergency brake of the speed swing gave out, rolling it towards the track derailing the heater car that was dragged across the employee.

Following that incident, on November 18, 2011, Manager Track Programs Herbeck conducted a meeting with Gang 9112 regarding the past practice of documenting potential safety hazards/defects in the machine's assigned log books and continued operation of the machines even though the machines were defective. On page 46 of the transcript Track Foreman J. R. Ruane recalled what was said by Manager Herbeck at that meeting as follows:

"Technically, he was talking about the incident and- and the policies that weren't followed. And that morning I had asked a question, basically stating you know, past practices, we haven't gone by that. We've ran the machine if it was safe to operate, according to the operator.

We haven't gone by the RMM procedure exactly. We've always just asked the operator, do you feel safe operating this machine and the job task you're going to do, and he said yes, we understand we've done this in the past.

And I think I stated for the six years that we've had RMM that I've known about on our side of the Railroad at least. I mean, I don't know exactly when it originated, but from that date, he said, Yes, we understand that we have not followed these procedures ev- to this point, correctly, but from this point forward, we will follow the procedures." (Underlining Board's emphasis)

Track Foreman Ruane's testimony was not refuted, therefore, it was factually substantiated that the Carrier had a long standing practice that did not adhere to the RMM procedure that pertained to the removal of non-compliant machines not being kept in service longer than 30 calendar days after a defect/hazard had been noted in the machine's log book.

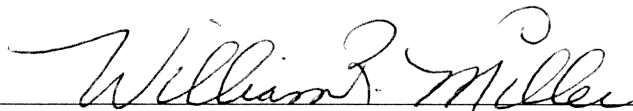
The record is clear that the Claimant operated the defective machine for four days prior to the accident involving employees Torres and Alvarado and that he noted the machine had a bad emergency brake. There is no dispute that the Claimant had the authority to remove the non-compliant machine as he had access to the records that showed that the machine had not been in

compliance for a lengthy period of time. It is also clear that if he had removed the machine from service it would have been contrary to a long-standing practice that did not follow the RMM Policy. Nonetheless, substantial evidence was adduced at the Investigation that the Claimant did not remove the machine from service which he was empowered to do.

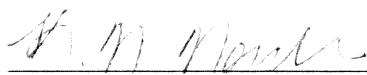
The only issue remaining is whether the discipline was appropriate. At the time of the incident Claimant had seven plus years of service. The record substantiates that employee Mack who operated the defective machine for one plus year prior to the Claimant's operation of the machine was dismissed from service, but was subsequently offered a Leniency Reinstatement to Service which he accepted. The record further shows that employee Torres who operated the machine on the date of the accident was returned to service with no back-pay pursuant to SBA No. 279, Case No. 1024 on December 17, 2012. It is clear that the Claimant only operated the machine for four days and he followed the practice regarding non-compliant machines, however, the Board does not absolve him of all responsibility. It is determined that Claimant had far less responsibility than the aforementioned employees. Additionally, the long standing practice of not taking machines with defects out of service mitigates in Claimant's behalf as well. Despite a lesser responsibility Claimant was dismissed which the Board has determined was an excessive punishment. The Board finds and holds that the dismissal is rescinded and reduced to a Level 3 discipline with a five days suspension with no compensation which is consistent with the Carrier's UPGRADE Discipline Policy for the violation of Cardinal Safety Rules. Claimant is to be reinstated to service with seniority intact, all benefits unimpaired and made whole in accordance with Rule 22(f) of the Agreement for all time held out of service beyond the five day suspension period.

AWARD

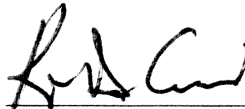
Claim partially sustained in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed.



William R. Miller, Chairman



K. N. Novak, Carrier Member



K. D. Evanski, Employee Member

Award Date: Aug 8, 2012