

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6402
AWARD NO. 201, (Case No. 225)**

**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 [Level 4 - ten (10) day suspension) imposed on Mr. K. Nunn in connection with allegations that the Claimant released a radiator cap on his machine causing hot fluids to burn his arm was without just and sufficient cause, unwarranted and in violation of the Agreement (System File UP507JF 12/1563849).**
- 2. As a consequence of the violation referred to in Part 1 above, the Carrier must remove the discipline from Mr. Nunn's record with seniority and other benefits unimpaired and compensate him at the straight time and overtime rates of pay for all wage loss 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 27, 2011, Claimant was directed to attend a formal Investigation on January 12, 2012, which was mutually postponed until January 26, 2012, concerning in pertinent part the following charge:

"...to develop the facts and place responsibility, if any, that while employed as Machine Operator on Gang 9196, at Glidden Subdivision, near Milepost 186, on November 13, 2011, while operating the TRIP0507, you allegedly released

the radiator cap f your machine, while running, causing hot fluids to spray, burning your arm.

These allegations, if substantiated, would constitute a violation of Rule 1.13 Reporting and Complying With Instructions, Rule 70.1 Safety Responsibilities, Rule 135.1.2 When to Use Lockout/Tagout, and Rule 135.3.2 Lockout/Tagout Procedures, as contained in the General Code of Operating Rules effective April 7, 2010, and in the System Special Instructions, effective April 7, 2010, Safety Rules, effective July 30, 2007, and Chief Engineer Bulletins, effective November 17, 2008."

On February 22, 2012, Claimant was notified that he had been found guilty as charged and was assessed a Level 4 discipline with a ten day suspension beginning on February 22, 2012, through March 16, 2012.

It is the Organization's position that the Claimant was denied a "fair and impartial" Investigation because the Carrier failed to timely render a decision within 20 calendar days of the Hearing and did not issue its finding until the 36th day with no explanation as to why it was tardy. It further argued the Carrier failed to call all relevant witnesses and that the claim should be sustained without reviewing the merits. If, however, the Board chose to examine the merits it will find that the Carrier did not meet its burden of proof. It argued the record confirms that Claimant properly: (1) contacted his Track Supervisor and Foreman/EIC and alerted them that he was going into lockout/tagout; (2) locked out/tagged out his machine after it automatically shutdown; (3) conducted a job briefing with Spiker Operator Rodriguez and placed cones and a flagman; (4) waited a reasonable amount of time to check the status of his machine's radiator; and (5) complied with all relevant Carrier Rules and regulations on November 13, 2011. 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. It argued that it only has to call those witnesses that it deems pertinent to the case, however, that does not remove the Organization's ability to call witnesses or request that witnesses be present at the Hearing and in this instance it went beyond the requirements of Rule 22 as the Carrier offered and called in Supervisor Call and attempted to contact Supervisor Robinson. It further argued that it did render a decision within 20 days from the time of the Hearing as it took place on January 26, 2012, and the Notice of Discipline was mailed on February 15, 2012, which was 20 days from the time of the Hearing. Turning to the merits it argued the record shows that the Claimant failed to properly follow Carrier procedures for shutting down a machine before maintenance was conducted violating all of the Rules set forth in the Notice of Investigation. 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.

Rule 135.3.2 governs the procedures for shutting down a machine before maintenance is conducted and it states in pertinent part:

"A. Lockout/Tagout Procedures

Follow these steps when servicing, maintaining, adjusting, or repairing equipment during the course of work when On-Track Safety has been established.

1. Notify the employee in charge and the equipment operators on both sides of your equipment that a lockout/tagout is in progress. Let them know where you are located and in which direction you are working, so they will know whether you are behind them or in front of them.

2. Place 1 orange cone in the center of the track at least 15 feet from each end of your equipment.

Note: Other equipment operators are required to stop when approaching an orange cone and may not proceed until it is removed.

3. Tagout the equipment according to the procedures in 135.3.2.D.

4. After completing the maintenance or repair, promptly notify the employee in charge and all affected employees that you are discontinuing the lockout/tagout process.

5. Remove your cones and tags."

On page 8 of the transcript Track Supervisor Allen testified that he arrived on the scene shortly after the Claimant was burned from the hot water that blew out when he opened the radiator cap of his overheated machine. Mr. Allen was questioned about the incident as follows:

"Q: And so, as you approached from behind, you didn't observe any cones out?

A: No.

Q: Okay. Now, when you got out, 'cause you said you got out of your truck, Mr. Nunn had already burned himself and you all were refilling the machine with fluids. Did you see a cone out in front of the machines?

A: No.

Q: Okay. Do you remember looking there?

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

On page 14 of the transcript the questioning of Mr. Allen continued as follows:

"Q: Now, you stated no cones were out. Why would cones be out?

A: That is part of the lockout/tagout procedure.

Q: Okay.

Q: Okay.

A: And there was no cones out. And so, that's part of the lockout/tagout procedure.

On page 66 of the transcript Track Foreman Joseph explained that he arrived on the scene with Track Supervisor Allen. Mr. Joseph was questioned as follows:

"Q: Okay. Were there any cones or any of that stuff out when you all approached the machine?

A: No, I didn't see any cones."

On page 117 of the transcript the Claimant was questioned about the November 13, 2011, incident as follows:

"Q: Mr. Allen, Supervisor Kenneth Allen and Foreman Joseph, both stated when they approached that you didn't have any cones out. Now, you stated that your job briefing with Mr. Chris Rodriguez was that you were going to put yours out in front, he was going to put his out in back?

A: Right.

Q: Now, whose machine was in lockout/tagout, the spiker or the TRIP?

A: The TRIP.

Q: The TRIP. And you were the operator of the TRIP, correct?

A: Right.

Q: So, whose responsibility is to make sure the cones are out?

A: Well, I guess it's mine." (Underlining Board's emphasis)

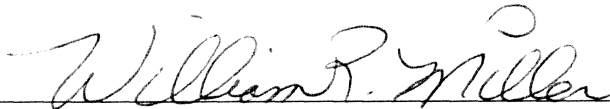
Claimant's Supervisors testified that the Claimant did not put out cones while being in a lockout/tagout mode and Claimant confirmed the same in the testimony set forth above.

Substantial evidence was adduced at the Investigation that Claimant was guilty as charged because he told EIC about the overheating equipment, but did not explain that he intended stop and make repairs of his machine. Additionally, it is clear that he failed to make sure cones had been placed on both ends of the machine.

The only issue remaining is whether the discipline was appropriate. At the time of the incident the Claimant had approximately 16 years of service. The requirement to place cones serves as a warning device to equipment and personnel in front of and behind the machine and the lack of cones placed the Claimant and the Spiker Operator in jeopardy as well as other Carrier personnel because they may not have been able to determine if the equipment was stopped or not. Review of the discipline assessed shows it was in accordance with the Carrier's UPGRADE Discipline Policy. The Board finds and holds the discipline was not excessive, arbitrary or capricious and will not be set aside and the claim will remain denied.

AWARD

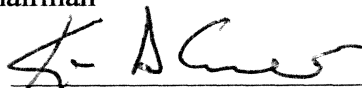
Claim denied.



William R. Miller, Chairman



K. N. Novak, Carrier Member



K. D. Evanski, Employee Member

Award Date: 8.2.13