

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6402
AWARD NO. 202, (Case No. 226)**

**BROTHERHOOD OF MAINTENANCE OF 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

QUESTION AT ISSUE:

Did the Carrier comply with Rule 22 of the General Agreement when it charged B. D. Pruitt with violation of Rule 1.6, Items 1 and 4 of the General Code of Operating Rules, effective April 7, 2010, and was substantial evidence adduced at the Investigation on June 4, 2013, to prove the charges; and was the discipline assessed in the form of permanent dismissal warranted?

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.

On May 16, 2013, Claimant was directed to attend a formal Investigation on June 4, 2013, concerning in pertinent part the following charge:

"...to develop the facts and place responsibility, if any, that while employed as a Trackman on Gang 9161, at Otwell, Arkansas, near Milepost 136.25, at approximately 1030 hours, on May 4, 2013, you allegedly engaged in behavior that endangered others when your tie plate hook entered the window of a vehicle. In addition, you allegedly were dishonest in your reporting of the loss of your hook to others.

These allegations, if substantiated, would constitute a violation of Rule 1.6 Conduct (1) Careless of Safety, (4) Dishonest, and the part that reads, "*Any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported. Indifference to duty or to the performance of duty will not be tolerated,*" as contained in the General Code of Operating Rules, effective April 7, 2010."

On June 14, 2013, Claimant was notified that he had been found guilty as charged and was assessed a Level 5 discipline which was permanent dismissal.

On July 10, 2013, the Claimant requested that his case be handled under the expedited provisions of Public Law Board No. 6402 wherein a decision will be based upon the Notice of Hearing, Transcript of the Hearing, Notice of Discipline, Claimant's Service and Discipline Records, and the applicable Discipline and/or Grievance Rules of the parties Agreement.

The Board has thoroughly reviewed the record and the transcript and finds that the formal Investigation was held in "absentia". On pages eight and nine of the transcript the Organization acknowledged that the Claimant was aware that the Hearing was being held on June 4, 2013, but advised it he would not attend because he could not afford the expense of traveling as he had been unemployed for approximately one month and his unemployment benefits had not yet started. The Hearing Officer explained that the Hearing site had been set to be in proximity with the Traveling Track Gang that the Claimant worked on and so witnesses from that Gang would be available if needed. The record further substantiates that the Claimant never requested a postponement of the Investigation until he had available funds for attendance, therefore, it is determined that the Carrier did not violate the Claimant's right to a "fair and impartial" Investigation, when it was held in absentia. It is further noted there is no requirement that an accused must attend their formal Investigation, but when a charged employee chooses not to attend, he does so at his own potential peril because he offers no rebuttal or alternative theory or story. See Second Division Awards 11763, 13217, 13360, 13491, 13924 and 13957. The dispute will be resolved on its merits.

Turning to the merits, the transcript substantiated that on May 4, 2013, Claimant was working as a Trackman near Otwell, Arkansas, on Traveling Track Gang 9161. Supervisor A. Graham for Gang 9161 explained that Claimant was using a tool called a plate hook on that date when the incident under charge arose. On page 11 of the transcript Mr. Graham was questioned about that tool and its function as follows:

"Q: Now you're saying a plate hook, describe to me what's a plate hook?

A: A plate hook is a metal object, roughly a quarter inch in diameter that has a T hook on the end of it. And it's curved at the end, which is when the trackmen are bending over they can put it through the hole in the- on the plate, in order to pick it up easier for them to flip them in position for when the tie gang comes through.

It's a- just basically a tool made for them to make their job easier where they don't have to bend over completely.

Q: How- how large are they?

A: They're normally about I would say two feet long.

Q: Okay.

A: Probably within a pound and a half, two pounds tops."

On page 11 of the transcript, Mr. Graham explained that he was notified that a non-railroad vehicle that was traveling on a parallel road to the railroad tracks approximately 100 feet from the tracks was damaged when a plate hook went through its rear left side window, shattering the glass of that vehicle. Mr. Graham went on testify as follows:

"...we were working south, vehicle passing north had sustained damage that a plate hook had went into their rear glass, breaking the glass on their vehicle.

Went out, looked at it, took the pictures. Started trying to measure, got my wheel out and went and measured the distance. It was roughly a 100 to 115 feet. And checked the machines that were in the area, there was no possible way for that to have been done by a machine. So I started talking to the people, find out if people were missing hooks.

And it was brought to my attention that Mr. Brian Pruitt had lost his hook and had to go find another one. And then talking to the witnesses in the area it was determined that he had thrown the hook personally."

(Underlining Board's emphasis)

On pages 13 and 14 of the transcript the questioning of Mr. Graham continued as to when he discovered that there was a plate hook missing and that the Claimant had lost one. Mr. Graham responded in pertinent part as follows:

"...I believe it's Exhibit 5 or R excuse me the picture of the plate hook. You can see that the ends not broke off and it's not bent in anyway. So, therefore, there was no possible way that it had built up pressure by machine to- to ricochet off of the rail.

I called on the radio to check and see if any trackman had lost their hook. They said yes. Vestigating [sic] into it, they said that Mr. Brian Pruitt had lost his hook. At that time I talked to Gino James [sic]. Called on the radio, told him to step aside and give me a call.

He did. I asked Gino because- the reason I went through Gino James is those two, Gino's been kind of a mentor to Mr. Pruitt. Tried to help him through several incidents in the past that he had had. At that time I talked to Gino, he said that Brian had admitted throwing it." *(Underlining Board's emphasis)*

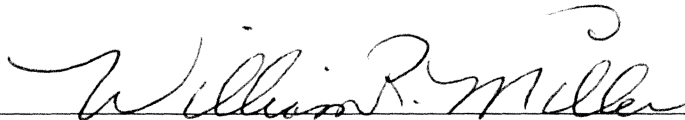
On pages 26 and 27 of the transcript Mr. G. R. James, Trackman, confirmed Mr. Graham's testimony that the Claimant had lost his plate hook and no one else in Gang 9161 was missing their plate hooks. Mr. James also testified that he believed the Claimant told him he had thrown the plate hook in a ditch or something.

Despite the Organization's efforts to offer alternative reasons as to how the vehicle might have been damaged, the evidence adduced at the Investigation shows that on May 4th no one on Gang 9161 lost a plate hook except the Claimant and one plate hook smashed a passerby's car window. It is not clear that the Claimant intentionally threw the plate hook at the vehicle, but it was not denied that he did throw the tool, so whether it was intentional or not, it was careless of the safety of his fellow workers and the traveling public and was a violation of Rule 1.6, Item 1. On pages 23 - 25 of the transcript Trackman Graham testified that between 7:00 a.m. and 8:00 a.m. of the shift the Claimant had broken the tip off of a plate hook and he placed the damaged tool on the tool cart and picked up a new plate hook and then at approximately 10:30 a.m. the Claimant again stated that he had broken a second plate hook, but this time he did not have the damaged tool to place on the tool cart when he retrieved another plate hook. Claimant told Mr. Graham he had thrown the second damaged tool in a ditch or somewhere else. Shortly, thereafter, the crew was notified of a plate hook going through a traveler's car window. The Claimant's story told to Mr. Graham is not credible and is a violation of Item 4 of Rule 1.6. Because the Claimant elected not to attend the Investigation the evidence that was presented by the Carrier, which was substantial, stands un-refuted and it is clear that the Carrier met its burden of proof that Claimant was guilty as charged.

The only issue remaining is whether the discipline was appropriate. A review of the Claimant's disciplinary record shows that this was his second dismissal. Claimant was previously dismissed on November 3, 2011, for violation of the Carrier's Drug and Alcohol Policy Companion Agreement. Claimant was reinstated on December 28, 2011, at a Disciplinary Level 3, after having worked with the Employee Assistance Program (EAP). This second serious offense occurred within 17 months of the latter offense. In this instance the Claimant was careless of the safety of others and was less than forthright. 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 appeal is denied.

AWARD

Appeal denied.

A handwritten signature in cursive script, reading "William R. Miller", is written over a horizontal line.

William R. Miller, Chairman & Neutral Member

Award Date: January 24, 2014