

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 7426

AWARD NO. 10, (Case No. 10)

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES DIVISION - IBT RAIL CONFERENCE**

vs

UNION PACIFIC RAILROAD COMPANY (SPWL)

William R. Miller, Chairman & Neutral Member

T. W. Kreke, Employee Member

B. W. Hanquist, Carrier Member

Hearing Date: September 22, 2010

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

1. The Level 4 discipline [ten (10) day suspension without pay] imposed upon Claimant J. A. Chavez, Jr. for alleged violation of Rule 42.4.2 (Using Track and Time Authority) and Rule 6.3 (Main Track Authorization) as contained in the General Code of Operating Rules, effective April 3, 2005, in the System Special Instructions, effective November 17, 2008 is arbitrary, capricious, unwarranted and on the basis of unproven charges (Carrier's File 1523999).
2. As a consequence of the violation outlined in Part 1 above, we respectfully request that Claimant J. Chavez, Jr. now be compensated for all wage loss suffered by him, straight time and overtime and that the alleged charge(s) be expunged from his personal record."

FINDINGS:

Public Law Board No. 7426, 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 16, 2009, Carrier notified Claimant to appear for a formal Investigation on July 7, 2009, concerning in pertinent part the following charge:

"...to develop the facts and place responsibility, if any, that while employed as Tamper Operator, at Lathrop, California, near Milepost 84.25, Oakland Subdivision, at approximately 11:46 a.m., on June 8, 2009, you were allegedly

outside of your track and time authorization.

These allegations, if substantiated, would constitute a violation Rule 42.4.2 (Using Track and Time Authority), and Rule 6.3 (Main Track Authorization), as contained in the General Code of Operating Rules, effective April 3, 2005, in the System Special Instructions, effective November 17, 2008, and in the Maintenance of Way Signal Rules, effective November 17, 2008. Please be advised that if you are found to be in violation of this alleged charge the discipline assessment may be a Level 4, and under the Carrier's UPGRADE Discipline Policy may result in up to 10 days off work without pay or up to five (5) days training without pay and you must pass the necessary operating rules exam or equivalent in order to return to work and a Corrective Action Plan must be developed prior to returning to service."

On July 16, 2009, Claimant was notified that he had been found guilty as charged and was assessed a Level 4 discipline and a ten day suspension without pay.

There is no dispute between the parties that the Claimant entered the service of the Carrier on May 1, 1989, and at the time of the charges was working as a Tamper Operator when he was charged with being outside of the authorized track time limits on June 8, 2009.

It is the Organization's position that on June 8th, the Claimant was on the Tamper machine operated by Machine Operator W. Curley when he traversed it past CP SP093, beyond Foreman Westphal's Track and Time Authority. It argued that the question to be answered, is did the Carrier prove the charges against the Claimant and the answer has to be a resounding NO, because according to it the Claimant was only a passenger on the Tamper that was operated by W. Curley when the incident occurred on June 8, 2009. It further argued that the testimony substantiated that the Claimant instructed Mr. Curley to stop the Tamper and not go past the designated control point location and despite his instruction Curley failed to stop the Tamper. It concluded by requesting that the discipline be rescinded and the Claim be sustained as presented.

It is the position of the Carrier that all occupants within a machine such as a Tamper should know and understand their on-track protection when occupying the track. It argued that the Claimant was within the cab of the machine when it ventured outside the authorized limits and because of that he holds responsibility for the safety of himself and others. It further argued that it is irrelevant the Claimant realized their location and questioned their authority as they traveled past their authorized limits. According to it, the Claimant and the person operating the Tamper are equally responsible to individually ensure they remain within the limits and because he failed to meet those responsibilities, he was guilty as charged. It closed by asking that the discipline not be disturbed and the Claim remain denied.

The Board has thoroughly reviewed the transcript and the record of evidence. There is no dispute between the parties that the Claimant was on board the Tamper when it exceeded its Track and Time Authority. The Organization's argument is that because the Claimant was a passenger on the Tamper and not the Operator of the machine he was not responsible and it further argued that he directed the Operator to stop, whereas, the Carrier argued that he bore an equal responsibility and his directive to stop at the last moment did not mitigate his obligation to know whether they were within the limits.

On June 8th the Claimant was instructed to ride as a passenger, being used as a look out and to throw switches, on a Jackson 6700 series Tamper, which was operated by System Machine Operator W. Curley. Contrary to the Organization's skillful coloration of the facts and despite the fact that the Claimant was not the Operator of the Tamper it did not absolve him from the responsibility to know where he was as it related to track and time authority. On page 101 - 102 of the Transcript he was questioned as follows:

"Q Can I ask you to clarify, are we talking about a red signal or a red-

A A board. Flags.

Q A flag?

A Formed- yes, Form B.

Q So they- a Form B flag?

A Correct

Q Are you aware of the location of the red board on the Form B?

A I believe it was to be- the red board was to be at 93.

Q Would that be Milepost 93 or-

A Milepost 93, yes.

Q Upon hearing or- the conversation on the radio to Mr. Curley not to go past SP 093, did you discuss that with Mr. Curley?

A When I seen at 84.5, I did see the red/yellow flag and I was concerned about it because it wasn't- which I was not aware that we were in 93. It- it

said 84.5 so that struck me as odd with the flag being at 84.5 instead of 93 so yes, I figured something was wrong and I did say to hold up, but-

Q Since I've asked this question to several people today, I've gotta ask you. Are you aware of the right to challenge on track safety?

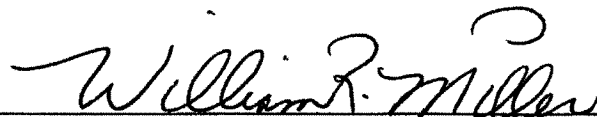
A Yes. (Underlining Board's emphasis)

Claimant and Mr. Curley were instructed by Foreman Westphal to traverse the Tamper west down the main track under Westphal's Track and Time Authority, from Control Point (CP) F074 and to stop short at CP SP093, which is also identified as CP93 or Milepost 84.5. Claimant had a responsibility just as Mr. Curley did, to know that Milepost 84.5 and Control Point SP093 were one in the same and it clear from the aforementioned testimony that the Claimant did not understand that. Furthermore, the red/yellow flag spotted by the Claimant gave him a right to challenge Curley's actions, even though he argued that he did not exercise that right because in the past whenever he exercised a challenge it was not considered appropriate. In this instance, the Claimant should have exercised that right. The record is clear that the Carrier met its burden of proof that Claimant was guilty as charged.

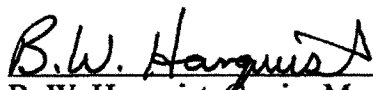
The only issue remaining is whether the discipline was appropriate. Compliance with on-track safety rules and/or procedures is important to ensure the safety of those on or near the tracks, of the trains which operate on those tracks, and of the employees and passengers who occupy the trains. The Board finds and holds that the discipline will not be rescinded because it was not arbitrary, excessive or capricious.

AWARD

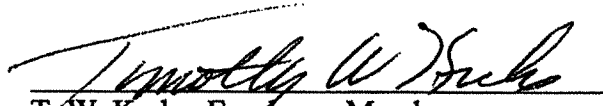
Claim denied.



William R. Miller, Chairman



B. W. Hanquist, Carrier Member



T. W. Kreke, Employee Member

Award Date: January 18, 2011