

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6302
AWARD NO. 202, (Case No. 208)**

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

vs

UNION PACIFIC RAILROAD COMPANY

William R. Miller, Chairman & Neutral Member
K. D. Evanski, Employee Member
P. Jeyaram, Carrier Member

Hearing Date: April 10, 2012

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

- 1. The five (5) day/forty (40) hour suspension imposed upon Brandt Truck Operator K. M. Hunsaker for violation Rule 42.11.1 (Speed when Passing Through Switches), Rule 42.1 (Track Cars), Rule 1.1.2 (Alert and Attentive) and Rule 1.1.2 (Safety Responsibilities) of General Code of Operating Rules, System Special Instructions, Maintenance of Way Rules and the Safety Rules in connection with his failure to stop Brandt Truck 827171 from derailling on the moveable point frog near Mile Post 831.20 on the Gila Subdivision on February 27, 2010 is based on unproven charges, unjust, unwarranted and in violation of the Agreement (System File D-10-49D/1542221).**
- 2. As a consequence of the violation referred to in Part 1 above, Mr. Hunsaker shall have his record cleared of this matter and be compensated for any and all straight time and overtime hours of wage loss suffered at his respective rate of pay."**

FINDINGS:

Public Law Board No. 6302, 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.

The undisputed facts indicate that the Claimant that at the time of the incident under charge the Claimant had approximately 30 years of unblemished service. On February 27, 2010, Claimant was operating a Brandt Power Unit Truck that derailed with two attached cars when he passed over a Moveable Point Frog Power Switch (MPF). It was alleged that Claimant passed over the MPF at an excessive speed.

On March 17, 2010, Carrier notified Claimant to appear for a formal Investigation on March 29, 2010, which was mutually postponed until June 7, 2010, concerning in pertinent part the following charge:

"...to develop the facts and place responsibility, if any, that while employed as System Brandt Truck Operator, on Gang 9996, near Milepost 831.20, on the Gila Subdivision, at approximately 1415 hours, on February 27, 2010, while operating Brandt Truck 82717, you allegedly failed to stop your truck from derailling on the moveable point frog, resulting in extensive damage to your truck, and a two (2) car derailment.

These allegations, if substantiated would constitute a violation of Rule 42.11.1 (Speed when Passing Through Switches or Derails), Rule 42.1 (Track Cars), Rule 1.1.2 (Alert and Attentive), and Rule 70.1 (Safety Responsibilities), as contained in the General Code of Operating Rules, effective April 3, 2005, the System Special Instructions, effective June 22, 2009, the Maintenance-of-Way Rules, effective November 17, 2008, and the Safety Rules, effective July 30, 2007. Please be advised that if you are found to be in violation of this alleged charge, the discipline assessment may be a Level 3, and under the Carrier's UPGRADE Discipline Policy may result in up to five (5) days off work without pay or up to one (1) day training without pay and a Corrective Action Plan must be developed prior to returning to service."

On June 24, 2010, Claimant was found guilty as charged and was assessed a Level 3 discipline with a five day suspension without pay and the requirement to develop a Corrective Action Plan before returning to work.

It is the position of the Organization that the Carrier failed to meet its burden of proof. It argued that the record reveals that while there was a derailment on February 27, 2010, there was nothing more that Claimant could have done to prevent the derailment of his Brandt truck. It asserted that on the morning of the incident the Claimant and Foreman McCosh attended the morning safety briefing wherein the Carrier reviewed various safety issues and assigned the daily duties. One of the Claimant's assigned duties was to tow railroad cars to where his gang needed them. Neither Claimant or Mr. McCosh, the Employee In Charge (EIC) were informed that a switch and moveable frog setup was present at the single to double main line connection point at Mile Post 831.20, the area that they would be operating in. It further argued that Claimant operated his vehicle within the required speed limits and reasonably relied on the direction of his EIC, Foreman McCosh who directed the Claimant to enter the connection point and who subsequently assumed responsibility for the derailment. It concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the Carrier's position that substantial evidence was presented at the Investigation to warrant the assessed discipline. It argued that the facts indicate Claimant was traveling faster than the authorized speed, despite a clearly posted sign warning of a Moveable Point Frog Power Switch (MPF). According to it, Claimant failed to observe the track and admitted to looking at other employees who were working nearby. It further argued the Claimant had a responsibility to ensure that the "way was clear" and to observe all posted signs that might have affected the movement of the Brandt Truck and he should have been operating the vehicle within the authorized speed limit. Claimant failed in both important responsibilities, thus, he was responsible for the derailment that occurred whereas if had properly observed the track and operated his truck within the authorized speed limit, the derailment could have been avoided. It closed by asking that the claim remain denied.

The Board has thoroughly reviewed the record and determined that the Claimant received a "fair and impartial" Hearing and was afforded his Agreement "due process" rights, therefore, the dispute will be resolved on its merits.

On pages 40 and 41 of the transcript Foreman S. J. McCosh was questioned about his knowledge of the incident and the Claimant's operation of the Brandt truck and he testified as follows:

"Q Were you standing there when he went over the switch?

A Yes I was.

Q About what speed would you say he was operating?

A I would say 15 miles an hour.

Q And the rules clearly state five mph. Is that correct?

A That is correct.

Q Would 15 miles an hour allow you to get stopped short of any appliance that wasn't appropriate on the track?

A No, it wouldn't.

Q Would that also say to you if he's pulling up a grade, that he pretty much had to be going somewhere in that neighborhood, in order to get that far past the switch and derail that- that many wheels on the ground?

A Yes.

Q Could he have been doing five miles an hour and have derailed the front of the Brandt- of the Brandt truck, the car and the front end of a second car?

A No."

Foreman McCosh was further questioned on page 44 of the transcript as to whether there were signs posted and he testified as follows:

"Q At this particular dual control switch, at Control Point 831, was there any type of signs or other indications that this was indeed, a moveable point frog switch?

A Yes, there were."

Rule 42.11.1 states in pertinent part:

"Operators must look to ensure that switches are properly lined for movement before passing through the switches. Track cars must not exceed the speeds outlined below.

Power-Operated Switches and Derails

Track cars operating over power-operated switches and derails must not exceed 5 MPH.

Hand-Operated Switches and Frogs

Motor cars operating over hand-operated switches and frogs must reduce to 1/2 the authorized speed.

Track cars must not exceed 5 MPH when moving over self-guarded frogs and jump frogs."

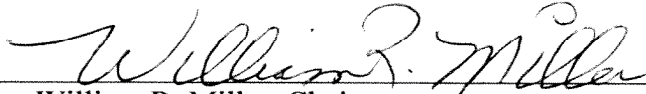
On Page 59 of the transcript the Claimant testified that he did not notice any signs that would indicate that there was a movable point frog switch ahead of him and he was traveling at 10 MPH. which was an admission of excessive speed. There is no dispute that the Claimant was not forewarned at a job briefing about the moveable point frog, however, the evidence presented

at the Hearing substantiated that there were signs indicating the turnout is equipped with a movable point frog switch which required a reduced speed. Substantial evidence was adduced at the Investigation that the Carrier met its burden of proof that Claimant was guilty as charged.

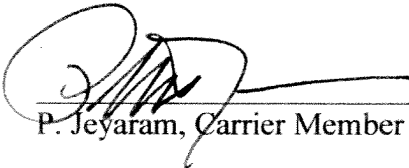
The only issue remaining is whether the discipline was appropriate. Review of the discipline reveals that it was in accordance with the Carrier's UPGRADE Discipline Policy, therefore, the Board finds and holds the discipline will not be set aside because it was not arbitrary, excessive or capricious.

AWARD

Claim denied.



William R. Miller, Chairman



P. Jeyaram, Carrier Member



K. D. Evanski, Employee Member

Award Date: June 18, 2012