

**NATIONAL MEDIATION BOARD  
PUBLIC LAW BOARD NO. 6302  
AWARD NO. 209, (Case No. 215)**

**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 ten (10) day suspension imposed upon Foreman L. M. Ramirez for violation of Rule 42.4.2 (Using Track and Time Authority) in connection with shortening his track and time authority limits on April 14, 2010 is based on unproven charges, unjust, unwarranted and in violation of the Agreement (System File D-1048U-210/1540838).**
- 2. As a consequence of the violation referred to in Part 1 above, Mr. Ramirez shall have any mention of this incident removed from his personal record and be compensated for all straight time and overtime hours that he was unjustly withheld from service."**

**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.

On May 7, 2010, Carrier notified Claimant to appear for a formal Investigation on May 13, 2010, which was mutually postponed until June 29, 2010, concerning in pertinent part the following charge:

**"...to develop the facts and place responsibility, if any, that while employed as EIC for Tie Gangs 9063/65 and S/L Gang 9083, on April 14, 2010, you had a job briefing with Track Supervisor, V. Edwards, on shortening up the limits on the East end of your track and time authority. Then without contacting men and/or equipment you shortened both the East and West end of your track and**

**time authority, resulting in men and equipment on the West end to be out of the track and time authority limits.**

**These allegations, if substantiated, would constitute a violation of Rule 42.4.2 (Using Track and Time Authority), as contained in the Maintenance-of-Way 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 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, 2010, Claimant was found guilty as charged and was assessed a Level 4 discipline and a ten day suspension without pay and a Corrective Action Plan developed prior to his return to work.

It is the position of the Organization that at the onset of the Hearing it objected to holding of the Hearing as a form of double jeopardy. According to it, the record shows, as does the transcript, Claimant was offered and accepted an offer to participate in the Safety Analysis Process (SAP) regarding the incident under charge, thus, the Investigation was a form of double jeopardy. Additionally, the Claimant was denied his right to a "fair and impartial" Hearing because the Hearing Officer played an integral role in the preliminary investigation, was the person who ordered Claimant's Supervisor to bring charges and also acted as the Hearing Officer, mandates that the Board sustain the claim without even reviewing the merits. The Organization relied on a recent on-property decision of this Board, Award No. 194 arguing that it is directly on point with the instant case and should be followed. Turning to the merits it argued that the Carrier failed to prove that a violation of Rule 42.4.2, (Using Track and Time Authority) ever happened. Secondly, it becomes apparent through the testimony that Claimant had not been fully briefed on moves to be made that would have affected his duties as the Employee In Charge (EIC). Claimant's Supervisor had the opportunity and the subgroup coordinator had a responsibility to insure the person responsible for on track safety had an understanding of the moves to be made in changing the make-up order of the equipment. It asserted that the Claimant was made a scapegoat for an incident that was not entirely his fault and could have been prevented with better communication. It concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the Carrier's position that the Claimant was not denied a "fair and impartial" Hearing and was afforded his "due process" rights. It argued that the testimony reveals that the Claimant while working as an EIC on April 14, 2010, shortened both East and West end of his track and time authority, resulting in men and equipment on the West end to be out of the track and time authority limits. It asserted that it places a great deal of trust in its employees to conduct its

business efficiently, safely and professionally and in this instance the Claimant violated that trust and it is fortunate that no one was hurt because of that serious error, therefore, it reasoned that the discipline imposed was corrective in nature and in accordance with its UPGRADE Discipline Policy. It closed by asking that the discipline not be disturbed and the claim remain denied.

The Board has thoroughly reviewed the record and will first address the Organization's alleged procedural arguments. It asserted that the Hearing Officer erred in the multiplicity of roles that he held and in doing so he denied the Claimant his right to a "fair and impartial" Investigation. It argued that Award No. 194 of this Board is directly on point involving the same Hearing Officer wherein the Board determined the following:

**"However, we cannot abide the situation where procedurally a Carrier officer assumes the multiplicity of roles as Haverstick did here of being, in the Organization's characterization of roles, complainant, judge, jury and executioner. (Underlining Board's emphasis)"**

The record indicates that in the instant dispute the complainant was not the Hearing Officer as the charges were filed by Track Supervisor V. L. Edwards and the discipline was issued by Director Track Program Ties, W. A. Huber, Jr. thus the circumstances in this case are significantly different than those in Award No. 194 which offers the Claimant no assistance.

The Organization also argued that following the incident the Claimant was offered the opportunity to participate in the Carrier's Safety Analysis Process (SAP) as an alternative to the formal Investigation process and under Step Two: Request for SAP it states in pertinent part:

**"(c) If eligible for SAP, the disciplinary hearing scheduled in connection with the incident will be cancelled."**

It reasoned that because the Claimant was offered to chance to participate in the SAP the Investigation should have been cancelled in accordance with Step Two, Paragraph (c), however, the Carrier countered that argument by quoting from Section 5, Paragraph B. Availability of SAP to Employees which states:

**"SAP will be utilized when any employee is subject to discipline as a result of an accident or injury requests its use as an alternative to discipline...."**

It argued SAP was not available to the Claimant in this case because there was no accident or injury that occurred on April 14, 2010, and even if it was incorrectly offered at first, the Claimant never actually participated in the program.

The Carrier is correct the Claimant was not eligible for participation in SAP because there was no accident or injury involved in the incident of April 14, 2010. However, the Organization makes a strong argument that if the Claimant had participated in the program, even if he should not have been allowed to do such, a subsequent Investigation would be inherently unfair. Review of the record does not substantiate that the Claimant actually participated in SAP which was acknowledged in the Organization's closing statement at the Investigation wherein it stated the following:

**"...Subsequent to that participation and that paper analysis, Mr. Ramirez was charged with a Level 4 violation and that brings us here today."**

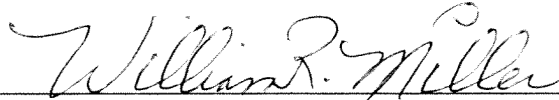
The Board also notes that the SAP form submitted as proof that Claimant was in that program was unsigned. The Organization stated that it was an electronic copy which is why it was unsigned. Interestingly, the Claimant never provided the Organization with a signed copy of that document nor did he testify that he went through the program, thus it is determined that the discipline will not be set aside account of the Claimant being in SAP.

The case will be resolved on its merits. There is no disagreement between the parties that track work is potentially dangerous and that employees need to be alert and attentive to their duties. The record indicates that on April 14th, the Claimant had a job briefing with Track Supervisor, V. Edwards, on shortening up the limits on the East end of the track and time authority. Subsequently, Claimant shortened both the East and West end of the track and time, resulting in men and equipment on the West end to be out of track and time authority limits. Substantial evidence was adduced at the Hearing that the Claimant failed to utilize means to ensure he was obtaining track authority which would have protected the work activities of Tie Gangs 9063/65 and S/L Gang 9083, on April 14, 2010. The Carrier met its burden of proof that the Claimant was guilty as charged.

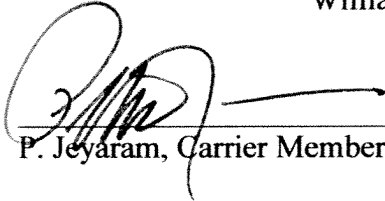
The only issue remaining is whether the discipline was appropriate. Review of the record reveals that at the time of the incident the Claimant had approximately 14 years of service with a good work record, however, his infraction was of a serious nature. The discipline assessed was in accordance with 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 and the claim will remain denied.

**AWARD**

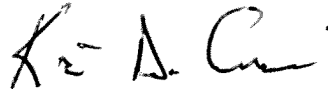
Claim denied.



William R. Miller, Chairman



P. Jeyaram, Carrier Member



K. D. Evanski, Employee Member

Award Date: August 1, 2012