

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6302
AWARD NO. 210, (Case No. 216)**

**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 dismissal (subsequent reinstatement by letter dated November 19, 2010 after being withheld from service beginning June 23, 2010) of Track Machine Operator C. Martinez for violation of Rule 1.6 (Conduct - Careless of the Safety of Themselves or Others) in connection with the charge '...that on June 11, 2010, at about 10:00 a.m., on the Provo Subdivision, near Milepost 665.30, while in the house track, you were allegedly told to lock out and tag out your Ballast Regulator BR0203 and stay off of the right side steps due to a broken hand rail. In the process of locking and tagging, you took it upon yourself to use the right side stairs where you lost your balance, grabbed the broken hand rail, which broke the rest of the way off and caused you to fall to the ground.' (Employees' Exhibit 'A-1') is based on unproven charges, unjust, unwarranted and in violation of the Agreement (System File C-1048U 165/1541436).**
- 2. As a consequence of the violation referred to in Part 1 above, we request Claimant Martinez have all discipline associated with this issue be removed from his employee records, that he be returned to service immediately with all seniority previously established restored unimpaired, vacation rights restored unimpaired as well as all Collective Bargaining Agreement rights restored unimpaired and that he be compensated all hourly compensation for time lost while withheld from service due to the Carrier's unjustified actions in this case in violation of our Collective Bargaining Agreement and fair past practice. This compensation is to include all straight time and overtime hours Claimant Martinez has been and being unjustly denied."**

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 June 23, 2010, Carrier notified Claimant to appear for a formal Investigation on July 9, 2010, concerning in pertinent part the following charge:

"...to develop the facts and place responsibility, if any, that on June 11, 2010, at about 10:00 a.m., on the Provo Subdivision, near Milepost 665.30, while in the house track, you were allegedly told to lock out and tag out your Ballast Regulator BR0203 and to stay off of the right side steps due to a broken hand rail. In the process of locking and tagging, you took it upon yourself to use the right side stairs where you lost your balance, grabbed the broken hand rail, which broke the rest of the way off and caused you to fall to the ground.

These allegations, if substantiated, would constitute a violation of Rule 1.6 - Part 1 (Conduct - Careless of the Safety of Themselves or Others), as contained in the General Code of Operating Rules, effective April 7, 2010. Please be advised that if you are found to be in violation of this alleged charge, the discipline assessment may be a Level 5, and under the Carrier's UPGRADE Discipline Policy may result in permanent dismissal."

On July 29, 2010, Claimant was found guilty as charged and was assessed a Level 5 discipline and dismissed from the service of the Carrier.

It is the position of the Organization that Claimant was denied his right to a "fair and impartial" Hearing because the Carrier had pre-determined the guilt of the Claimant and the Hearing Officer did not act as a trier of facts, but instead as a prosecutor. According to it, those procedural errors substantiate that Claimant was pre-judged prior to the Hearing and are grounds for sustaining the claim without even reviewing the merits. However, if the merits are examined the Organization argued that the facts indicate the Claimant used the safest route he had been taught by the Carrier in the exit of his machine and his fall was not directly responsible due to the hand rail in question. Both Claimant and Supervisor M. Lopez who conducted the reenactment, testified that Claimant fell because his heel caught on a raised part of the machines platform and he instinctively grabbed the broken handle. And even then, he did not actually fall as he jumped back to his feet and then tripped and took a fall. It asserted that he had no intention of utilizing the broken handle, but when his heel got caught he grabbed the first thing he saw to break his fall as any reasonable person would do. It concluded that it was a freak accident and it requested 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 clearly shows that Claimant was instructed to not use the right side of the Ballast Regulator to perform Lockout/Tagout (LOTO) procedures in order for Gang Machinist J. E. McKeighan to perform repair work on the Ballast Regulator. According to it, Machinist McKeighan testified numerous times of those instructions. It reasoned that Claimant chose not to abide by those instructions, as he used the right stairs of the machine for the LOTO procedure even though he knew that the right side of the Ballast Regulator had damage that needed repair. It further argued numerous witnesses testified the Claimant did not need to lock the doors in order to be in compliance with the LOTO procedure and as a result of not following instructions and during the locking of the door, Claimant lost his balance, grabbed the broken hand rail, which broke the rest of the way off and caused him to fall to the ground. It closed by stating that the Claimant was guilty as charged and it asked that the discipline not be disturbed and the claim remain denied.

The Board notes that the Claimant was reinstated by letter dated November 19, 2010, without back pay, but with the right of the Organization to process the claim for a clearance of his personnel record and all lost monies from the date he was taken out of service until his return.

The Board has thoroughly reviewed the record and transcript and is not persuaded that any alleged procedural violations rise to the level to sustain the claim without reviewing the merits or that Claimant was denied his "due process" Agreement rights.

Review of the record indicates that multiple arguments were raised in behalf of the Claimant, but the central question at issue is whether or not the Claimant purposely disregarded a directive to not use the right hand side of the Ballast Regulator when he performed a LOTO procedure as the handrail was broken. On page 50 of the transcript the Organization questioned Mr. J. E. McKeighan, Gang Machinist as to whether he instructed the Claimant to stay off the right side of his machine and McKeighan testified that he thought he did. On page 54 of the transcript the Hearing Officer followed up the questioning of the Organization when he asked McKeighan the following:

"Q We've been kind of lead down a path that there may be some misunderstanding of what your instructions were.

A Yes

Q When you- when you gave Mr. Martinez the instructions, did he act on those instructions?

A When I- when I talked to Calvin about locking and tagging out the machine and that the railing was damaged, okay, at that time, when he proceeded

to go up, you know, and start locking and tagging out the machine, I thought that that was an understanding, you know.

Q Yes

A Could there have been a communication- could there have been some kind of a- a misunderstanding? It's possible, I suppose, you know ..."
(Underlining Board's emphasis)

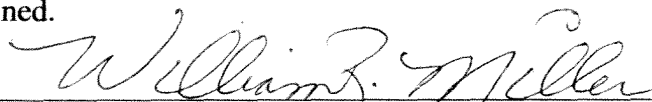
On page 56 and 57 of the transcript the Claimant asked Mr. McKeighan if there might have been a miscommunication problem between them regarding using the right side of the machine and McKeighan testified in pertinent part:

"A I- at that- yeah there could have been between me and you...."

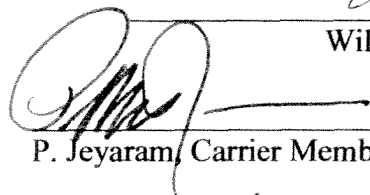
At other points during the Investigation Mr. McKeighan contradicted the aforementioned testimony stating that he did tell the Claimant to stay off the right side of the Ballast Regulator. The facts indicate there was a discussion between the Claimant and McKeighan over a damaged right hand railing, however, that testimony lacks clarity and consistency as to whether Claimant was clearly instructed to stay off the right side of the machine, but instead reveals that McKeighan could not definitely say what was actually said between him and the Claimant and whether or not Claimant understood his instructions. The Board is not persuaded that Claimant purposely disregarded McKeighan's instructions, therefore, it is determined that the Carrier erred when it dismissed the Claimant. The Board finds and holds that the dismissal, subsequently reduced to a suspension with the right of appeal, is rescinded and the Claimant is to be made whole for all loss of monies in accordance with Rule 48 (h).

AWARD

Claim sustained.



William R. Miller, Chairman



P. Jeyaram, Carrier Member



K. D. Evanski, Employee Member

Award Date: August 1, 2012