

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6302
AWARD NO. 213, (Case No. 222)**

**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

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

- 1. The discipline [suspension commencing on November 8, 2010 through and including November 14, 2010 and three (3) hours off on November 15, 2010] imposed upon Assistant Foreman G. Morgan for violation of Rule 121.2.4 (Procedures for Clearing Trains) as contained in the Chief Engineer Bulletins effective November 17, 2008 leaving his assigned sub-group work area, resulting in leaving men and equipment in his sub-group without a sub-group coordinator is based on unproven charges, unjust, unwarranted and in violation of the Agreement (System File D-1048U-217/1546741).**
- 2. As a consequence of the violation referred to in Part 1 above, we request that all charges, discipline and correspondence in connection with the referred violation must be dropped and removed from Mr. Morgan's record and he must be compensated for all time unjustly withheld from service since his removal from service and improper suspension on November 8, 2010."**

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 September 17, 2010, Claimant was directed to attend a formal Investigation on September 29, 2010, which was mutually postponed until October 8, 2010, concerning in pertinent part the following charge:

"...to develop the facts and place responsibility, if any, that while employed as Assistant Foreman on Gang 9065, Sidney Subdivision, at approximately 1415 hours on September 13, 2010, you allegedly failed to contact the EIC or Foreman

to let them know you were leaving your designated Sub-group work area, resulting in leaving men and equipment in your sub-group without a sub-group coordinator as prescribed by CEB 121.2.4.

These allegations, if substantiated, would constitute a violation of Rule 121.2.4 (Procedures for Clearing Trains), as contained in the Chief Engineer Bulletins, 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 October 22, 2010, Claimant was notified that he had been found guilty as charged and was assessed a Level 4 discipline with the suspension to commence on November 8, 2010, through and including November 14, 2010, and three hours off on November 15, 2010.

It is the Organization's position that the Carrier's discipline of Claimant was unwarranted because: (1) he was a long term employee; (2) he lacked any history of formal discipline; (3) he had already been disqualified from serving as an Assistant Foreman; (4) the Carrier failed to establish that it took reasonable steps to notify Claimant of his Investigation; and (5) Claimant was tried in absentia and without the ability to formulate a proper defense. It concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the position of the Carrier there were no procedural violations that warrant overturning the assessed discipline as Claimant was properly notified of the Hearing date and the nature of the charge against him. The fact that he did show for the Hearing was no fault of the Carrier and it was appropriately held in absentia. Turning to the merits it argued that there is substantial evidence in the record that Claimant violated Rule 121.2.4 by abandoning the men and equipment in his charge while serving as a Sub-group Coordinator (SGC). It argued the Claimant failed to communicate with anyone about his whereabouts and simply left the work area while serving in a critical safety sensitive role. It further argued the discipline assessed in this instance was in keeping with the Carriers UPGRADE Discipline Policy. It closed by asking that the discipline not be disturbed and the claim remain denied.

The Board will first address the Organization's argument that the Claimant was denied a "fair and impartial" Investigation because the Investigation was held in absentia. Review of the facts reveals that the Notice of Investigation was sent to the Claimant's address of record and the U.S. postal tracking information confirmed that the Notice was received at Claimant's home and a previous postponement was granted. It is determined that the Claimant chose not to appear at

the Investigation as he offered no subsequent proof that he could not attend the Hearing. The Carrier did not violate the Claimant's right to a "fair and impartial" Hearing in this instance when it was held in absentia. Additionally, the Board notes that in Second **Division Award 13957** it was determined in pertinent part:

"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 and 13924."

The rationale of Award 13957 will be followed in this instance as it is on point. The Board has also determined that there were no other procedural errors that denied the Claimant his "due process" Agreement rights.

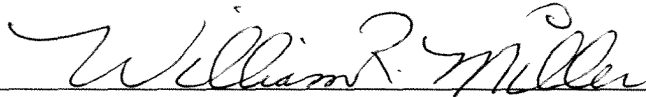
Turning to the merits, it is clear that on September 13, 2010, Claimant was assigned as a "Sub-Group Coordinator (SGC)". The sub-groups are established for the purpose of ensuring that all employees are notified of approaching trains, and receive the warning to clear the track. All sub-groups assign an employee to be a SGC. When a train approaches the work area the Employee In Charge (EIC) contacts the SGC's who in turn issues the warning to employees in their respective groups to clear the track. The role of the SGC is important for the safety of employees and the SGC has a responsibility to help protect his co-workers who are working on a "live" track.

The testimony of witnesses, Track Supervisor K. T. Ridler (See Transcript pages 21 - 26) and Foreman J. B. Miller (See Transcript pages 35 - 40) substantiated that Claimant failed to contact the EIC or Foreman to advise them he was leaving his designated Sub-group work area, that resulted in leaving men and equipment in his sub-group without a SGC, exposing those employees and equipment to potential danger. Ridler and Miller's testimony was not refuted and nothing was offered to explain the Claimant's carelessness that had the potential to cause a catastrophe. Substantial evidence was adduced at the Investigation that the Carrier met its burden of proof that Claimant was guilty as charged.

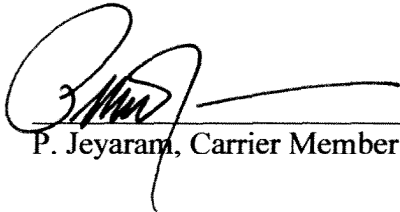
The only issue remaining is whether the discipline was appropriate. Claimant was guilty of a serious safety infraction and review of the discipline reveals that it was in accordance with the Carrier's UPGRADE Discipline Policy, therefore, the Board finds and holds the discipline will not be set aside 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: Oct 10, 2012