

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6402
AWARD NO. 159, (Case No. 180)**

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

vs

**UNION PACIFIC RAILROAD COMPANY (Former Missouri Pacific
Railroad Company)**

William R. Miller, Chairman & Neutral Member
T. W. Kreke, Employee Member
K. N. Novak, Carrier Member

Hearing Date: February 23, 2011

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

- 1. The discipline (Level 4) imposed upon Mr. S. Seiler for alleged violation of Maintenance of Way Rule 42.2.2 (Other Speed Requirements) in connection with charges of failing to stop his vehicle before passing a red flag displayed for a stop test on June 5, 2010 at New Waverly, Texas, near Mile Post 178, while employed as a Brandt truck operator on Gang 9450 was arbitrary, capricious, and in violation of the Agreement (System File UP-214-WF-10/1536190).**
- 2. As a consequence of the violation referred to in Part 1 above, Claimant S. Seiler shall now receive the remedy prescribed by the parties in Rule 21(e).**

FINDINGS:

Public Law Board No. 6402, 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.

Review of the record reveals that the Claimant had been in the service of the Carrier approximately 14 years and during the last seven years was regularly assigned as a Brandt Power Unit Operator. At the time of this dispute he was assigned to Gang 9450 located in New Waverly, Texas.

There is no dispute between the parties that the Claimant, while operating his vehicle traversing main track, was unable to stop his vehicle short of a red flag, which was displayed on

the left side of the track and placed near a crossing he came upon the morning of June 5, 2010, near Mile Post 178.

On June 28, 2010, the Carrier advised Claimant to appear for a formal Investigation on July 7, 2010, concerning in pertinent part the following charge:

"...to develop the facts and place responsibility, if any, that while employed as Brandt Power Unit Operator on Gang 9450, at New Waverly, Texas, near Milepost 178, at approximately 9:45 a.m., on June 5, 2010, you allegedly failed to stop your vehicle before passing a red flag displayed for a stop test.

These allegations, if substantiated, would constitute a violation of Rule 42.2.2, 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 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 23, 2010, Claimant was notified that he had been found guilty as charged and was assessed a Level 4 discipline with no time off.

It is the position of the Organization that the key to this dispute is the fact that the Carrier has presented no rule, policy or procedure governing compliance with a stop test in regards to what an employee is required to do when observing a red flag on the left side of the track as there was no evidence that not stopping short of a misplaced flag is a violation of Rule 42.2.2. It argued that Rules 5.4.7 and 5.4.8 and FRA Regulations state that red flags will be placed in the middle of the track or on the right hand side of the track. It stated that the records show that Track Supervisor Ehlers placed the red flag to the outside of the left rail, therefore, the placement of the flag in that position governed traffic approaching from a southbound direction on the single track and did not govern the Claimant who was traveling northbound. It further argued that Track Supervisor Gilford testified that when conducting a proper red flag test the flag should be placed in either the middle of the track or on the right side. It concluded by requesting that the discipline be rescinded and the Claim sustained as presented.

It is the Carrier's position that the Organization is incorrect in its argument regarding the placement of a red flag as they apply to Train, Engine and Yard (TE&Y) craft employees, whereas the Engineering Department has established its own guidelines and procedures for its testing. It argued that the test was conducted properly and Claimant failed to stop short of the

flag in violation of Rule 42.2.2. It closed by asking that the discipline not be disturbed and the Claim remain denied.

The Board has thoroughly reviewed the record and determined that no procedural errors occurred during the Hearing and the Claimant was afforded his "due process" Agreement rights.

The Carrier asserted that Claimant violated Rule 42.2.2 (Other Speed Requirements) which states in pertinent part the following:

"Track cars and machines must be operated at a speed that will allow the operator to stop in 1/2 the distance the track is seen to be clear...."

The Organization argued that the red flag was misplaced and relied upon Maintenance of Way Rules 5.4.7 and 5.4.8. The two Rules state the following:

"Supplement: 5.4.7 Display of Red Flag or Red Light

When displaying a red flag that is intended to stop train movements, ensure that the full face of the flag is clearly visible to approaching trains and that the flag is displayed at a right angle to the track.

Display Between Rails. When a red flag or red light is displayed between the rails of any track, the train must stop and not proceed until the flag or light has been removed by an employee of the class that placed it.

Place red flags to the right of the track as viewed by an approaching train when possible.

For two or more main tracks or sidings, place flags on the field side for outside tracks; for center tracks or when conditions warrant, red flags or lights may be placed between the rails."

"5.4.8: Flag Location

Flags or red lights must be displayed to the right of the track as viewed from an approaching train. In multiple main track territory or where sidings are adjacent to main track(s), they will be placed on the field side of outside tracks. Red flags or red lights may be displayed between the rails as outlined in Rule 5.5.7 (Display of Red Flag or Red Light). Flags or red lights will be placed in this manner unless otherwise specified by track bulletin, track warrant, special instructions, or general order."

Review of the record indicates that the Carrier argued that the aforementioned Rules applied only to TE&Y employees while the Engineering Department had established its own guidelines and procedures for its testing. Supervisor Ehlers stated that neither Rule applied to Claimant's stop test because he was operating a machine and not a train. Contrary to Ehlers statement Claimant's immediate supervisor, Track Supervisor Gilford testified on page 40 of the Transcript as follows:

"Q If you were given a stop test, how would you give a stop test?"

A Basically the way I give a stop test is I got a tube is what I carry with me and it has the two holes in it that you can put a full face flag in, it straddles across either rail, east to west side of the rail and it'll actually be sitting in the middle of the track when the flag would end up in the middle of the track.

Q That's what most people do on a stop test?

A Yeah, pretty much this is the way we approach to do a stop test. Now I'm not sure how it went down, how you did one, but that's the way I do a stop test."

On page 42 of the Transcript Supervisor Gilford testified that a red flag is suppose to be displayed in accordance with Rules 5.4.7 and 5.4.8 and that was the manner in which he always performed a stop test. On page 43 of the Transcript the Hearing Officer questioned Gilford about Exhibits 8 and 9 which were copies of Rule 5.4.7 and 5.4.8 as follows:

"Q In reference to Exhibit 8 and 9, are these rules intended for application of flags regarding train traffic or are they intended for application of the rules regarding Maintenance of Way employees and performing stop tests?"

A I think that rule is basically covering trains- trains and engines. And we actually use those rules also for our Maintenance of Way equipment in establishing flag position." (Underling Board emphasis)

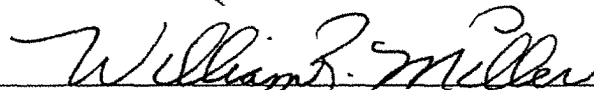
As set forth above, Supervisor Ehlers testified that Rules 5.4.7 and 5.4.8 were not applicable to the stop test performed for the Claimant, but never offered a different rule, policy or procedure which allegedly governed whereas Supervisor Gilford stated that both rules applied to all stop tests governing MW equipment. The record is devoid of any evidence that rebuts the Organization's position and would justify Ehlers' placement of a red flag on the left side of the

rail as an indication to stop for approaching on-track equipment. It is clear in this instance the Carrier did not meet its burden of proof.

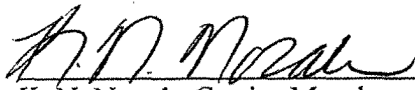
The Board finds and holds that the Level 4 discipline assessed on the Claimant's personnel record is removed and the Claim is sustained. The Carrier owes no monies because the Claimant suffered no monetary loss as he was not suspended from service.

AWARD

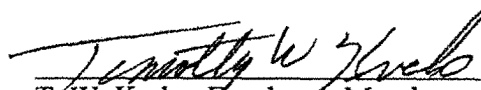
Claim sustained in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed by the parties.



William R. Miller, Chairman



K. N. Novak, Carrier Member



T. W. Kreke, Employee Member

Award Date: June 27, 2011