

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6402
AWARD NO. 166, (Case No. 187)**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
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: July 20, 2011

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

- 1. The Level 4 discipline [eight (8) day suspension] imposed upon Mr. A. M. Sasser for violation of Rule 136.4.2 (Inaccessible Track) and Rule 43.4 (Equipment Tie-Up) of the General Code of Operating Rules in connection with failure to protect equipment by not making the track inaccessible is unjust, unwarranted and in violation of the Agreement (System File UPLW409-10/M10-MOP172).**
- 2. As a consequence of the violation referenced in Part 1 above, we respectfully request that Mr. Sasser be allowed remedy in accordance with Rule 22 of the Agreement."**

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.

On March 2, 2010, Carrier notified Claimant to appear for a formal Investigation on March 9, 2010, concerning in pertinent part the following charge:

"...to develop the facts and place responsibility, if any, that while employed as Foreman, on Gang 9188 on February 7, 2010, you allegedly failed to properly protect your equipment by not making your tie up track inaccessible in Jama Yard on the Austin Subdivision."

On March 23, 2010, Claimant was notified that he had been found guilty as charged and was assessed a Level 4 discipline with an eight day suspension that began on April 1, 2010 and concluded on April 8, 2010.

It is the position of the Organization that review of the evidence indicates that on the date of the incident the Claimant was working as a Foreman. It argued that Claimant and his crew were never advised that they needed to secure their equipment in a house or yard track, but instead had been told the yard would not be in use from February 7, 2010, until crew returned from their rest days and based upon that information the equipment was tied up and secured in technical compliance with relevant Rules. It concluded by stating that the Carrier did not meet its burden of proof and because of that it requested that the discipline be rescinded and the claim sustained as presented.

It is the Carrier's position that the Claimant violated Rules 136.4.2 - Inaccessible Track and 43.4 - Equipment Tie-Up. It argued that the record reveals that the Claimant failed to properly secure the equipment and ensure the track was inaccessible and asked that the claim remain denied.

The Board notes that this is the first in a series of two cases involving the same Claimant and we have thoroughly reviewed the transcript and record of evidence and determined that no procedural errors occurred during the Investigation and the Claimant was afforded his Agreement "due process" rights.

Turning to the merits, the evidence indicates that on February 7, 2010, Manager of Track Programs, C. Martinez received a call from a Service Unit Representative out of San Antonio who passed by the Jama Yard and did not see proper derails and protection provided for the Claimant's equipment. Based upon that call Manager Martinez called Track Supervisor G. Carnahan to apprise him of this and dispatched him to the Yard to look into the matter and to take pictures of what he found. Supervisor Carnahan testified on pages 14, 24 and 26 of the Transcript without being refuted that Claimant did not properly tie up his equipment. On page 26 he was questioned as follows:

"Q So Mr. Carnahan looking- looking through these photos and from what I'm hearing that you're say- stating that on each end of where Mr. Sasser's truck and equipment was tied up at it could have been accessed by anyone at anytime whether it be train or yard crew or what have you, correct?"

A It could have been, yes sir.

Q And what I'm hearing is that the track in which Mr. Sasser's equipment was tied up in was not properly made inaccessible or locked- locked out

to where his equipment was basically left unprotected, correct?

A Correct. *(Underlining Board's emphasis)*

The Claimant suggested on pages 38 and 39 of the Transcript that he understood from the MYO there was not to be any activity in Jama Yard after he tied up his equipment. Claimant's statement was not collaborated and Supervisor Carnahan testified to the contrary when he was questioned on page 28 on the subject as follows:

"Q If there was- was there any activity in the yard when you was there?
From- I mean from train crews or yard crews-

A Ballast train crew at- dumping everyday set the bad orders out there
that we had." *(Underlining Board's emphasis)*

During his closing statement on page 44 of the Transcript, Claimant subsequently admitted that he failed to properly secure the track when he stated in pertinent part:

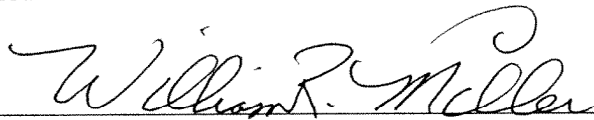
"...But I tried to get it done, but it didn't get done...."

Substantial evidence was adduced at the Investigation that the Claimant failed to properly provide protection for his equipment in violation of Rules 136.4.2 and 43.4.

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 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



K. N. Novak, Carrier Member



T. W. Kreke, Employee Member

Award Date: 10/18/11