

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7426
AWARD NO. 16 (Case No. 16)**

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

vs

UNION PACIFIC RAILROAD COMPANY (SPWL)

William R. Miller, Chairman & Neutral Member
T. W. Kreke, Employee Member
B. W. Hanquist, Carrier Member

Hearing Date: July 20, 2011

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

- 1. The Level 4 (11 day suspension) imposed upon Welder J. Reyes for violation of Rule 4.1 as contained in the Engineering Department Fire Prevention Plan in connection with his failure to fill out the Engineering Department Fire Risk Assessment and failure to have sufficient readily accessible water to perform hot work on September 3, 2009 is unjust, unwarranted and in violation of the Agreement (System File L-1045S-451/1530256).**
- 2. As a consequence of the violation referred to in Part 1 above, we respectfully request that the Level 4 (11 day suspension) be expunged from Mr. Reyes' personal record and that he be compensated for all wages lost, straight time and overtime as well as any benefit loss suffered by him as a result of the suspension."**

FINDINGS:

Public Law Board No. 7426, 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 14, 2009, Carrier notified Claimant to appear for a formal Investigation on September 21, 2009, which was mutually postponed until October 6, 2009, concerning in pertinent part the following charge:

"...to develop the facts and place responsibility, if any, that while employed as Welder, on Gang 8887, at San Leandro, California, near Milepost 17.5, at

approximately 9:00 a.m., on September 3, 2009, you allegedly failed to fill out the Engineering Fire Risk Assessment for hot work performed, and have sufficient readily accessible water to perform hot work."

On October 30, 2009, Claimant was notified that he had been found guilty as charged and was assessed a Level 4 discipline with a 11 day suspension and a Corrective Action Plan development.

It is the position of the Organization that the Claimant admitted that on September 3, 2009, he forgot to fill out the Fire Risk Assessment form. The Organization asserted that the Claimant was in charge of the welding duties that day and took every precaution to perform his work safely and without incident. According to it, the Claimant and his crew exercised caution and performed their tasks in conformity with the Fire Risk Assessment. It argued that with regard to the alleged failure to have enough water on hand the Carrier failed to prove that charge. There was ample water for the gang to weld on hand in portable pumps as well as tank of water on the gang truck. There was also water in an adjacent ditch that could have been used to refill the Indian Pumps used for portable fire protection. It additionally argued the crew had their spark shields in place and shovels at the ready and they had adequate amount of water required for welding pursuant to Carrier Rules. 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 guilty of a serious Rule infraction. It stated that Fire Risk Assessment is very important on the Carrier's property as there have been major forest fires started by maintenance of way employees which have caused injuries and millions of dollars of damage to land and personal property which is why the Carrier takes a very strict stance in such a matter. It argued that the record verifies that the Claimant did not dispute the fact that he failed to fill out the form, which is a requirement of the Rule nor did he have the necessary water on hand. It asserted that the discipline was appropriate and closed by asking the claim remain denied.

The Board has thoroughly reviewed the record which substantiates that the Claimant admitted that he did not fill out the Fire Risk Assessment form on September 3, 2009. The second charge is whether or not the Claimant had sufficient water on hand readily accessible for fire prevention and is in dispute between the parties.

Testimony of various witnesses verified that in accordance with Carrier Rules the Claimant needed to have at least 20 gallons of water readily available while doing hot work - butte welding in this instance. On pages 48 and 49 of the transcript, Manager of Track Maintenance Fitzgerald was questioned about the incident as follows:

"Q ...What is required to perform the hot work for a butte weld?

A They are to have the minimum of 20 gallons water on hand with two pump sprayers.

Q Okay, so 20 gallons and the pump- say 20 gallons and two pump. Okay, what does a pump sprayer hold?

A Pump sprayer is a- we use an Indian pump [phonetic], so that's a five gallon pump.

Q So that's 10 gallons for the two sprayers?

A Correct.

Q So that's minus the- that'll be minus that 20 gallons?

A Correct.

Q So they need-

A An additional 10 gallons on minimum I've had.

Q Okay, that's what I need to know. And what do they have?

A They had two Indian pumps, plus two silver bullets, which are pressurized water containers that hold two and a half gallons each."

On page 57 and 58 of the Transcript, Manager Fitzgerald went on to say the Claimant and his gang had a total of 15 gallons of water available. Under cross-examination on pages 60 and 61 he modified that amount by adding another 19 gallons of water stating there was a holding tank on the truck with that amount of water in it, but he added a proviso that the water was not actually available to the crew because the tank was not properly functioning. On page 61 he was asked to explain why that water was not available to the crew and he testified as follows:

"Q So the only way to empty that tank is?

A Gravity feed.

Q So you could open it up and gravity feed the water out of it?

A Yes.

Q And could you fill up a container with that?

A Yes. But Mr. Reyes was not familiar or anyone else on the gang familiar, I had to perform a gravity feed on the tank.

Q And you speaking in- in behalf of Mr. Reyes on that subject, you know that because?

A He told me. *(Underlining Board's emphasis)*

On page 139 of the transcript, the Claimant testified that he had 15 gallons of water in pressurized tanks and another 19 in the tank on the truck which he stated was not working, but could still have been accessed. On the surface it would appear he had 34 gallons of available water, however, close review of his testimony reveals that he never refuted Fitzgerald's testimony that he told the Manager that he was not familiar in how to perform a gravity feed of the water, therefore, based upon the un-refuted testimony of Manager Fitzgerald the Claimant's crew only had 15 gallons of water readily available which is consistent with the Closing Statement of J. L. Rocha on page 150 of the transcript, who as a member of the crew was charged along with the Claimant and stated the following:

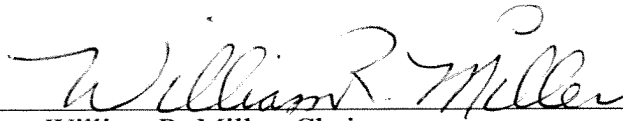
"Mr. Kevin know- knew we have 15 gallons of water why he sent us to weld that day. It was my first day and I- the way I was treated, I was treated not good at that day for the- things happened when I went to bump in other places. Then I come to work on this day, that happened again, you know. I understand why we went with 15 gallons, you know that day, he knew." *(Underling Board's emphasis)*

The Board has determined that substantial evidence was adduced at the Investigation that the Carrier met its burden of proof that Claimant was guilty as charged.

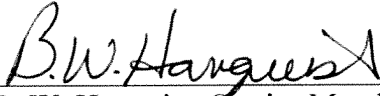
The only issue remaining is whether the discipline was appropriate. The Carrier has a duty to conduct its business in an efficient and safe manner for its employees as well as the general public as fire can easily get out of control and damage property and in this instance it exercised discipline in accordance with its UPGRADE Discipline Policy and reduced what could have been a 60 day suspension to an 11 day corrective suspension on the basis the Claimant was a good employee. The claim will remain denied.

AWARD

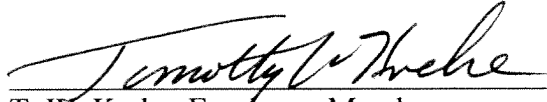
Claim denied.



William R. Miller, Chairman



B. W. Hanquist, Carrier Member



T. W. Kreke, Employee Member

Award Date: Sept 12, 2011