

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6302
AWARD NO. 225, (Case No. 238)**

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

vs

UNION PACIFIC RAILROAD COMPANY

William R. Miller, Chairman & Neutral Member
K. D. Evanski, Employee Member
J. T. Wayne, Carrier Member

Hearing Date: June 5, 2013

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

- 1. The discipline [Level 3 - one (1) day training without pay] imposed on Mr. D. Tworek by letter dated November 17, 2011 in connection with allegations that he failed to keep a good eye on gauge was without just and sufficient cause, unwarranted and in violation of the Agreement (System File R-1148U-301/1563229).**
- 2. As a consequence of the violation referred to in Part 1 above, the Carrier must remove these charges from the Claimant's record and compensate him for all wage and benefit loss suffered as a result of the Carrier's improper discipline."**

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 November 2, 2011, Carrier notified Claimant to appear for a formal Investigation on November 10, 2011, concerning in pertinent part the following charge:

"...to develop the facts and place responsibility, if any, that at approximately 1500 hours, on October 29, 2011, while employed as Track Inspector, the geometry car found wide gauge at Milepost 22.25 and 22.50 on its last run on August 22, 2011. Ties were installed and gauged in that area after that. You were allegedly instructed to keep a good eye on the gauge in the curves in that area. On October 29, 2011, the geometry car found wide gauge in the same

area that it found on the previous run.

These allegations, if substantiated, would constitute a violation of Rule 1.15 (Reporting and Complying with Instructions), 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 3, and under the Carrier's UPGRADE Discipline Policy may result in up to five (5) days off work without pay or up to one day training without pay and a Corrective Action Plan must be developed prior to returning to service.

On November 17, 2011, Claimant was notified that he had been found guilty as charged and was assessed a Level 3 discipline with a one day training without pay and the requirement to develop a Corrective Action Plan.

The facts indicate the Claimant was working on Gang 5274 at Columbus, NE, on October 29, 2011, when he allegedly failed to keep a good eye on the gauge in the curves in that area as instructed by his Supervisor. "Gauging" refers to the distance between the inside balls of the rails. It was alleged Claimant failed to comply with Rule 1.13 that led to the aforementioned charges.

It is the Organization's position that the Carrier failed to meet its burden of proof. It argued that the evidence presented at the formal Investigation was irrelevant to the charges. It asserted that the Claimant was never given instructions by Manager Collins and if the Claimant had been given instructions, it argued that Claimant's failure to keep a good eye on the track is different than looking for a wide gauge on the track. It further argued that there were ongoing issues with the gauge in those curves, and that the issue was nothing more than a temporary fix. It reasoned that the record shows there was a dispute in facts as to what the Carrier allegedly told the Claimant to do and contrary to the Carrier's arguments it is clear that Claimant did keep a good eye on the curves and the Carrier failed to dispute that fact. It concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the position of the Carrier the record shows that Manager Collins testified during the Hearing that he had previously instructed the Claimant on a section of curve track that was having gauging issues. Collins explained that he told Claimant to monitor the curve for gauge so that there would not be wide gauge again. It argued that on October 28, 2011, Mr. Collins asked the Claimant if the curve had been checked and was told by the Claimant it would be good for the geometry car inspection. On the next day, October 29th, the geometry car found a wide gauge on the same area that the Claimant was assigned to monitor. It closed by stating that it was clear that Claimant failed to follow Manager Collins instruction and it asked that the discipline not be disturbed and the claim remain denied.

The Board has thoroughly reviewed the record and determined that the Claimant received a "fair and impartial" Hearing and was afforded his Agreement "due process rights, therefore the dispute will be resolved on its merits.

Review of the record reveals that the Claimant was instructed to "keep a good eye" on the track and he was responsible for ensuring that the rail gauge stayed within tolerance. The facts further show that Claimant was told to be mindful of the gauge on the curves and he was aware of that section of track covered by the Notice of Investigation as having been identified as a problem area. Claimant reported to his Manager that gauge was fine, implying that he understood the instruction to monitor that portion of track. Manager of Track Maintenance, R. K. Collins testified on pages 12 and 13 of the transcript that he discovered a wide gauge on the curve at Milepost 22.25, 22.50 on August 24 and October 9 after which he discussed the wide gauge issue with the Claimant wherein he instructed the Claimant to closely monitor the curve for the gauge so that they did not have a wide gauge again. Collins further testified the Claimant told him on October 28th that whenever the EC geometry car was scheduled to measure the track it would not find a wide gauge. On the following day, October 29, 2011, the EC geometry car discovered a wide gauge on that portion of track.

On page 51 of the transcript the Claimant was questioned about his conversation of October 28th with Manager Collins as follows:

"Q: Did you discuss with Mr. Collins on October 28th, the day before the EC car found the wide gauge, about the curve?"

A: Yes.

Q: Did you tell Mr. Collins he would find no wide gauge in the curve?

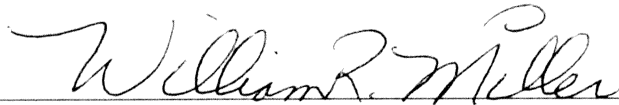
A: Yes...."

Claimant confirmed that he misadvised Manager Collins about the wide gauge in the curve. Substantial evidence was adduced at the Investigation that Claimant was guilty as charged.

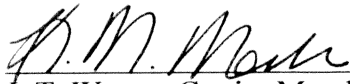
The only issue remaining is whether the discipline was appropriate. At the time of the incident the Claimant had five plus years of service with a good work record. Based upon the Claimant's good work record, the Board finds and holds that the discipline was excessive and is removed from his record and reduced to a Coaching Session, however, the Claimant is not entitled to any monies because examination of Payroll Records show that he never served an unpaid day for training and that he lost no compensation.

AWARD

Claim partially 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.



William R. Miller, Chairman



J. T. Wayne, Carrier Member



K. D. Evanski, Employee Member

Award Date: 8.5.13