

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 7426

AWARD NO. 5, (Case No. 5)

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES 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: September 22, 2010

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

1. The Carrier's decision to impose a Level 4C discipline [sixty (60) day suspension] on Mr. D. Agee for the alleged violation of Union Pacific General Code of Operating Rules, Rule 1.1.2 (Alert and Attentive), Rule 42.2.2 (Other Speed Requirements) and Rule 42.9 (Signal to Stop) was harsh, unjust, based upon unproven charges and in violation of the Agreement (Carrier's File 1512914).
2. As a consequence of the violation referred to in Part 1 above, we request that Claimant D. Agee be compensated for all wage and benefit loss suffered, that his seniority and qualifications be reinstated in the T.M.O. Tamper Class and the charges be expunged from this personal record."

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 August 25, 2008, Carrier notified Claimant to appear for a formal Investigation on August 28, 2008, which was mutually postponed until September 2, 2008, concerning in pertinent part the following charge:

"...to develop the facts and place responsibility, if any, that while employed as Tamper Operator on Gang 8058, on the Martinez Subdivision, near Milepost 29.25, at approximately 12:00 p.m., on August 20, 2008, while traveling equipment from

Suisun, California to Oakland, California, you allegedly failed to stop for stopped equipment ahead, resulting in a collision.

These allegations, if substantiated, would constitute a violation of Rule 1.1.2 (Alert and Attentive), Rule 42.2.2 (Other Speed Requirements), and Rule 42.9 (Signal to Stop), as contained in the General Code of Operating Rules, effective April 3, 2005, and in the Maintenance of Way & Signal Rules, effective April 1, 2004. Please be advised that if you are found to be in violation of this alleged charge, that the discipline assessment may be a Level 4C."

On September 25, 2008, Claimant was notified that he had been found guilty as charged and was assessed with a Level 4C violation with a 60 day suspension to begin at 0001 hours, on August 21, 2008, and to conclude at 0001 hours on October 20, 2008.

There is no dispute that on August 20, 2008, Claimant was assigned to a Jackson 6700 Tamper (Group 26 Machine) on Consolidated System Gang 8058 working Monday through Friday with Saturday and Sunday as rest days. The instant case concerns a machine collision that took place involving the Claimant's Tamper and a Ballast Regulator at or near Milepost 29.25 on the Martinez Subdivision at approximately 12:00 p.m. on August 20th.

It is the Organization's position that on August 20, 2008, there was a job briefing performed prior to the movement of equipment (Tamper and Ballast Regulator) involved in this incident. During that job briefing there were no unusual circumstances or hazards discussed. Subsequently, the Carrier planned a Red Flag Audit to test the front machine's (Ballast Regulator) ability to stop and the Regulator failed to stop in time and knocked over the red flag which was placed on a curve. It argued that neither the Assistant Foreman or the Ballast Regulator Operator attempted to warn the Claimant of what had transpired and instead the Regulator backed up after passing the red flag and did not try to attempt to notify the Claimant until it was too late. According to the Organization there were excessive amounts of grease on the rail and because there were no radio transmissions as to the change in conditions the accident was inevitable even though the Claimant made every effort to bring the machine to a stop.

The Organization also argued that the Carrier Supervisor advised Claimant to admit guilt and accept a ten day suspension or receive 60 days if he went through with a formal Investigation. Claimant rejected that offer and protested the issue during the Investigation. The Organization concluded it is clear that not only had the Carrier pre-determined the Claimant's guilt it decided that if it had to go through an Investigation the penalty imposed would be much harsher. It concluded by requesting that the discipline be set aside and the Claim be sustained as presented.

It is the position of the Carrier that Claimant's guilt was established by substantial evidence; that on the date in dispute the Claimant was moving his machine from Suisun, California, to Oakland, California, and failed to control the speed of his machine and failed to stop for stopped equipment ahead of him on the track resulting in a collision with a Ballast Regulator. According to the Carrier the Claimant did not operate the Tamper at a speed that would allow him to stop half the distance the track was seen to be clear and because of that there was a collision with the Ballast Regulator stopped on the mainline which was a violation of Rule 42.2.2: Other Speed Requirements. It argued that Claimant admitted on page 70 of the Transcript that he failed to stop in a timely manner resulting in the accident and it further argued that the infraction under the Carrier's UPGRADE Discipline Table required the assessment of Level 4C thus the 60 day suspension was appropriate. It closed by asking that the discipline not be disturbed and the Claim remain denied.

The Board has thoroughly reviewed the transcript and the record of evidence and has determined that the formal Investigation was held in accordance with the Agreement and it is clear that the Hearing was conducted in a fair and impartial manner.

Review of the testimony substantiates that the Claimant was working as a Tamper Operator on August 20, 2008, moving his machine the Tamper from Suisun, California, to Oakland, California, following a Ballast Regulator. The Carrier administered a Red Flag Audit to test the front machine's ability to stop and the Regulator failed to stop in time and knocked over the red flag coming to stop just past the flag. Claimant was following the Regulator with the Tamper and on page 70 of the Transcript he was questioned about the accident as follows:

"Q And did your tamper slide or run into the back of a ballast regulator?"

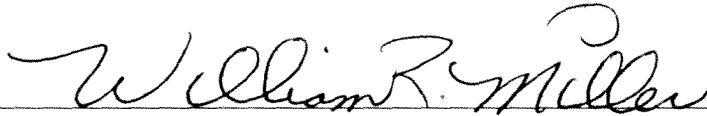
A Yes, it slid into the back of the regulator and stopped."

On page 87 of the Transcript Claimant further testified: **"...my machine was in good working condition."** Contrary to the Organization's assertion there was no substantive evidence that the track was excessively greasy to the point that the Claimant could not have stopped his machine, which he acknowledged was in good working order, provided he had been operating at a slow enough speed and was attentive to the circumstances. Substantial evidence was adduced at the Investigation that the Claimant did not operate the Tamper at a speed that would have allowed him to stop half the distance the track was seen to be clear and was not alert and attentive to his duties failing to follow the proper stop procedures while operating the Tamper resulting in the accident. Carrier met its burden of proof that Claimant was guilty as charged.

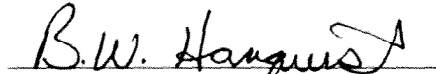

The only issue remaining is whether the discipline was appropriate. The discipline assessed was in accordance with the Carrier's Discipline Policy and the Board finds and holds at it will not be set aside because it was not arbitrary, excessive or capricious.

AWARD

Claim denied.



William R. Miller, Chairman


B. W. Hanquist, Carrier Member
T. W. Kreke, Employee Member

Award Date: Nov 23, 2010