

PUBLIC LAW BOARD NO. 7633

Brotherhood of Maintenance
of Way Employees Division - IBT Rail Conference

and

Union Pacific Railroad Company
(Former Missouri Pacific Railroad Company)

Case No: 053
Award No: 053

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The Carrier’s discipline (dismissed from the service of the Union Pacific Railroad Company) of Mr. G. Avila, by letter dated May 11, 2015 for alleged violation of GCOR 1.6 Conduct - Careless of the safety of themselves and Rule 42.2.2: Other Speed Requirements - Resulting in collision was without just and sufficient cause, unwarranted and in violation of the Agreement (System File UP985PA15/1629248D MPR).
2. As a consequence of the violation referred to in Part 1 above, Claimant G. Avila shall be allowed to return to work with all vacation and seniority rights unimpaired, the charges and discipline be removed from his personal record and he be compensated for any lost time including overtime, per/diem and mileage and that he be reimbursed for any additional expenses incurred that would have been covered by the Carrier.”

FINDINGS:

Public Law Board No. 7633, upon the whole record and all the evidence, finds the parties involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as amended; this Board has jurisdiction of the dispute herein; the parties were given due notice of hearing before this Board and they participated therein.

Claimant, who began service on January 30, 2012, was disciplined pursuant to a Notice of Investigation dated April 24, 2015, Investigation held April 29, 2015, “to develop the facts and determine your responsibility, if any, in connection with the below charge: On 04/20/2015, at the location of Benbrook, Tx, near Milepost 254.4, Fort Worth Subdivision, at approximately 14:15

hours, while employed as a M/O R (Br) Bal Reg, you allegedly operated track cars and machines that must be operated at a speed that will allow the operator to stop within half the distance the track is seen to be clear, you were also careless of safety to yourself and others. This is a possible violation of the following rule(s) and/or policy: 1.6 : Conduct - Careless of the safety of themselves; 42.2.2 : Other Speed Requirements - Resulting in collision. Additionally, Rule 1.6: Conduct stipulates that any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported. Indifference to duty or to the performance of duty will not be tolerated. A review of your previous discipline history indicates that your current discipline status is a Level 0. The proposed discipline for the charges contained herein may result in a Level 5 pursuant to the Union Pacific Railroad Discipline Upgrade Policy. If you are found to be in violation of this alleged charge, the discipline assessment may be a Level 5. Under the Carrier's Upgrade Discipline Policy, Level 5 may result in permanent dismissal."

In a discipline letter dated May 11, 2015, the Carrier found that "the evidence more than substantially supports the charges against you. The following charge has been sustained: On 04/20/2015, at approximately 14:15 while employed as a M/O R (Br) Bal Reg, you operated track cars and machines that must be operated at a speed that will allow the operator to stop within half the distance the track is seen to be clear, you were also careless of safety to yourself and others. This is a violation of the following rule(s) and/or policy: 1.6 : Conduct - Careless of the safety of themselves; 42.2.2 : Other Speed Requirements - Resulting in collision. Rule 1.6: Conduct stipulates that any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported. Indifference to duty or to the performance of duty will not be tolerated. You will be assessed a Level 5 pursuant to the Union Pacific Railroad's Upgrade Discipline Policy. The discipline assessment of Level 5, under the Carrier's Upgrade Discipline Policy, results in permanent dismissal. Effective immediately, you are hereby dismissed from all service with the Union Pacific Railroad."

The Organization appealed the discipline and the Carrier denied the appeals. The dispute was not resolved during a settlement conference and progressed to arbitration. This matter is now before the Board for final and binding resolution. The Board has carefully reviewed the entire

record in this case, including the arguments and awards provided in support of the parties' respective positions, whether or not specifically addressed herein.

The Board finds the Organization's procedural objections unpersuasive.

Fifteen witnesses testified during the Investigation (including Claimant). A number of them testified that they saw Claimant proceeding eastbound through the switch from the main line into the Benbrook House Track, speed limit 10 mph, at excess speed ("way too fast"; "pretty fast"; "too fast . . . probably 20 miles per hour."). A number of witnesses also saw movement in the cab, presumably Claimant trying to slow/stop his machine, in the moments prior to the collision. Claimant was operating Ballast Regulator 0801 (57,000 lbs.). At the speed Claimant's machine was travelling it struck CAT Tamper 0801 (88,000 lbs.) with such force that the heavier -- and stationary -- Tamper was pushed 39 feet eastward from the point of impact, in turn striking stationary Ballast Regulator 0804 (57,000 lbs.), which in turn struck stationary CAT Tamper 1002. Claimant and the operator of CAT Tamper 0801 were injured, and all four machines incurred significant damage, in the total amount of approximately \$50,000. The collision derailed Claimant's machine.

Claimant testified that the collision occurred because his brakes failed: they grabbed but then immediately released, no matter how hard or how many times he tried to apply them. The Organization argues that the frantic attempts by Claimant to slow/stop observed by multiple witnesses corroborates Claimant's claim that the brakes on his machine failed moments before it collided into stationary CAT Tamper 0801. However, two mechanics, one mechanic trainee and the Service Unit's Work Equipment Manager testified that the brakes were inspected and tested immediately after the collision, and road tested the next day, upon Claimant's machine being re-railed. The brakes were found in all instances to be operational. Additionally, Claimant inspected the machine, including the brakes, at the start of his shift on the day of the collision and noted no issues/problems. Moreover, during this shift, Claimant operated the machine for 96 miles, including at least six (6) siding stops, prior to the collision without noting any brake issues/problems, at all. The Organization argues that the mechanics and Work Equipment Manager testified it is *possible* the brakes failed in the moments before the collision, even though they tested operational immediately afterward. However, the Board finds that it is clear from their testimony

that they considered such a scenario highly unlikely. As the Service Unit's Work Equipment Manager testified, "Yeah [the brakes] could malfunction, yeah. But you know, they usually don't. If it malfunctions, it usually stays malfunctioned. It doesn't like repair itself." After thorough review, the Board finds that the record does not support the failed brake defense.

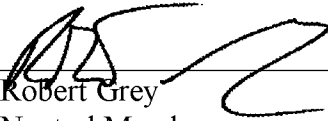
The record does support the Organization's argument that the House Track is on a downgrade which Claimant was approaching from a turn out. However, the record also shows that the turn out was slight, and Claimant had approximately 510 feet of visibility to CAT Tamper 0801, so he should have been able to stop approximately 255 feet before the point of impact, if he was operating in compliance with the charged Rules. The record also shows that the weather was not a factor: it was not raining, and the rails were not wet.

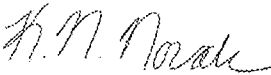
The Organization's argument that the collision occurred in the 12th hour of Claimant's shift is not persuasive.

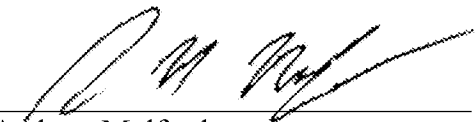
There is substantial evidence in the record to uphold the Carrier's discipline determination. The Organization's defenses are not persuasive. The discipline assessed by the Carrier was not arbitrary, capricious, or an abuse of discretion under the facts and circumstances of this record, and will therefore not be disturbed by this Board.

AWARD:

Claim denied.


Robert Grey
Neutral Member
Dated: March 20, 2018


Katherine Novak
Carrier Member


Andrew Mulford
Labor Member