

NATIONAL MEDIATION BOARD

**PUBLIC LAW BOARD NO. 6402
AWARD NO. 127, (Case No. 148)**

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs

UNION PACIFIC RAILROAD COMPANY

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

Hearing Date: September 23, 2009

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The dismissal (subsequently returned to service by letter dated October 29, 2008) of Machine Operator Bradley R. Polasek for violation of Rule 1. (1) (Conduct (Careless of the Safety of Themselves or Others), Rule 80.1 (Avoiding Slips, Trips and Falls), Rule 1.1.2 (Alert and Attentive) and Rule 1.1.1 (Maintaining a Safe Course) in connection with being careless of his safety when he jumped over a pool of water causing him to slip and fracture his lower leg is based on unproven charges, unjust, unwarranted and excessive (System File MW-08-75/1504875D MPR).
2. As a consequence of the violation outlined in Part (1) above, we are now requesting that the charges be dropped and that Mr. Polasek have his personal record cleared of all charges. Also that be reinstated with all back pay, seniority unimpaired and all other rights due to him by the collective bargaining agreement."

FINDINGS:

Public Law 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 April 4, 2008, Carrier notified Claimant to appear for a formal Investigation on April 15, 2008, which was mutually postponed and subsequently held on June 10, 2008, concerning the following charge:

"Please report to the Miller Yard Office, at 8150 South Central Expressway, Dallas, Texas, on Tuesday, April 15, 2008, 1:00 p.m., for investigation and hearing on charges to develop the facts and place responsibility, if any, that on March 30, 2008, you were careless of your safety when you allegedly jumped over a pool of water causing you to slip and fracture your lower leg.

This is a possible violation of Rule 1.6 (1) (Conduct (Careless of the Safety of Themselves or Others), Rule 80.1 (Avoiding Slips, Trips and Falls), Rule 1.1.2 (Alert and Attentive), and Rule 1.1.1 (Maintaining a Safe Course), as contained in the General Code of Operating Rules, effective April 3, 2005, in the Safety Rules effective July 30, 2007."

On June 25, 2008, Claimant was notified that he had been found guilty as charged and was dismissed from service.

It is the Organization's position that the Carrier erred in dismissing the Claimant which was subsequently reduced to a suspension. It argued that the charge against the Claimant is that he was careless of his safety when he jumped over a pool of water, however, a careful reading of the record indicates there is no evidence that the Claimant attempted to jump over a pool of water. It further argued that the Carrier speculated that because the Claimant sustained an injury, he must have violated the various cited Safety Rules when in fact the testimony of the Claimant and the only eye-witness confirm that Claimant conducted himself in a safe manner attempting to avoid injury. It concluded that the Carrier failed to prove the Claimant responsible for the injury sustained on March 30, 2008, and requested that the Claim be sustained as presented.

It is the position of the Carrier that the Claimant admitted during the Hearing that he did in fact attempt to cross a pool of water on March 30, 2008, using a tie as a bridge, which was careless of safety in its self. It argued that Claimant's behavior indicates a lack of concern for his own safety that resulted in injury to himself. It points out that its employees are engaged in dangerous work every day, and in order to remain free from injury, employees have a responsibility to strictly follow its Safety Rules and because the Claimant did not adhere to those Rules he was injured. It concluded that Claimant behaved recklessly, and therefore, the dismissal which was reduced to a suspension was appropriate and should not be disturbed.

The Board has thoroughly reviewed the record and finds that the Claimant entered the Carrier's service on April 4, 1997, and on March 30, 2008, he was assigned and working as a Machine Operator on a CAT Tamper on Gang 9166. On that morning, Claimant and his co-Machine Operator Gregurich were transported to the location where the CAT Tamper had been left the previous evening. During that night there had been heavy rains and there was much standing water near the tracks. Claimant and his

partner located what appeared to be a safe area along the right of way to get to their assigned machine. Claimant led the way and when he stepped on the end of a tie partially submerged in a puddle of water the tie shifted which caused the Claimant to lose his balance, falling and breaking his leg. The injury was promptly reported and medical attention was provided.

Testimony of both the Claimant and co-worker Gregurich confirms that they assessed the situation and determined that the pathway they chose to traverse on their way to the CAT Tamper appeared to be safe and Claimant did not attempt to jump the water (See testimony of Gregurich, on pages 21 & 22 and Claimant, on pages 53 - 56 of the Transcript). No one else was present at the time of the incident, nor is there any other first-hand evidence which contradicts the aforementioned testimony. Carrier witnesses testimony is speculative in nature and assumes that there must have been a safer way to get to the CAT Tamper because of the fact that Claimant was injured. Many tribunals have ruled that some injuries are unavoidable and the fact that the Claimant was injured in this instance does not prove that he violated the Carrier's Safety Rules. The record is clear that the Carrier did not meet its burden of proof that Claimant was inattentive or careless in the performance of his duties.

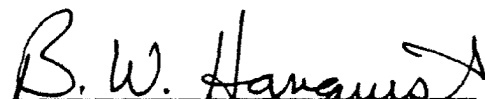
The Board finds and holds that the dismissal subsequently reduced to a suspension was not appropriate and should be removed from the Claimant's personnel record. The record indicates that on October 29, 2008, the Carrier determined that the dismissal should be reduced to a suspension and directed the Claimant to return to its service. The record further substantiates that the Claimant could not report to work because his broken leg had not yet healed. Therefore, because there was no loss of work opportunity to the Claimant as he was unable to perform any service we will not award any monies.

AWARD


Claim sustained in accordance with the Findings.
The Carrier shall make this Award effective within 30 days of the date hereof.



William R. Miller, Chairman



B. W. Hanquist, Carrier Member



T. W. Kreke, Employee Member

Award Date: 12/9/09