

NATIONAL MEDIATION BOARD

**PUBLIC LAW BOARD NO. 6402
AWARD NO. 132, (Case No. 153)**

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

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 Level 4.5 discipline imposed upon Machine Operator Justin W. Hall in connection with a waiver agreement signed by him on July 21, 2008 concerning a violation of Carrier Rule 42.2.2 in regards to a machine collision on July 20, 2008 was unjust, unwarranted and in violation of the Agreement (System File MW-08-103/1507682D MPR).
2. As a consequence of the violation outlined in Part (1) above, we request that Mr. Hall be granted remedy in accordance with Rule 21(f) of the Agreement."

FINDINGS:

Public Law Board 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.

The facts of the case are that on August 21, 2008, Claimant was operating a Speed Swing Machine on System Gang 9116 at Milepost 237, Main Line #1 on the Dallas Subdivision. Claimant was unable to stop his machine in time and collided with another machine. As a result the boom of Claimant's Speed Swing hit the roof of a Spike Puller doing serious damage to the roof of the other machine.

Following the accident, Claimant was given a Discipline Calculation Worksheet equating the incident if proven to be valued at a Level 4.5, which requires up to a 60 day suspension under the Carrier's UPGRADE Policy. Simultaneously, Claimant received a Waiver Offer allowing him to accept the discipline and waive his right to a Hearing or reject the offer and elect a Hearing. Claimant signed the waiver accepted the proposed discipline, after which he was required to observe the suspension.

It is the Organization's position that it need not address the issue of whether or not the Claimant was guilty of violating Carrier Rule 42.2.2 because the Carrier violated Rule 21 (g) of the Agreement when it did not give the Claimant a reasonable opportunity to consult with his duly authorized representative before signing any waiver. It argued that being advised of his right to an Investigation is not the same thing as being afforded the opportunity to consult with his representative before signing a waiver of his contractual right, therefore, it requested the Claim be sustained as presented.

It is the position of the Carrier that this is a classic case of an employee standing up and accepting responsibility for his actions wherein he waived his right to a Hearing which was permissible under Rule 21. It argued that Claimant accepted the discipline without coercion and the dispute should go no further. It asked that the Claim remain denied.

The Board has thoroughly reviewed the record including Rule 21(g) which states:

"Except as otherwise provided herein, an employee may waive in writing the right to a hearing and accept the discipline proposed, which will then be levied against the employee's discipline record. An employee will be afforded a reasonable opportunity to consult with his duly authorized representative before signing any waiver. When a waiver is utilized, it will not be necessary to further advise the employee that discipline has been assessed. Signed waiver will be placed on the employee's discipline record, and a copy thereof will be furnished the charged employee and the General Chairman."

Rule 21 does not require that an employee must consult with his union representative prior to accepting discipline, instead it affords him the opportunity to do so if he wants to. The Rule allows him up to 15 days to accept or reject the waiver offer during which time he can seek guidance from the Organization, but there is no mandatory requirement to seek counsel.

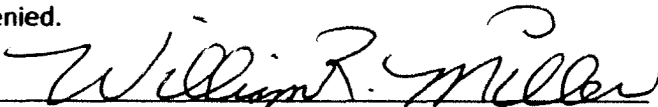
In the instant case Claimant accepted the waiver and according to Manager R. E. Howard he was advised of his right to an Investigation and was glad to sign for a Level 4.5 discipline because he thought he would probably face a more severe punishment. The Manager's statement was not refuted nor did the Claimant voice any complaint regarding his acceptance of the discipline.

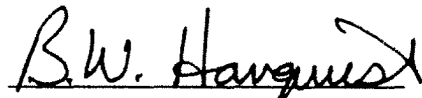
The Board finds and holds that Carrier's discipline of Claimant as the result of his action on July 21, 2008, was justified. Claimant was afforded the opportunity to have an Investigation, but declined

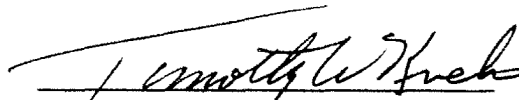
and voluntarily accepted the discipline wherein he admitted his guilt. The discipline will not be set aside.

AWARD

Claim denied.


William R. Miller, Chairman


B. W. Hanquist, Carrier Member


T. W. Kreke, Employee Member

Award Date: 12/9/09