

NATIONAL MEDIATION BOARD

**PUBLIC LAW BOARD NO. 6402
AWARD NO. 134, (Case No. 155)**

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 dismissal of Machine Operator Santos Perez for violation of Rule 1.6 (1) [Conduct (Careless of the Safety of Themselves or Others)] and Rule 42.2.2 (Other Speed Requirements) in connection with operating a multi screw machine is based on unproven charges, unjust, unwarranted and excessive. (System File MW-08-110/1508903 D).
2. As a consequence of the violation outlined in Part (1) above, we are now requesting that the charges be dropped and that Mr. S. D. Perez have his personal record cleared of all charges. Also, that he be compensated for all lost time, vacation rights and seniority rights unimpaired."

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.

On May 23, 2008, Carrier notified Claimant to appear for a formal Investigation on June 12, 2008, which was mutually postponed and subsequently held on July 30, 2008, concerning the following charge:

"Please report to the Crown Plaza Suites, 700 Avenue H East, Arlington, Texas, on Thursday, June 12, 2008, at 8:00 A.M., for investigation and hearing to develop the

facts and place responsibility, if any, in connection with the charge that at approximately 12:05 p.m., on May 17, 2008, while working on Gang No. 9113, at approximately Milepost 218, on the Fort Worth Subdivision, you operated a multi screw spiker machine in such a manner that your machine struck another machine resulting in damage to the machines resulting in damage to the machines and the death of John T. Hadfield.

If established, such actions would be a violations of Rules 1.6 (1) (Conduct (Careless of the Safety of Themselves or Others)), as contained in the General Code of Operating Rules, effective April 3, 2005; and Rule 42.2.2 (Other Speed Requirements), as contained in the Maintenance of Way and 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 5 and may result in your dismissal."

On August 14, 2008, Claimant was notified that he had been found guilty as charged and was dismissed from service.

There is no disagreement between the parties that this is the second of two dismissal cases involving the same Claimant presented to the Board. In Award No. 133, Case No. 154, the Board determined that there was no disagreement between the parties that on May 17, 2008, Claimant while operating a Multi-Screw Machine struck another machine resulting in damage to both machines and the death of co-worker John T. Hadfield. Following the accident Claimant was given a reasonable cause drug and/or alcohol test in accordance with the Carrier's Drug and Alcohol Policy. Claimant tested positive for methamphetamines and was removed from service pending the outcome of that Investigation. In the prior case the question at issue was whether or not the Claimant should have been allowed to enter the Rehabilitation/Education Program whereas the issue in the instant case is whether or not the Claimant operated his machine in a careless or unsafe manner.

It is the Organization's position that the Carrier failed to prove its charges and the Hearing was not conducted in a fair and impartial manner. It argued that Claimant attempted to explain that there was a mechanical problem with the machine that was documented in the machine's log book and that his May 17, 2008, entry to the log had been altered. According to it, all of this could have been proven or dispelled by producing the original log book rather than a copy of the single entry. Because the Hearing Officer did not secure the original log book and allowed unsubstantiated and inflammatory testimony concerning the Claimant's physical condition to remain in the record over its strenuous objection he was a denied a fair and impartial Investigation and the Carrier did not meet its burden of proof. 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 violated the Rules he was charged with and he was provided with a fair and impartial Hearing. It argued that Claimant failed to control the speed of his machine that caused the collision and the death of his co-worker which was confirmed by the fact that he could not stop his machine in a timely fashion. Furthermore, it argued that the testimony gathered

at the Hearing confirms that the accident involved a "high impact collision" as there was significant damage to both pieces of equipment. It stated that Claimant not only collided with another machine, but did so at a high rate of speed on an uphill grade leading to the death of his co-worker while under the influence of an unauthorized drug in his system, therefore, dismissal was the appropriate punishment. In closing it asked that the discipline not be disturbed and the Claim remain denied.

The Board has thoroughly reviewed the record and will first address the Organization's procedural arguments. A reading of the record indicates that the Carrier provided the Claimant with a fair and impartial Investigation and Claimant was not inhibited in his defense. All of the Organization's procedural arguments are rejected and the case will be determined on its merits.

The Board finds that on page 60 of the transcript the Claimant was questioned about the job briefing prior to the accident. The Claimant was asked whether or not during that briefing he was informed and instructed as to where the next work site would be and to what Milepost he should take his machine to. Claimant's answer in pertinent part was as follows:

"...I wrote it down wrong. I misunderstood them. I thought we had to go to 228 instead of- instead of- instead of one- 218. So it was my mistake that I wrote it down wrong, so I'm thinking I had a 10 mile travel to the next location." (*Underling Board's emphasis*)

On page 63 of the transcript, the questioning of Claimant continued regarding the condition of the machine he was operating on May 17, 2008. Claimant was asked the following:

"Q Mr. Perez, and then- and- and according to the pre-trip here, am I correct in- in reading that there was no problems with the machine?"

A That morning, no. (*Underlining Board's emphasis*)

On page 68 of the transcript the Claimant was asked and he testified as follows:

"Q Mr. Perez, on the day of May 17th, 2008, I believe it was stated in earlier testimony that you were under the influence of methamphetamine. Is that correct?"

A That's- that's not correct because I had done some three days before. At the time, I wasn't- I- it was in my system but I wasn't affect uh- affect- I mean infect- I wasn't bothered by it. I mean I had- I wasn't feeling- I had slept and ate the day- that night and the day before. I- it was in my system but I had done it three days before that- that day. So. (*Underlining Board's emphasis*)

Once again on page 68 Claimant stated that the machine was safe to operate and on page 69 he further testified that he should have probably operated the machine at a slower speed.

Manager Maintenance of Way Equipment Operations C. W. Jones testified on pages 43 and 44 of the transcript that tests were conducted by him and two other equipment Supervisors on the Multi-Screw Spiker Machine operated by the Claimant and the machine was found to be working properly. Jones testified there was nothing wrong mechanically that would have prevented the machine from stopping in half the sight distance, which was 434 feet to where Claimant would have been able to see the machine in which he collided. Manager Jones testimony was not refuted.

The aforementioned testimony of the Claimant clarifies the following: (1) he thought he had ten miles further to go to the work site because he did not write down the correct milepost number; and (2) the machine was functioning properly; and (3) he had methamphetamines in his system; and (4) he was operating the machine at too fast a speed. The conclusion is inescapable that the contributory factors to the cause of the accident are Claimant's use of methamphetamines, failure to correctly transcribe the Milepost work site and failure to operate his machine at a safe speed. Furthermore, the record proves that the machine was mechanically sound. The testimony of Manager Jones and the Claimant confirm that the Carrier met its burden of proof that Claimant was guilty of violating Rules 1.6 (1) and 42.2.2 as he failed to operate his machine in a safe manner.

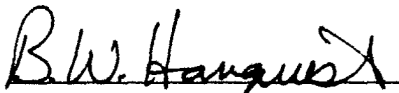
The only issue remaining is whether the dismissal was appropriate. The seriousness and the tragedy of the accident is highlighted by the fact that Claimant was also arrested by the Johnson County Sheriff's Department and is currently awaiting trial based on this same incident. The Board finds and holds there is no reason for mitigation, because the dismissal was not arbitrary, excessive or capricious. 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