

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6402

AWARD NO. 140, (Case No. 161)

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
DIVISION - IBT RAIL CONFERENCE**

vs

**UNION PACIFIC RAILROAD COMPANY (Former Missouri Pacific
Railroad Company)**

William R. Miller, Chairman & Neutral Member

T. W. Kreke, Employee Member

B. W. Hanquist, Carrier Member

Hearing Date: August 17, 2010

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

1. The Carrier's decision to impose a Level 3 discipline, five (5) day suspension without pay, upon Claimant Q. L. Bratchett, for his alleged violation of Rule 1.13 (Reporting and Complying with Instructions) in connection with his use of his personal cell phone while working on the tracks on the Palestine Subdivision near Mile Post 99.98 at approximately 11:47 A.M. on July 7, 2008 is unjust, unwarranted, excessive and in direct violation of the Agreement (System File MW-08-118/1510165D).
2. As a consequence of the violation outline in Part 1 above, we request that the Level 3, five (5) day suspension without pay be reversed and expunged from the Claimant's record and that the Claimant be compensated for fifty-five (55) hours as his respective straight time rate of pay for the time served on October 9, 2008 through and including October 13, 2008."

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 August 5, 2008, Carrier notified Claimant to appear for a formal Investigation on September 2, 2008, which was mutually postponed until September 5, 2008, concerning in pertinent part the following charge:

"...to develop the facts and place responsibility, if any, that while employed as a MOW Machine Operator Helper, at Palestine Subdivision, near Milepost 99.98, at approximately 11:47 a.m., on July 7, 2008, you allegedly failed to comply with instructions from supervisor to not use cell phones while working on track.

These allegations, if substantiated, would constitute a violation of Rule 1.13 (Reporting and Complying with Instructions), as contained in the General Code of Operating Rules, effective April 3, 2005. In addition to your current discipline status of a Level 3, please be advised that if you are found to be in violation of this alleged Level 3 charge the discipline assessment may be a Level 4...."

On September 25, 2008, Claimant was notified that he had been found guilty as charged and record was assessed with a Level 3 UPGRADE discipline and a five day suspension.

The facts indicate that on July 7, 2008, Claimant was working as a Machine Operator Helper on the Palestine Subdivision near Milepost 99.98 when he was observed by Track Supervisor Garman utilizing his personal cell phone to take pictures of another employee. Garman a few days prior had given instructions to all employees on the gang that the use of cell phones while working was prohibited and would result in disciplinary action. Garman's warning was a follow-up to the instructions given to the gang at the end of May 2008 by the Director of Track Programs at a town hall meeting.

It is the Organization's position that the Claimant was performing his work assignment when he noticed that another employee who had been assigned to assist in the rail laying process was cutting the rail with a rail saw while only wearing a facial respirator. Said employee was not wearing the rest of his proper personal protective equipment (PPE) to perform his rail sawing assignment; hard hat, face shield or leggings. According to the Organization, that because there had been previous discussion about the amount of injuries taking place on Gang 9112 and because the Claimant readily recognized that the Crane Helper employee was working unsafely, he stopped working and informed his sub-group coordinator of the unsafe act that was taking place. The Claimant and his sub-group coordinator J. Braxton, then proceeded to step off the tracks, approximately 25 feet and into a safe location away from on track equipment and the men performing track maintenance work, and the Claimant used the camera function of his personal cell phone and took a picture of the employee performing the aforementioned unsafe act. The Organization argued at that specific moment Supervisor Garman noticed the Claimant taking the picture and rather than address the employee not wearing proper PPE while operating the rail saw, Garman instead approached Claimant instructed him to put his cellular telephone away and informed him that he was going to be disciplined. It further argued that Claimant offered an explanation which was ignored by Garman. The Organization contended that the Claimant was trying to be a good employee and took the picture with his immediate leader's approval so that it

could be used to correct the unsafe actions of another. 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 safety is of paramount importance when working on and around railroad tracks and equipment. Due to the inherently dangerous nature of the work performed by MW employees, it is imperative that the Carrier have stringent safety policies and rules that must be followed. It argued that it is common knowledge that cell phones are a distraction to users whether walking, driving or working on the railroad tracks and of the Carrier has repeatedly informed its employees that cell phones are not allowed to be utilized while working on or around the rail.

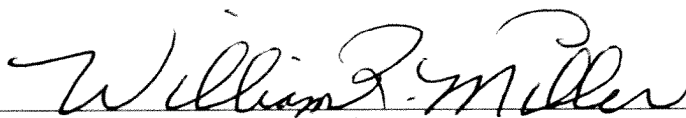
According to the Carrier, on the day in dispute Track Supervisor Garman observed Claimant using his cell phone to take pictures of another employee. Supervisor Garman a few days prior had given all employees on the gang a reminder that the use of cell phones while working was strictly prohibited and would result in discipline. The Carrier also argued that contrary to the Organization's assertion that Claimant was taking the picture of the co-worker to be used as a corrective measure of that employee does not excuse his misbehavior. Simply put it argued "two wrongs don't make a right". It closed by asking that the discipline not be disturbed and the Claim remain denied.

The Board has thoroughly reviewed the record finds an important unanswered question. The question is: **"Did the Claimant have the approval of his sub-group coordinator J. Braxton to take the picture of co-worker cutting rail while not wearing personal protective equipment (PPE)?** There is no dispute between the parties that J. Braxton was Claimant's superior as sub-group coordinators are often Assistant Foremen. The Claimant testified that Braxton gave him permission to take the photograph with his personal cell phone. That testimony was not refuted. It is a well settled issue within this industry that if one party sets forth a factual argument and it is not refuted by the other, that contention not challenged must be accepted by the Board as fact (See Third Division Awards 11828, 12251, 12363, 15018 and First Division Awards 16517, 20288 and 20552 which stand for that proposition, to name just a few). In this instance the Carrier could have rectified the issue by having Braxton at the Hearing who could have either confirmed or denied Claimant's position. Absent that information the Board as the appellate trier of fact is locked to the record that was produced on the property and in this instance the Claimant's unchallenged story of what transpired on July 7, 2008, must be accepted.

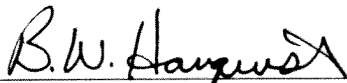
The Board finds and holds that in this case the record is clear that the evidence and testimony preponderates in favor of the Claimant and the Carrier did not meet its burden of proof, therefore, the discipline is set aside and the Claim is sustained as presented.

AWARD

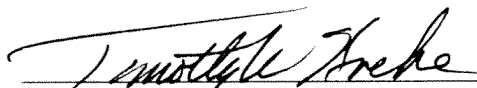
Claim sustained and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed by the parties.



William R. Miller, Chairman



B. W. Hanquist, Carrier Member



T. W. Kreke, Employee Member

Award Date: October 4, 2010