

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6402

AWARD NO. 149, (Case No. 170)

**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 18, 2010

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

1. The Carrier discipline [Level 3 - five (5) days off without pay] of Mr. J. Ellis issued by letter dated September 11, 2009, in connection with alleged violation of Company Rule 1.13 (Reporting and Complying with Instructions) as contained in the General Code of Operating Rules, in connection with allegations that Claimant failed to comply with instructions in operator manual to lock and secure in the travel position all components of the gauger spiker damaging gauger mechanism, was unjust, capricious, based upon unproven charges and violation of the Agreement (System File UP-513-JF-09/1521817D).
2. As a consequence of the Carrier's violation outlined in Part 1 above, Mr. Ellis shall now be compensated for all time lost from being removed from service September 17 through September 21, 2009, have all charges dismissed, have the Level 3 discipline removed from his record and have all other rights guaranteed by the Collective Agreement Rule 21(f)."

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 July 9, 2009, Carrier notified Claimant to appear for a formal Investigation on July 29, 2009, which was mutually postponed until August 18, 2009, concerning in pertinent part the following charge:

"...to develop the facts and place responsibility, if any, that while employed as MOW Machine Operator at Galena Park, Texas, Clinton Industrial Lead, at approximately 0915 hours, on June 19, 2009, you allegedly failed to comply with instructions in operator manual to lock and secure in the travel position all components of the gauger spike damaging gauger mechanism.

These allegations, if substantiated, would constitute a violation of Rule 1.13 (Reporting & Complying with Instructions), as contained in the General Code of Operating Rules, effective April 3, 2005, and Propelling in the Operators' Manual for Gauger Spiker. Please be advised that if you are found to be in violation of this alleged charge the discipline assessment may be a Level 3, and under the Carrier's UPGRADE Discipline Policy may result in up to five (5) days off without pay...."

On September 11, 2009, Claimant was notified that he had been found guilty as charged and record was assessed with a Level 3 and a five day suspension without pay.

The undisputed facts are the Claimant entered the service of the Carrier on February 3, 1998, and had a Machine Operator seniority date on the System Roster of June 11, 2004. Claimant was assigned to the gauger/spiker machine on System Gang 9112 at Galena Park, Texas, on the Clinton Industrial Lead when the alleged incident occurred.

It is the Organization's position that at the time of the incident Claimant had over 11 years of service with a clean record. It argued that the Notice of Investigation was vague and unclear and the Claimant was deprived of "due process" It argued that on the date in dispute the gauger/spiker machine had an on-going problem with the safety pins that help to hold up the gauger which was not corrected. It pointed out that witness Mechanic R. F. Mendez stated that he did not witness the machine derail or strike anything because of wide gauge at the joints. It further argued that Mendez testified that in order for the gauger to be bent the Spiker would have had to have been traveling forward and according to it the testimony indicates that the machine traveled in a reverse motion. 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 on June 19th while operating his machine, Claimant failed to secure his gauger mechanism to lock and secure in the travel position as required by the machine's operating manual and by failing to secure the part with the appropriate locking pin while traveling, he caused damage to the machine. It closed by asking that the discipline not be disturbed and the Claim remain denied.

The Board has thoroughly reviewed the record and we find no procedural errors which require setting aside the discipline as the Claimant was afforded his "due process" Agreement rights.

Turning to the merits the review of the Transcript reveals that R. Mendez, Work Equipment Mechanic with Gang 9111 testified on page 73 of regarding the repair of the gauger/spiker machine as follows:

"A Correct. On the- on the 18th of June, the day before the incident was the day that we worked on the latching mechanism for the gauger. That was the day before. And it had been damaged there for a little while. The latching mechanism. But on the 18th was the day that we fixed it and it was- it was able to be pinned. I mean I pinned it myself on the 18th. That was the day before..."

On pages 123 - 124 of the Transcript the Claimant confirmed that he was operating the subject machine when it derailed. Testimony from various other witnesses substantiated that if the gauger mechanism had been properly secured the damage that occurred on June 19, 2009, would not have happened. It is clear from the record that the Carrier met its burden of proof with substantial evidence that the Claimant failed to comply with instructions when he failed to properly secure (pin) the gauger mechanism resulting in damage to the machine he was operating.

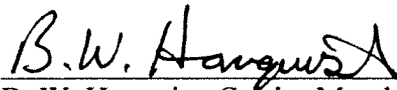
The only issue remaining is whether the discipline was appropriate. The discipline exercised by the Carrier was in accordance with its UPGRADE Discipline Policy, therefore, the Board finds and holds that the discipline will not be set aside because it was not arbitrary, excessive or capricious.

AWARD

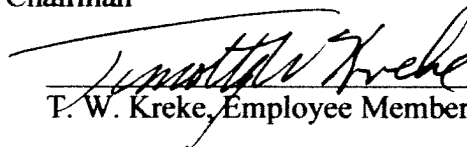
Claim denied.



William R. Miller, Chairman



B. W. Hanquist, Carrier Member



T. W. Kreke, Employee Member

Award Date: Nov 1, 2010