

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6402

AWARD NO. 151, (Case No. 172)

**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 Level 5 discipline (permanent dismissal) imposed upon Foreman G. Lewis for alleged violation of General Code of Operating Rules (GCOR) Rules 1.6(2) (Conduct - Negligent) and 42.2.2 (Other Speed Requirements) in connection with his involvement of an equipment collision while employed as foreman on Tie Gang 9168 on August 19, 2009 is based on unproven charges, unjust, unwarranted and excessive (System File UP-517-JF-09/1523869D).
2. As a consequence of the violation outlined in Part 1 above, '...for the removal of the charges for the alleged violation of Union Pacific Rule 1.6(2) (Conduct - Negligent), and Rule 42.2.2 (Other Speed Requirements) as contained in the general Code of Operating Rules, effective April 3, 2005 and the removal of the Claimant's assessment of the Level 5, Discipline and the removal of the Claimant's unwarranted and unjustified dismissal from active service of the Union Pacific Railroad from his Personnel Record and the reinstatement of the Claimant to active service with all seniority unimpaired, to be paid for all time lost, beginning August 20, 2009, through and including on a continuous basis until this matter is settled, at the Claimant's respective straight time rate of pay and any and all overtime acquired by the gang to which the Claimant was assigned to at the Claimant's respective overtime rate of pay, through and including on a continuous basis until this matter is settled, all lost time to be credited to towards Railroad Retirement, vacation, hospitalization and all expenses to be paid, to include any meals and mileage at the rate of \$.55 a mile acquired by the Claimant attending the Formal Investigation on September 29, 2009 from the Claimant's place of residence at 568 Augustine Drive, Lake Charles, Louisiana 70611 to the Miller Yard Office, Conference Room, 8150 South Central

Expressway, Dallas, Texas and back to the Claimant's place of residence ***'
(Employees' Exhibit "A-3")."

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 28, 2009, Carrier notified Claimant to appear for a formal Investigation on September 16, 2009, which was mutually postponed until September 29, 2009, concerning in pertinent part the following charge:

"...to develop the facts and place responsibility, if any, that while employed as Track Foreman, on Gang 9168, on August 19, 2009, you allegedly were careless of the safety of yourself and others and negligent while riding on the RLPI 0902 without adequate passenger seating and when you failed to observe the sight distance and speed of the RLPI 0902 to enable it to stop in half the distance the track is seen to be clear. This alleged failure in the RLPI 0902 colliding with the TRIP 0905 and eight (8) employees being injured.

These allegations, if substantiated, would constitute a violation of Rule 1.6(1) (Conduct - Careless of the safety of themselves or others), Rule 1.6(2) (Conduct - Negligent), and Rule 42.2.2 (Other Speed Requirements), as contained in the General Code of Operating Rules, effective April 3, 2005, and in the Maintenance-of-Way Rules, effective November 17, 2008. Please be advised that if you are found to be in violation of this alleged charge the discipline assessment may be a Level 5, and under the Carrier's UPGRADE Discipline Policy may result in permanent dismissal."

On October 14, 2009, Claimant was notified that he had been found guilty as charged and his record was assessed with a Level 5 UPGRADE discipline and he was dismissed from service.

The facts indicate that the Claimant entered the service of the Carrier on August 14, 2001 and at the time of the alleged rule infraction he was assigned and working as the Foreman on Gang 9168.

It is the Organization's position that the Investigation was not fair and impartial and the Carrier did not meet its burden of proof. It argued that the Claimant was not on board RLPI 0902 on August 19, 2009, while it was traveling, but had been on it earlier in the day when it was not traveling as he was asked to monitor the machine by Trackman Frazier as he thought something was wrong with it. Supervisor C. W. Jones testified that the Mechanics do this all the time when they are trying to diagnose any problem on equipment and this is not a violation as long as the piece of equipment is not in the traveling mode.

The Organization further argued that the reason the accident happened is because there was too much oil on the rail, the decline in elevation and the heavy weight behind the machine coupled with the fact that one Operator had no radio and the other Operator's radio didn't work properly. It also noted that three rather than eight employees were injured and only one resulted in lost time. It reasoned that because the Claimant was not on board the machine he had no fault in causing the accident, therefore, 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 there were no procedural violations involved in the handling of the dispute. On the merits it argued that the Claimant was improperly riding on the machine and in violation of Carrier and FRA's which only allowed the Operator to ride. The Claimant was also in violation of those same Rules, in addition to Rule 42.2.2 when he failed to ensure that even though he should not have been on the machine while it was traveling, did nothing to ensure or assist the Operator in operating "at a speed that will allow the Operator to stop in 1/2 the distance the track is seen to be clear". Furthermore, it argued that the record shows that the Claimant failed to ensure that those employees ahead of the machine were properly warned. It suggested that the Claimant should have broadcasted over the radio an emergency warning to the rest of the gang instead of just telling them to move forward. His action or lack of it contributed to the injuries and because of that it closed by asking that the discipline not be disturbed and the Claim remain denied.

The Board has thoroughly reviewed the record finds no procedural violations that require setting aside the discipline as it is clear that the Organization and Claimant fully understood the charges which is evident by their worthy defense. The Claimant was not denied his "due process" Agreement rights.

On page 51 of the Transcript the Claimant was asked the following question:

"Q And are you saying that you were not riding on the machine?"

A Sir, I did not do nothing that no one on the gang, including supervisor and mechanic do it. That's why I felt it was- I wasn't wrong to get on it and I don't

see what was wrong with it...." (*Underlining Board's emphasis*)

On page 38 of the Transcript G. Noll, Manager of Track Programs - Tie South read into the record a written statement by the Claimant regarding the incident in question which reads in pertinent part as follows:

" As the one man rail lift approached the 526.5, I noticed the machine in the main line at the switch. I noticed the 6869 tie gangs at a slow move at or around the 527. At 526.5 the machine was at a slow roll. As we passed the 526.75, the machine brakes would not hold..." (*Underlining Board's emphasis*)

On page 62 of the Transcript G. A. Noll was asked whether there was any further evidence that Claimant was on board the machine at the time of the accident. Noll responded as follows:

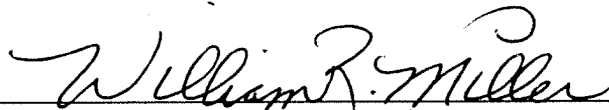
"A No, when I asked Mr. Lewis about being on the machine and he stated that yes he was, and he knew that he- it was wrong. And I asked him why, he stated the reason he was on the machine was because Mr. Frazier asked him to get on the machine." (*Underlining Board's emphasis*)

Based upon the aforementioned testimony and evidence it is clear that the Claimant was on board the machine at the time of the accident. Claimant's actions of improperly riding on the machine was not only careless and negligent, but also a violation of Carrier's and FRA's Rules. Nonetheless, having chosen to be on the machine, once the Claimant realized the Operator was having difficulty stopping it, he should have taken more positive action by either taking it over or having radioed ahead and told those employees to get in the clear rather than just moving ahead. The record substantiates that the Carrier met its burden of proof that the Claimant was guilty as charged.

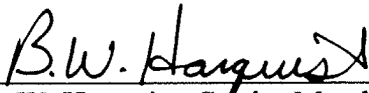
The only issue remaining is whether the discipline was appropriate. The Board does not excuse the Claimant's behavior as he was culpable for his actions, however, after review of the record the Board has determined that the discipline was excessive. Therefore, the Board finds and holds that the Claimant is to be reinstated to service with seniority intact and all other rights unimpaired without backpay.

AWARD

Claim partially sustained in accordance with the Findings 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: Nov 1, 2010