

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6402
AWARD NO. 177, (Case No. 198)**

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

vs

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

William R. Miller, Chairman & Neutral Member
K. D. Evanski, Employee Member
K. N. Novak, Carrier Member

Hearing Date: September 19, 2012

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

- 1. The dismissal of Truck Driver M. Redd without the benefit of a fair and impartial investigation in connection with his removal from service beginning on March 10, 2011 is unjust, unwarranted and in violation of the Agreement (System File UP-236-WF-11/1546108).**
- 2. As a consequence of the violation referred to in Part 1 above, we request that Mr. Redd be reinstated with all back pay from March 10, 2011 and continuing. Also, that he be reinstated with all seniority and vacation rights unimpaired and all other rights due to him by the collective bargaining 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 indicate that Claimant was involved in an incident on October 5, 2010, wherein the Claimant was allegedly dishonest with two Bridge and Building Managers. Subsequently, the Claimant was charged with violation of Rule 1.6 Conduct - Part 4 (Dishonesty).

The Carrier offered the Claimant a Leniency Agreement dated October 21, 2010. The terms of the leniency required the Claimant to waive investigation and accept dismissal with the stipulation that Claimant would then be returned to Carrier's service with a discipline status of

Level 3 and Claimant would be subject to an 18 month probationary period. Paragraph 2 stated in pertinent part:

"If at any time during the eighteen (18) months probationary period, commencing with the date he returns to service, he is in violation of any serious rule violation or any cardinal safety rule violation, he will revert back to the status of a dismissed employee without the benefit of a hearing under the Collective Bargaining Agreement he is working."

On March 9, 2011, the Claimant was involved in an incident with jacks on a bridge falling into the San Jacinto River. The Claimant called Manager of Bridge Maintenance C. Gust and made statements indicating the jacks had accidentally fallen whereas two co-workers allegedly provided different facts regarding the incident. The Carrier asserted that the Claimant was dishonest about the incident regarding the details of what occurred. At the time of the second incident the Claimant was still within his probationary period. As such, the Claimant was returned to dismissed status without the benefit of formal Hearing in accordance with the terms of his Waiver.

It is the position of the Organization that the Carrier did not meet its burden of proof because it did not show that Claimant was dishonest. It argued the record shows that the Claimant reported the fact that he accidentally bumped the jacks and knocked them into the water. It further argued for the Carrier's position to have any substance it would have to show that Claimant intentionally knocked the jacks into the water and then was dishonest when he reported that action. It concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the Carrier's position that Claimant previously accepted dismissal for being dishonest regarding an incident on October 5, 2010, and then he was dishonest when recounting the events that occurred on March 9, 2011. It argued that Claimant's co-workers told a different story as to how the jacks fell into the river that proved the Claimant's dishonesty. It also argued that at no time during the on-property handling were those statements refuted or challenged nor did the Claimant submit a statement offering a different version of the event. Additionally, it stated that the Claimant failed to follow the directions of the job briefing and placed the gang in an unsafe condition. It closed by asking that the claim remain denied.

The Board has thoroughly reviewed the record and recognizes that the Organization offered various procedural arguments suggesting that the Claimant was denied "due process", but the Board is not persuaded that Claimant was denied his "due process" Agreement rights, therefore, the dispute will be resolved on its merits.

Review of the record reveals a discrepancy in the parties files. The Carrier argued that the statements from Manager Gust and two of Claimant's co-workers were not refuted on the property and there were no statements submitted by the Claimant. The Carrier's file reflects that argument, as it contains no exhibits that refute the aforementioned statements nor does it contain any statement from the Claimant as to what transpired on March 9, 2011, whereas the Organization's file contains a rebuttal letter to Manager Gust's statement signed by the Claimant as well as a written statement from the Claimant regarding the incident. However, it is not clear that the Claimant submitted those statement to the Carrier. The Board has determined that Claimant's statements are "de novo" as there was no indication that they were exchanged between the parties.

The Carrier asserted that the Claimant was dishonest about what happened on March 9th. Manager Gust stated in pertinent part:

"Mr. Redd stated in a phone call to myself yesterday at 1630 hrs that he accidentally knocked a jack into the water below the bridge while working. At 1712 hrs bridge carpenter Marshall "Scott" McCarthy called and gave details that Mr. Redd actually backed over the jacks with the gang truck which is not reflective of the story Mr. Redd told me. I contacted the other carpenter on the gang, Harley Matthews, and verified Mr. McCarty's story...."

Carpenter M. McCarthy wrote in his statement the Claimant was driving the truck when it hit the jacks and the Claimant got out of the truck and told him the following:

"...I asked him what just happened and he said we had hit the jacks with the truck. I got out of the truck and checked the situation and both jacks had been knocked into the San Jacinto River..."

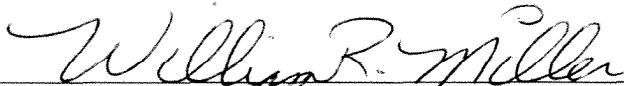
Carpenter Harley Matthews offered an explanation of the incident in pertinent part as follows:

"...We got back into the truck in order to return to the bridge, where we were working, by backing up; at that time I observed there was a barge approaching the bridge. We continued to back up until we heard a loud noise. After Mike Redd stopped he informed us that he had hit the jacks. After this happened we took time discuss a job briefing on what to do with this occurrence. Scott McCarthy and I then got out to go behind the truck and evaluate the situation further. Upon our evaluation, we noticed that Mike Redd had backed up on the bridge past the point where we had already removed ties and the jacks had fallen into the San Jacinto River...."

It is clear from the statements of Mr. McCarthy and Mr. Matthews that the Claimant was the first of the three employees to exit the truck after which he told his co-workers that he had accidentally bumped into the jacks and knocked them into the river. As previously mentioned Manager Gust stated that the Claimant told him "**...he accidentally knocked a jack into the water below the bridge while working...**" Gust said that Claimant's version was not reflective of what his co-workers stated, but he never explained how the Claimant's story differed. The Claimant clearly told McCarthy and Matthews that it was his fault that he bumped into the jacks and knocked them into the river with the truck. It is also evident that he told the Manager that he knocked the jacks into the river, however, the record gives no indication as to what his specific explanation for the accident was or how it differed from his co-workers version of the incident. The Carrier did not meet its burden of proof that the Claimant was dishonest or that he failed to accept responsibility for the accident of March 9, 2011, nor was there any showing that he did not meet the requirements of the Leniency Agreement dated October 21, 2010. Therefore, the Board finds and holds that the return of the Claimant to a dismissed status was in error and Claimant shall be reinstated to service at a Level 3 disciplinary status, with seniority intact and benefits unimpaired with full back pay in accordance with Rule 22(f) of the Agreement.

AWARD

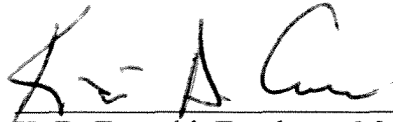
Claim sustained in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed.



William R. Miller, Chairman



K. N. Novak, Carrier Member



K. D. Evanski, Employee Member

Award Date: 10-23-2012