

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6402
AWARD NO. 182, (Case No. 203)**

**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 18, 2012

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

- 1. The ten (10) day suspension imposed upon Machine Operator D. Tovar for violation of Rule 1.13 Reporting and Complying with Instructions, Rule 43.4 Equipment Tie-Up and Rule 43.5 Unattended Equipment as contained in the General Code of Operating Rules and Maintenance of Way rules in connection with allegedly failing to set the parking brake and drain stored energy on BRP0801 on May 13, 2011 is based on unproven charges, unjust, unwarranted and in violation of the Agreement (System File UP-252-WF-11/1553422).**
- 2. As a consequence of the violation referred to in Part 1 above, Mr. Tovar shall have his record cleared of this matter and be compensated for all time lost including all straight time and overtime hours beginning July 10, 2011, through July 27, 2011 and all other rights due him under 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 and did participate therein.

On May 25, 2011, Claimant was directed to attend a formal Investigation on June 14, 2011, concerning in pertinent part the following charge:

**"...to develop the facts and place responsibility, if any, on the following charges:
While employed as Machine Operator on Gang 9293, at Finley Siding, Valentine**

Subdivision, at approximately 1130 hours, on May 13, 2011, you allegedly failed to set the parking brake and drain stored energy (air) on the BRP0801, causing the machine to strike the AASQ9208.

These allegations, if substantiated, would constitute a violation of Rule 1.6 Conduct (1) Careless of Safety, (2) Negligent, Rule 1.13 Reporting and Complying with Instructions, Rule 43.4 Equipment Tie-Up, and Rule 43.5 Unattended Equipment, as contained in the General Code of Operating Rules, effective April 7, 2010, and Maintenance of Way Rules, effective November 17, 2008."

On June 14, 2011, Claimant was notified that he had been found guilty as charged and was assessed a Level 4 discipline with a ten day suspension without pay.

It is the Organization's position that the Carrier did not meet its burden of proof. It argued that the Claimant was assigned to operate a Ballast Regulator Machine of Gang 9293 and on the evening of May 13, 2011, as the gang tied up and parked their machines the Claimant testified that he turned off the ignition, engaged the hand brake, turned the battery switch off and drained the air. It pointed out that no one offered any substantive evidence that refuted the Claimant's rendition of the incident. It further argued that if the Carrier had proven its cases, which it did not, the discipline was excessive for a 30 year employee with a good work record. It concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the position of the Carrier that the Claimant failed to set the parking brake and drain the stored air from the BRP0801 on May 13th. It argued the facts indicate that the next morning, May 14th, Mr. Smith was assigned to operate the same machine that the Claimant had used the night before. After checking the oil, Mr. Smith turned on the machine's master switch. That morning was very windy and as soon as the master switch was thrown the prevailing winds rolled the BRP0801 into the AASQ2908. According to it, after the incident BRP0801 was examined and it was discovered that the parking brake was in the off position and it still had air in the machine which meant that the Claimant failed to set the parking brake and drain the stored air, therefore, Claimant was guilty as charged and the discipline was appropriate. It closed by asking that the discipline not be disturbed and the claim remain denied.

Claimant asserted that on the evening of May 13th he properly shut down his Ballast Regulator Machine whereas the Carrier argued he did not which caused it to roll into another machine on the morning of May 14th when the master switch was turned on. The question to be answered is: "Could the machine roll if the brakes were properly set and the air was drained?" On pages 25 and 26 of the transcript Mr. K. D. Smith, Work Equipment Mechanic was questioned as follows:

"Q When did you become aware that the parking brake switch had not

been properly set?

A When the machine started rolling when I turned the power back on and it opened up the air valve releasing the brakes.

Q Okay on this particular piece of equipment, I believe you stated it was BRP0801, is the braking system known as a fail safe braking system?

A Yes it is.

Q What does fail safe mean?

A Fail safe means if you have no air on there, if you lose air pressure, that the brakes have a spring that apply the brakes.

Q Okay. So if the machine operated as functioned and the operator had set the machine up the prior evening to be stored and had drained his air pressure, there is no reason why the machine could have or sh- or would have rolled at any point in time.

A That's correct. *(Underlining Board's emphasis)*

On page 57 of the transcript Mr. Smith was re-examined as follows:

Q And to the best of your knowledge, when you proceeded to do an equipment inspection the next day, you did not find the service brake applied to the full detemp position-

A No.

Q -or you did not find the parking brake applied?

A No.

Q Did- and you did not find the main disconnect inside the cab con- on the control panel disconnected either?

A It was on the on position.

Q Is there anything else he could have done to have prevented this situation,

the operator?

A To drain the air tank.

Q And you're 100% positive he did not drain the air tank?

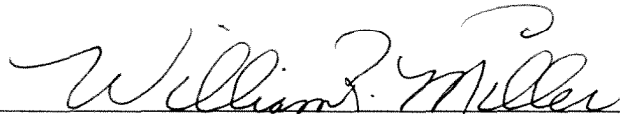
A It had air on the system. There's no way the machine could move with air on this- off of it. (Underlining Board's emphasis)

No one disputed Mechanic Smith's testimony that if the air was properly drained and the brake was set the wind on May 14th would not have moved the machine that Claimant shut down on the evening of May 13th. Substantial evidence was adduced at the Investigation that Claimant failed to properly shut down his Machine on May 13 which resulted in the subsequent accident that occurred on May 14, 2011, proving that Claimant was guilty as charged.

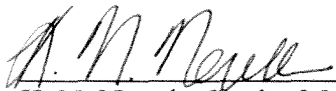
The only issue remaining is whether the discipline was appropriate. At the time of the incident the Claimant had over 30 years of service. However, the discipline assessed was in accordance with the Carrier's UPGRADE Discipline Policy and it was not excessive, arbitrary or capricious, therefore, the Board finds and holds the discipline will not be set aside and the claim will remain denied.

AWARD

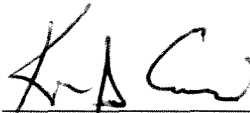
Claim denied.



William R. Miller, Chairman



K. N. Novak, Carrier Member



K. D. Evanski, Employee Member

Award Date: 11/11/12