

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6402
AWARD NO. 186, (Case No. 207)**

**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 discipline [Level 3 - five (5) day suspension without pay] imposed on Mr. P. Gloston, Sr. by letter dated July 28, 2011 for alleged violation of Rules 1.10 (Games, Reading, or Other Media), Rule 1.1 (Safety), Rule 1.1.2 (Alert and Attentive), Rule 1.13 (Reporting and Complying with Instructions), Rule 40.1 (Chapter 1 Supplement) and Rule 40.2 (Chapter 2 Supplements) in connection with allegations that on May 26, 2011 while employed as a machine operator on Gang 9166 he used a cell phone while standing between the Main Line and No. 1 Yard Track was without just and sufficient cause, unwarranted and in violation of the Agreement (System File UP-266-WF-11/1554474).**
- 2. As a consequence of the violation referred to in Part 1 above, the Carrier must remove this discipline from Mr. Gloston's record and compensate him for all losses, including wages, benefits, seniority rights and any other losses suffered as a result of the Carrier's improper discipline."**

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 June 22, 2011, Claimant was directed to attend a formal Investigation on July 12, 2011, concerning in pertinent part the following charge:

"...to develop the facts and place responsibility, if any, that while employed as

Machine Operator on Gang 9166, Tyler, Texas, near Milepost 546.10, on May 26, 2011, at approximately 1200 hours, you were allegedly observed standing between the Main Line and the #1 Yard Track using your cell phone.

These allegations, if substantiated, would constitute a violation of Rule 1.10 Games, Reading, or Other Media Rule 1.1 Safety, Rule 1.1.2 Alert and Attentive, Rule 1.13 Reporting and Complying with Instructions, Rule 40.1 Chapter 1 Supplement, and Rule 40.2 Chapter 2 Supplements, as contained in the General Code of Operating Rules, effective April 7, 2010, System Special Instruction, effective April 7, 2010, and Maintenance of Way Rules, effective November 17, 2008."

On July 28, 2011, Claimant was found guilty as charged and was assessed a Level 3 discipline with an actual five day suspension.

It is the Organization's position that the Carrier violated the Claimant's contractual due process rights when it failed to timely hold the formal Investigation and failed to provide a fair and impartial hearing because the Carrier held the Investigation without the Claimant being present and the reason why he was not at the Hearing is because he was working out of town when the Notice of Investigation was sent. It asserted the Carrier did not make every effort to schedule and hold the Investigation within 15 days of the Claimant rejecting the Rule 22(g) waiver. It further argued that the Carrier did not meet its burden of proof. It concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the position of the Carrier that there were no procedural errors in the handling of the case. Turning to the merits it argued that the testimony and evidence introduced at the Investigation showed that the Claimant was standing between the Main Line and #1 Yard Track using his cell phone. The Claimant was fouling the track, which meant he was close enough in proximity to the track to be struck by a moving train or on-track equipment. The Claimant could have avoided that danger by stepping over the tracks, but chose not and instead was seen by multiple witnesses leaning against his machine, standing between the main and siding talking on his cell phone. It closed by asking that the discipline not be disturbed and the claim remain denied.

The Board will first address the Organization's procedural arguments. It initially argued that the Claimant was denied a "fair and impartial" Investigation because the Hearing was held in absentia. Many Awards have determined that because an Investigation was held in absentia does not necessarily equate to being unfair. For example, in Second Division Award 13957 it was determined in pertinent part:

"It is further noted there is no requirement that an accused must attend their formal Investigation, but when a charged employee chooses not to

attend, he does so at his own potential peril because he offers no rebuttal or alternative theory or story. See Second Division Awards 11763, 13217, 13360, 13491 and 13924."

However, in Award 13957 the Board prefaced the aforementioned statement regarding the Claimant's conduct with the following finding:

"...discovered that he chose not to appear at the Investigation and offered no subsequent proof that he could not attend the Hearing." *(Underlining Board's emphasis)*

The question at issue in this case is whether or not the Claimant had a justifiable reason for not appearing at the Investigation. The Carrier argued it mailed a Notice of Investigation to the Claimant's last known address by certified mail and according to it that fulfilled its requirement to advise the Claimant as to when and where the Investigation would be held and it was his obligation to appear and when he did not appear it was within its right to hold the Hearing in his absence.

The Organization responded to the Carrier's argument by stating in its November 14, 2011, letter the following:

"The Organization takes exception that the Claimant received notice of investigation after the fact, because the Claimant did not receive notice until after the investigation. The Claimant was working on his scheduled work days. The Awards cited by the Carrier are irrelevant and have no bearing on this instant case." *(Underlining Board's emphasis)*

In its letter of May 11, 2012, the Organization further stated in pertinent part the following:

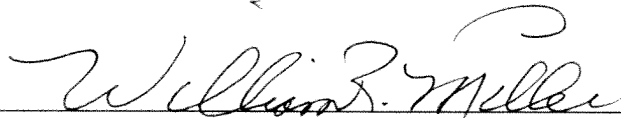
"...This is because the notification was not timely mailed, but instead notification was mailed approximately four weeks after the Claimant rejected the Rule 22 (g) waiver offer and at the same time the Claimant was working away from his home in connection with his assigned position with the Carrier." *(Underlining Board's emphasis)*

Review of the record reveals that the Organization's position was not refuted. Thus, it stands as fact that the Notice of Investigation was mailed when the Claimant was out of town working on a Carrier assignment. Additionally, the record was not refuted that the Claimant was working on the date of the Hearing. In Award 13957 discussed above, the Claimant never

offered any reason for not appearing at the Hearing, whereas, in this incident the Organization offered a justifiable reason for the Claimant not appearing, that being he was in the field and on the job when the Notice was sent to his residence and was again on the job the day of the Investigation. In this instance based upon the unique facts of the case the Board is not persuaded that the Claimant was made aware of the formal Investigation in accordance with the Agreement. The record further indicates that the Hearing Officer did not make a reasonable effort to inquire as to the whereabouts of the Claimant or his representative when neither appeared for the Hearing. It is determined that there is not a sufficient showing that the Claimant was notified of his formal Investigation prior to the actual date of the Hearing, therefore, because of that fatal flaw the Board finds and holds that the discipline is rescinded and the claim is sustained in accordance with part 2 of the claim without consideration of the merits.

AWARD

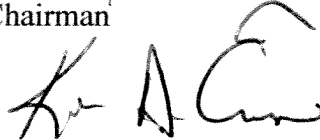
Claim sustained in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed.



William R. Miller, Chairman



K. N. Novak, Carrier Member



K. D. Evanski, Employee Member

Award Date: 11/11/12