

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6402
AWARD NO. 191, (Case No. 213)**

**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
P. Jeyaram, Carrier Member

Hearing Date: December 20, 2012

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

- 1. The discipline [Level 3 five (5) day suspension] imposed on Mr. M. Dodd, Jr., by letter dated September 16, 2011 for alleged violation of Rule 8.2 Position of Switches, Rule 8.15 Switches Run Through, Rule 1.1.2 Alert and Attentive and Rule 70.1 Safety Responsibilities in connection with allegations that on August 15, 2011 he ran through the switch at Mile Post 37.2, derailing his machine and allegedly causing damage to both the machine and the switch was without just and sufficient cause, unwarranted and in violation of the Agreement (System File UP271WF11/1556970).**
- 2. As a consequence of the Carrier's violation referred to in Part 1 above, the Carrier must remove this discipline from Mr. Dodd's record and compensate him for all losses, including all straight time and overtime 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 thereon and did participate therein.

On August 31, 2011, Claimant was directed to attend a formal Investigation on September 7, 2011, concerning in pertinent part the following charge:

"...to develop the facts and place responsibility, if any, that on August 15, 2011,

on the Galveston Subdivision while operating the TMT0704, you allegedly ran through the switch at Milepost 37.2, derailing your machine, resulting in damage to both the machine and the switch.

These allegations, if substantiated, would constitute a violation of Rule 8.2, Position of Switches, Rule 8.15, Switches Run Through, Rule 1.1.2 Alert and Attentive, and Rule 70.1 Safety Responsibilities, as contained in the General Code of Operating Rules, effective April 7, 2010."

On September 16, 2011, Claimant was notified that he had been found guilty as charged and was assessed a Level 3 discipline and a five day suspension without pay.

The facts indicate that on August 15, 2011, at the close of the workday the Claimant was parking his tamper in a designated track when he allegedly ran through a switch in the Galveston Yard causing it to be derailed with damage to the switch.

It is the Organization's position the Carrier failed to meet its burden of proof because (1) the Claimant was instructed by the Employee In Charge (EIC) that the switch leading to the track where the gang was to park its machine was lined properly; (2) there was a possibility that a member from a train crew working in the vicinity of the track where the gang was to park its machines may have operated the switch leading to the track and left it lined improperly; (3) the Claimant was instructed to hook up and tow additional machines to his tamper machine thus decreasing the machine's ability to effectively come to a stop; and (4) the fact that the mechanics assigned to the Claimant's gang did not perform the necessary repairs to the tamper machines rear brakes when informed by the Claimant on the date prior to the alleged incident that the brakes needed repair all show that the Claimant did not violate the cited Rules in the Notice of Investigation. It concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the position of the Carrier that the evidence showed that the Claimant ran through the switch at Mile Post 37.2 on Galveston Subdivision. It argued the Claimant had the ultimate responsibility for making sure everything was properly aligned and it did not matter whether someone else told him the switch was aligned for his movement. It also pointed out there was a red flag to show Claimant that the switch was lined against him. Simply put it asserted the Claimant should have double checked the switch before proceeding into the hole. It further argued that assuming for the sake of argument that the brakes were not operating properly the Claimant had to be aware of that fact as he had operated the machine all day and had the responsibility for the status of all of the machine's safety functions at the time of the incident, therefore, he was still responsible for the accident. It closed by asking that the discipline not be disturbed and the claim remain denied because it was in accordance with the Carrier's disciplinary policy.

The Board has thoroughly reviewed the transcript and record of evidence and has determined that no procedural errors occurred during the Investigation and the Claimant was afforded his Agreement "due process" rights.

There is no dispute between the parties that the Claimant ran through the switch at Mile Post 37.2 on Galveston Subdivision. The Organization argued that the circumstances of the situation mitigate on behalf of the Claimant especially because he was told by the Employee in Charge (EIC) all switches were lined for his movement and that it was clear to enter the track where his gang was parking their machines as well as the other reasons listed above.

Rule 70.1 states in pertinent part that employees are to be **"aware of their surroundings and maintain awareness to avoid risks associated with required tasks and work."** Rule 1.1.2 requires employees to be alert and attentive when performing their duties and Rule 8.2 states in part that **"employees operating switches and derails must make sure: the switches and derails are properly lined for the intended route."** The aforementioned Rules have a common theme that the Claimant is ultimately responsible for making sure everything is properly aligned and if a switch or derail is not properly aligned, then the Claimant is responsible for changing it. The record indicates the Claimant fueled his machine prior to proceeding into the hole and tying it up which created a lapse in time from when he heard the switches were aligned and when he actually proceeded through the switch. The record further shows that there was a red flag to show Claimant that the switch in question was lined against him. The Claimant should have been more attentive to his surroundings and he should have double checked the switch before proceeding into the hole. Substantial evidence was adduced at the Investigation that the Claimant did run through the switch and derailed the machine with some damage to the switch.

The only issue remaining is whether the discipline was appropriate. At the time of the incident Claimant had approximately seven years of service with a good work record. The accident was not serious, but as determined in Third Division Award 37266 in pertinent part: **"...The minor nature of the accident does not excuse the error."** Review of the discipline reveals that it was assessed 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.

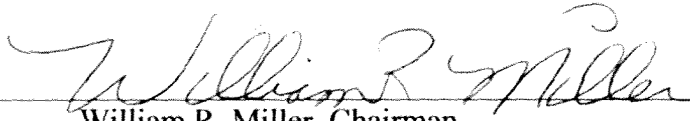
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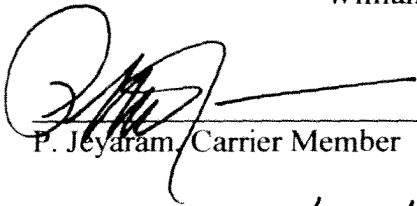
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Claim denied.



William R. Miller, Chairman



P. Jeyaram, Carrier Member



K. D. Evanski, Employee Member

Award Date: 4/18/13