

Parties to Dispute: (Brotherhood Railway Carmen of the United States
(and Canada
(
(Missouri Pacific Railroad Company

1. That the Missouri Pacific Railroad Company violated Rule 32 (a) of the controlling Agreement when they did not cite and hold a prompt investigation on Carman J. J. Reyna on incident that occurred January 23, 1979.
2. That the Missouri Pacific Railroad Company violated Rule 31 (c) of the controlling Agreement when General Manager G. T. Graham, designated handling officer of the Carrier, failed to respond in writing to our appeal of August 21, 1979 for Carman J. J. Reyna. Mr. Graham was advised of this failure October 23, 1979, he has still not replied.
3. That the Missouri Pacific Railroad Company violated Rule 32 of the controlling Agreement when they unjustly, arbitrarily, and capriciously disciplined Carman J. J. Reyna by dismissal May 31, 1979.
4. That the Missouri Pacific Railroad Company be ordered to compensate Carman J. J. Reyna as follows:
 - (a) Compensated for all time lost starting May 31, 1979 and continuing until returned to service with all rights unimpaired.
 - (b) Made for all vacation rights.
 - (c) Made whole for loss of health and welfare and insurance benefits.
 - (d) Made whole for pension benefits including Railroad Retirement and unemployment insurance.
 - (e) Made whole for any other benefit he would have earned during the time he is withheld from service.
 - (f) In addition to the money amounts claimed herein, Carrier shall pay Carman J. J. Reyna an additional amount of 6% per annum compounded annually on the anniversary date of the claim.

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

On January 23, 1979, at approximately 2:15 p.m., Claimant, a Carman at Carrier's Freeport, Texas repair facility was involved in a one vehicle accident while operating Company vehicle #8029, a 1978, 1/2 ton Ford pick-up truck with approximately 1800 miles recorded on the speedometer. Accompanying Claimant at the time was a co-worker, R. Lopez, also a Carman. Both employees were on duty at the time; were proceeding from Carrier's Angleton depot to the Angleton yard; and the operation of said vehicle was considered to be a part of Claimant's regularly assigned duties. As a result of the aforestated accident, Claimant and Mr. Lopez were injured; both were hospitalized; and Claimant was released from the hospital on January 30, 1979. The record also shows that Carrier's vehicle was totally demolished; and that the accident was investigated by the Angleton, Texas Police, but Claimant was not cited for violation of any traffic law.

On March 1, 1979, Claimant returned to work on light duty and on March 7, 1979, Claimant was notified by Carrier to appear at a hearing on:

"... March 14, 1979, for formal investigation to develop the facts and place responsibility if any in connection with your alleged operation of Company vehicle #8029 in an unsafe manner at about 2:15 p.m., January 23, 1979, while you were working as a Carman."

As per Organization's requests, said investigation was postponed and rescheduled for March 21, 1979, and then again for April 7, 1979, at which time the hearing was held. Said hearing, however, was adjourned and scheduled to reconvene on May 4, 1979; but was later postponed to May 18, 1979 at Organization's request, and still yet later postponed and rescheduled to May 24, 1978, at which time the investigation was held and concluded. As a result of said investigation, Claimant was notified on May 31, 1979, that he was dismissed from Carrier's service "... for violation of General Rule L and Rule 50 and Basic Rule 1 of the Uniform Code of Safety Rules in connection with operation of Company vehicle #8029 in an unsafe manner ... on January 23, 1979 ...".

Organization's initial contentions in this dispute focus upon various procedural considerations as well as upon the merits of the case itself. Procedurally, Organization maintains that Carrier's processing of this dispute was defective because of the following: (1) Carrier failed to conduct a prompt investigation; (2) Carrier failed to hold a fair and impartial hearing; (3) Carrier's Hearing Officer failed to act on Employee representative's objections, acted as a prosecutor rather than a trier of facts, and there were two hearing officers rather than one at the hearing itself; and (4) Carrier failed to respond to Organization's appeal dated August 21, 1979, within the time limits specified in Rule 31 (a).

Turning next to the merits portion of its argumentation, Organization contends that Carrier has failed to support the charges which have been levied against Claimant with sufficient evidence. In support of this general contention, Organization argues that Carrier's cited rules are ambiguous; that Carrier's witnesses' testimony is not based upon fact; that Claimant committed no wrong as confirmed by the fact that the Angleton Police did not issue Claimant a citation; and Carrier has failed to establish that vehicle #8029 was in proper operating condition at the time of the accident.

Carrier's basic position in this matter is that Claimant's investigation was conducted fairly and impartially; and that, as a result thereof, sufficient evidence was adduced to justify the resulting discharge. Regarding the procedural issues which have been cited by Organization, Carrier maintains that: (1) Claimant's investigation was "promptly held" as prescribed in Rule 32, and that any delays therein resulted from Claimant's hospitalization and recuperation period at home and, equally important, Organization's several postponements added significantly to the delay in the scheduling of the hearing; and (2) Carrier's response to Organization's August 21, 1979, appeal was tendered in a timely manner in accordance with Rule 31(a) and, although the wrong name was signed to the General Manager's response, this development in no way prejudiced the handling of this claim.

As to the merits of the instant dispute, Carrier maintains that there is sufficient evidence in the record which supports the conclusion that Claimant was guilty of operating vehicle #8029 in an unsafe manner. In particular, Carrier cites the fact that Claimant, as well as the Angleton police officer who investigated the accident, indicated that the accident was caused when Claimant "lost control" of his vehicle. In addition to the foregoing, Carrier also contends that there is no substantive evidence in the record which would indicate that Claimant's vehicle was mechanically defective at the time of the accident; but, even if such a conclusion were possible, it would not make it permissible for Claimant to operate his vehicle in an unsafe manner.

The Board has carefully studied the complete record in this matter and can find no good reason to modify or rescind the discipline which has been imposed by Carrier.

Regarding the various procedural objections which Organization raises, the record clearly indicates that several of these issues (particularly the matter of two hearing officers at the investigation) were not raised by Organization when the matter was handled on the property, but were raised at some point later in the procedure. Because of this, for obvious reasons, these contentions must now be rejected.

As to Organization's contention that Claimant's hearing was not conducted in a timely manner and that said hearing was not conducted fairly or properly by the Hearing Officer, these allegations simply are not supported by the facts of record in this matter. Indeed, the record shows that Claimant was not released from the Hospital until January 31, 1979, and that he did not report for work until March 3, 1979. Under these circumstances, Carrier assuredly cannot be held in default of the cited rule since Claimant obviously was not available for hearing nor is it probable that he would have been physically able to attend or participate fully in said hearing. As it appears from the record, Carrier's scheduling and

conducting of the hearing on the particular date, was undoubtedly of benefit to Claimant. Moreover, given the fact that Organization successfully requested several postponements of Claimant's initial investigation hearing as well as the subsequent reconvening thereof, these factors convince this Board that there is no substance to Organization's contention in this regard.

Turning to Organization's charge that Claimant's hearing was not conducted fairly or properly, the Board would merely note that Organization's numerous requests for postponements were granted; Organization was permitted to secure additional witnesses for its presentation; and the Hearing Officer's treatment of Organization's objections at the hearing were proper and were compatible with commonly held standards of acceptable hearing conduct which this Board has reviewed on numerous occasions.

Regarding the final procedural issue of Organization's charge that Carrier failed to respond in a timely manner to Organization's appeal letter of August 21, 1979, suffice it to say that such a Carrier document can be found in the record dated October 1, 1979 and dated as received by Organization on October 5, 1979. Additionally, although said document, unfortunately, contains a signature other than that of Carrier's General Manager to whom Organization's appeal was originally addressed, Carrier, nonetheless, was in compliance with Rule 31(a) of the controlling Agreement since Carrier need not reply to Organization's appeal through a particular individual (Second Division Award No. 4464 and Third Division Award No. 20790). And, still yet further, even a cursory examination of the construction of the disputed letter itself indicates that the transposition of signatures was a mere clerical error, which, in light of Rule 31(a), is of no consequence in the final resolution of the instant dispute since Claimant was not prejudiced in any way.

As to the merits portion of this dispute, the Board concludes, without equivocation, that there is sufficient evidence in the record to establish that Claimant was guilty of driving Carrier vehicle #8029 in an unsafe manner on January 23, 1979. The testimony of Claimant and co-employee Lopez, who was a passenger in Claimant's vehicle at the time, as well as the testimony of several other eye-witnesses to the accident, clearly indicates that Claimant's operation of the vehicle was not in compliance with Carrier's rules nor in conformance with commonly accepted safe driving practices. The fact that the Angleton Police who conducted the investigation of the accident did not issue a citation to Claimant or did not cite Claimant for any traffic violations, does not preclude Carrier from taking subsequent disciplinary action against Claimant for violations of Carrier's own rules. Claimant's admission, as well as the uncontroverted testimony of several eye witnesses, that he attempted to pass a vehicle and was unaware that there was a second, slower moving vehicle a short distance ahead of the vehicle being passed, is sufficient indication to this Board that Claimant operated his vehicle in an unsafe manner as charged. In such a situation, the consequences of Claimant's dereliction are his to bear.

Nor is Organization's charge that Claimant's vehicle (power steering and/or brakes, etc.) was defective, an acceptable defense. The Board has reviewed this particular element of the testimony very closely and finds that, as an affirmative defense, Organization has failed to adduce a sufficient quantum

of probative and substantive evidence which would be necessary to support such a contention. Perhaps even more significantly in this regard, Claimant's and passenger Lopez's written statements which were completed on January 31, 1979, clearly indicate that vehicle #8029 was not defective in any way either prior to or at the time of the accident. Such an admission by Claimant and by Mr. Lopez several days after the occurrence of the accident is clear evidence to the Board that Organization's allegations in this regard are manifestly unsupportable.

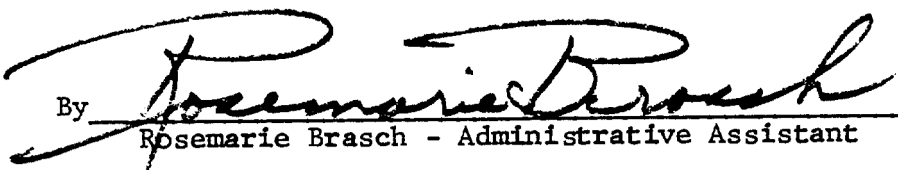
A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By


Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 2nd day of February, 1983.