

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32016
Docket No. MW-32591
97-3-95-3-529**

The Third Division consisted of the regular members and in addition Referee Nancy F. Murphy when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Burlington Northern Railroad**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The discipline [entry of censure and five (5) day suspension] imposed upon Truck Driver S. D. Jones for alleged, '... violation of General Safety Rule 1 in General Rules, Form 15001, for your unsafe driving of Truck No. 2606 in the Denver, Colorado, area at or about July 1 until July 22, 1994....' was unwarranted, without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement (System File C-94-S090-4/MWA 94-12-02AA).**
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant's record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered."**

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 were given due notice of hearing thereon.

S. D. Jones, seniority date September 18, 1978, is employed by Carrier as a Truck Driver. Claimant was working in that capacity, under the supervision of Section Gang Foreman A. Weaver and Roadmaster M. Theret when this dispute arose.

During the weeks prior to July 26, 1994, Foreman Weaver had approached Roadmaster Theret with concerns about Claimant's "unsafe" driving habits. The Roadmaster cautioned Foreman Weaver, that he could not "just say that someone is unsafe" and that it would be necessary to "be more specific with facts and dates" should the situation persist. In the meantime, however, the Roadmaster instructed the Foreman to "talk" to Mr. Jones, and "explain to him how to drive in a safe manner."

On July 26 or 27, Roadmaster Theret received the following documentation:

"Re: Stan Jones

Wed. July 13th 2 p.m.

Ran red light at Park ave west and Globeville Rd. When I asked him about it, he said: 'Don't worry, Weaver, there's nobody coming.'

Thurs. July 14th, 6:30 p.m.

When hy-railing (sic) in bound from S. Denver to town, entered xing at Bayaud w/o slowing down or looking to the right. When I asked him about it, he said: 'That's a one way st. & I can see no one is coming.' When I replied that it was a two way st., he said: 'Oh, I thought it was a one way.'

Thurs. July 14th, 12:35 p.m.

Instructed Stan to pull up next to a scrap tie pile to unload some ties from truck. In doing so, ran over two at the edge of the pile. When asked about it, he replied: 'I guess I didn't see them.'

He repeatedly puts truck into reverse at stoplights, if not for back-up alarm, would probably hit several cars by now. Narrowly missed on one occasion before he realized what the alarm was. When asked about it, he said: 'The gears are really close together'. No one else that has driven this truck for me has had this problem.

He cannot drive the truck - unable to smoothly shift gears under any circumstances.

Fri. July 22nd., 2:30 p.m.

Backed into a 5ft high stack of panels alongside the outbound main at Walnut. When asked about it, replied: 'Don't worry, I didn't hit them very hard.'"

Regarding the latter incident, Foreman Weaver went on to state:

"There was only minor damage to the truck which I was able to repair. There was no one guiding him back. I will not get close to the truck while Stan is driving as I feel he is to (sic) dangerous, and Chuck has given up on trying to direct him since as Chuck says: 'He doesn't pay attention or listen to you anyway so why bother?..."

On August 2, 1994, Claimant was instructed to attend an Investigation scheduled for August 10, 1994, to:

"Ascertain the facts and determine your responsibility, if any, in connection with your alleged unsafe driving, while assigned as a truck driver, at or about July 1 through July 22, as found out by this office on July 26, 1994."

On August 7, 1994, the Local Chairman sent the following correspondence to Roadmaster Underwood, concerning Claimant's Investigation:

"After looking into this matter it has been brought to my attention that Mr. Weaver refused to ride in a vehicle driven by Mr. Jones beginning on July 18, 1994 and has not ridden with Mr. Jones since then. Mr. Weaver went to the Carrier with the allegations described in your August 2, 1994 letter to Mr. Jones (notice to attend investigation) on July 18, 1994, and several times between July 1 and July 18. It is hard for me to believe that a section foreman could refuse to ride with his truck driver and the carrier not be aware of it for a full work week and the following Monday.

The time limits in rule 40 of the Agreement between Burlington Northern Railroad Company and its Employees represented by the Brotherhood of Maintenance of Way Employees has been violated. Mr. Jones hearing is not scheduled to be held within 15 days from the time the information was known to a carrier officer.

We contend that due process rights under the agreement has not been afforded Mr. Jones and the charges be dropped entirely.

If the (sic) is going to be held I must ask for a postponement until the week of August 15 through 19 because I will be unable to attend before then."

The Investigation was duly postponed and held on August 16, 1994. At the outset, the Organization again raised its timeliness objection, however the Investigation was convened. Foreman Weaver and Roadmaster Theret testified on behalf of Carrier, while Mr. Jones' co-workers, Truck Driver Jennings and Assistant Foreman Norman testified

at Claimant's behest. Neither of the witnesses was able to corroborate the incidents of alleged "unsafe driving", described by Foreman Weaver, prior to July 22, 1994. It is noted, however, that Mr. Jennings candidly admitted partial responsibility for the July 22 incident collision with the stack of panels. Specifically, Mr. Jennings conceded that Claimant had requested his help in directing the back-up movement, but because it was "too hot", Mr. Jennings instead sought shelter under a nearby overpass, leaving Claimant to back up without direction.

On September 1, 1994, Carrier notified Claimant that as a result of "violating General Safety Rule 1", an entry of censure and a five day suspension from service, had been placed in his personal record.

The Organization appealed the decision, maintaining that the assessed discipline "clearly" violated the Agreement. In further support of Carrier's alleged violation of Rule 40, the Organization pointed to Mr. Weaver's testimony in which he stated that he "thought" he spoke to Roadmaster Theret regarding Claimant's "unsafe" driving on July 19, 1994. However, when questioned as to whether that was the first occasion upon which he had spoken to the Roadmaster regarding Claimant's driving habits, Foreman Weaver stated that he had first raised the subject with the Roadmaster "about 3 1/2 years ago." Finally, noting the time limit exception provided for in Section B of Rule 40, the General Chairman stated that the case in dispute "certainly" did not constitute a personal conduct violation.

Regarding the merits of the dispute, Carrier denied the claim, maintaining that Claimant "continually failed" to safely execute the duties of his position as truck driver between July 1 and July 22, 1994. Carrier further stated that the discipline assessed was "appropriate and well measured."

Referring to the issue of timeliness, Carrier maintained that it became "officially aware" of Mr. Jones "unacceptable driving habit" when Roadmaster Theret received Mr. Weaver's letter dated July 26, 1994. Prior to that date, any interchange between Foreman Weaver and Roadmaster Theret was "idle conversation." It was only after "careful consideration" Carrier determined that an investigation was necessary, and, accordingly, Carrier notified Claimant by letter dated August 6, 1994, "seven (7) days after the date of first knowledge."

The Organization's premise that Carrier exceeded the requisite time limits is well founded on this record. The time limits for scheduling the investigation into the alleged incidents of July 13 and 14, began to run on July 19, 1994, when Foreman Weaver reported those occurrences to Roadmaster Theret. The hearing scheduled for August 10, 1994, fell clearly outside Rule 40 time limits. With respect to the July 13 and 14 events, and that lack of timeliness, cannot be cured by the device of tagging those incidents onto the July 22, 1994 allegation which first was reported to Roadmaster Theret on July 26, 1994. Therefore, the hearing of August 10 was untimely and invalid with respect to July 13 and 14, 1994, and discipline based thereon must be dismissed.

With the respect to July 22, 1994 incident, Claimant must be considered partially culpable for backing into and damaging the panels. However, his culpability is mitigated by the contributory negligence of Mr. Jennings. Based upon all of the foregoing, we find that the discipline assessed by Carrier must be reduced from a suspension without pay, to a Letter of Reprimand, referencing solely the incident of July 22, 1994, and deleting all references to alleged "unsafe driving" prior to that date.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 6th day of May 1997.