

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 41220
Docket No. MW-41401
12-3-NRAB-00003-100317

The Third Division consisted of the regular members and in addition Referee Patrick Halter when award was rendered.

(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference

PARTIES TO DISPUTE: (

(Texas Mexican Railway Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed upon Mr. A. Jimenez by letter dated September 24, 2009 for alleged violation of General Code of Operating Rules 1.1; 1.1.1; 1.1.2; 1.3.3; 1.4; 1.6; 1.10; and alleged violation of System Special Instructions 1.6; 1.10; and alleged violation of STAR (Safety Through Awareness and Responsibility) Engineering Booklet, Rule E22; and alleged violation of General Order No. 38, Item 2; and alleged violation of Federal Railroad Administration Emergency Order No. 26; in connection with charges of alleged failure to operate a company vehicle in a safe manner resulting in damage to a company vehicle on July 8, 2009 at approximately 5:45 A.M. while performing service as a welder foreman on Position TM-25 in the vicinity of Hwy. 359, 1.4 miles east of Serrano Yard Road, Laredo, Texas was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File TM-204-WF-09).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant A. Jimenez shall now have the charges stricken from his record and he shall now ‘*** be reinstated with all back pay

from July 08, 2009 and continuing, seniority unimpaired and all other rights due to him by the collective bargaining agreement.”

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.

On July 8, 2009, the Claimant reported for his shift beginning at 5:00 A.M. His duties that day involved driving a company truck on Highway 359 to Serrano Road Yard near Laredo, Texas, to work on a switch point. About a mile and a half east of Serrano Road, the Claimant decided to buy breakfast so he slowed the truck to veer off the highway on the passenger side towards a food facility.

As the Claimant approached the facility, he noticed that it was closed, so he shifted gear with the intention of returning the truck to the highway and, in doing so, encountered a drop at the shoulder of the highway. The truck rolled over on the passenger side at 5:45 A.M.; the Claimant notified the Roadmaster of the incident at 6:47 A.M.

The Claimant did not incur any physical fractures, but he did sustain pain in various parts of his body as well as bruises; he received medical treatment at a hospital emergency room. While at the emergency room, the Roadmaster attempted to discuss the incident with the Claimant, but he was enduring too much pain at that time to discuss it. Upon the Claimant's release from emergency care, he

returned to his residence to recuperate with prescription medication for pain and infection.

The day after the incident (July 9) the Roadmaster met with the Claimant to complete Form 68-D, Employee Report of Illness or Injury; however, the Claimant could not physically record the information, so another employee, present with the Roadmaster, hand printed the Claimant's responses on the form, such as the incident occurred at 5:45 A.M. while the Claimant was driving the company truck. In response to "how did the injury occur (include a sequence of events leading up to injury)" the Claimant responded the "truck went off the road and turned over on passenger side."

Aside from Form 68-D, the Roadmaster submitted Form 82-D, Manager's Report of Employee Injury or Illness and the employee "in charge of company vehicle" completed Form 89-D, Company Vehicle Accident Report noting that the road surface was dry when the cause of the accident ("loss of control") occurred thereby overturning the truck, which sustained "total loss" damage.

After submitting these forms the Carrier's preliminary investigation revealed that the Claimant received and accepted a call on his Carrier-issued cell phone at 5:46 A.M. on the incident date. Given the descriptions on the forms as to how the incident occurred and the results of the preliminary investigation, the Carrier directed the Claimant to report for an investigative Hearing on September 17, 2009, as follows:

"A formal investigation will be held to ascertain the facts and determine your responsibility, if any, in connection with your alleged failure to operate your company vehicle in a safe manner resulting in damage to your company vehicle."

According to the Carrier, the Claimant's failure to disclose his cell phone use at the time of the incident on Form 68-D violated numerous Rules from different sources – some are identical in substance – dealing with conduct, safety and cell phone use; specifically, General Code of Operating Rule 1.6, Conduct (an employee is not to be dishonest) and System Special Instruction Rule 1.6 (an employee is not to falsely report facts regarding matters under investigation). Also, General Order

No. 38 (Item 2) Federal Railroad Administration Emergency Order No. 26 and Safety Through Awareness and Responsibility (STAR) Engineering Booklet Rule E-22 wherein the Orders and E-22 prohibit cell phone use while driving. Rule 1.1, Safety, and related Rules there under, require obeying work Rules as an “essential job duty for safety and continued employment.”

Based on the Rules and Orders, plus the Claimant’s awareness and understanding of them as he acknowledged during the investigative Hearing, the Carrier concluded that the Claimant was on his cell phone at the time of the incident. The Roadmaster testified this contributed to if not caused the incident. On September 24, 2009 the Carrier dismissed the Claimant for his alleged failure to operate his company vehicle in a safe manner resulting in damage to the truck.

On October 16, 2009 the Organization filed a claim contesting the dismissal as harsh and excessive because the Claimant had 18 years of service and no disciplinary record at that time. The service-provider’s record of cell phone use is inaccurate as it shows the Claimant taking a call at 5:46 A.M. from a Track Inspector. The Claimant did not take a call from the Track Inspector at the incident scene but at Mile Post 30.8 where he pulled to the side of the road and did not continue driving.

The Organization also asserted that there was no witness to confirm that the Claimant was using the cell phone when the company vehicle “veered off the road when the wheel pulled to the right suddenly . . . Claimant could not stop the vehicle from going off the road which resulted in the Claimant getting injured.” The Claimant previously reported numerous mechanical problems with the truck to the Roadmaster, such as veering to the right, but the Roadmaster instructed the Claimant to continue driving it.

In addition to no witness to confirm the Carrier’s position that the Claimant accepted a call while driving, the Organization contended that citing the same Rules two or three times in the dismissal letter did not serve to prove the allegations. No Rules violations were cited in the vague Notice of Investigation, so the Claimant did not receive a fair and impartial Hearing.

The progression of this claim on the property shows that it was timely processed by the Organization and the Carrier in the usual and customary manner, including placement before the highest officer of the Carrier designated to handle it. The claim is now properly before the Board for adjudication.

The Board finds substantial evidence in the record that the incident occurred at 5:45 A.M. (Form 68-D) and that the Claimant was aware of and understood the Rules and Orders which prescribed that an essential job duty for continued employment required his compliance with safety measures while working, including the proscription of cell phone use when driving (the Claimant's testimony).

During the Hearing the Claimant acknowledged that "I was driving when I answered him [Track Inspector]" at 5:46 A.M. and, later during the Hearing, he denied driving when he accepted that call at Mile Post 30.8. The Claimant's conflicting testimony is not resolved by his assertion that he accepted the call at Mile Post 30.8 which, the Carrier notes, is 20 miles from the incident scene.

The Claimant disputed the accuracy of the time (5:46 A.M.) for the incoming call. The service provider's record of calls to the Claimant's cell phone number is not disputed and is produced by the service provider in the ordinary and customary routine of its business. The Claimant's allegation about inaccurate time is a bare assertion without supporting foundation.

The time of the incident (5:45 A.M.) and the time of the call (5:46 A.M.) coupled with the Claimant's conflicting testimony, leads the Board to conclude that the Carrier did not arbitrarily and capriciously find that the Claimant accepted a call at the time or so close in proximity to the time of the incident.

In its claim the Organization states that the company vehicle "veered off the road when the wheel pulled to the right suddenly . . . Claimant could not stop the vehicle from going off the road which resulted in the Claimant getting injured." The Claimant testified that "every once in a while it would" pull but not every time.

Furthermore, on Form 68-D under "how did the injury occur (include a sequence of events leading up to injury)" the Claimant responded with no statement that the wheel pulling to the right caused or contributed to the incident. The record

reflects that this particular mechanical issue was repaired in February 2009 - about four months prior to this incident.

As for the Hearing, its purpose was to develop the facts that may show a Rules violation. The Notice of Investigation was sufficiently clear so as to place the Claimant on alert that the matter under investigation concerned his operation of the company vehicle on July 8, 2009 and whether he did so in a safe manner. The Claimant was accorded ample time to present his position as well as to cross-examine the Carrier's witness. There was a fair and impartial Hearing.

In short, the Claimant's conduct on July 8, 2009 did not comport with the Rules and Orders cited in the dismissal letter. These findings culminate in the conclusion that the Claimant's dismissal was not arbitrary or capricious and did not violate the Agreement. Consequently, the Claimant's dismissal will not be disturbed.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 22nd day of February 2012.