

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7426
AWARD NO. 13 (Case No. 13)**

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES DIVISION - IBT RAIL CONFERENCE**

vs

UNION PACIFIC RAILROAD COMPANY (SPWL)

William R. Miller, Chairman & Neutral Member
T. W. Kreke, Employee Member
B. W. Hanquist, Carrier Member

Hearing Date: July 20, 2011

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

- 1. The discipline in the form of a Level 3, five (5) workday suspension beginning on March 23, 2010 and concluding on March 29, 2010, imposed upon Claimant M. Campbell for the alleged violation of Rule 74.3 (Driver Responsibility) as contained in the General Code of Operating Rules, effective April 3, 2005 and the System Special Instructions, effective June 22, 2009, in connection with allegedly failing to make notations on his log book when he was stopped to remove and put on full sets of snow chains on tractor and semi-trailer Unit #67311 on January 22, 2010; and for allegedly failing to make the proper notations in his log book when pulled over by the CHP on January 23, 2010 is unjust, unwarranted on the basis of unproven charges and in violation of the Agreement (System File L-1045S-454/1536834D)**
- 2. As a consequence of the violation referred to in Part 1 above, we respectfully request that the Claimant be compensated for all wages lost, straight time and overtime, as well as any and all benefits loss suffered by him resulting from his suspension and the alleged charge shall be expunged from his personal record."**

FINDINGS:

Public Law Board No. 7426, 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 February 23, 2010, Carrier notified Claimant to appear for a formal Investigation on March 1, 2010, concerning in pertinent part the following charge:

"...to develop the facts and place responsibility, if any, that while employed as Truck Driver on Gang 7591, RV90 RTS, at Citrus Heights, California, after training with Kevin Gibbons, CHP Commercial Officer on December 14, 2009, you allegedly failed to make notations on your log book when you stopped to remove and put on full sets of snow chains on your tractor and semi-trailer, Unit #67311, on January 22, 2010. The Driver/Vehicle Examination Report from the Nevada Highway Patrol you turned in to me shows you were pulled over at 9:30 a.m., and released at 10:00 a.m. As this is longer than 15 minutes it should have been noted on your log. Not only did you neglect to note that stop on your log book, it shows you were driving from 9:30 a.m., from Sparks, Nevada, until 11:30 a.m. when you arrived at Truckee, California, with no stops in between.

These allegations, if substantiated, would constitute a violation of Rule 74.3 (Driver Responsibility), as contained in the General Code of Operating Rules effective April 3, 2005, and the System Special Instructions effective June 22, 2009."

On March 22, 2010, Claimant was notified that he had been found guilty as charged and was assessed a Level 3 discipline with a five day suspension that began on March 23, 2010 and concluded on March 29, 2010.

It is the position of the Organization that the Carrier did not submit direct positive testimony and/or evidence to prove that the Claimant was not following the training instructions given him by C.H.P. Officer Gibbons nor did the Carrier submit any evidence from the Nevada Highway Patrol that the Claimant did anything different than what he testified to. It further argued that the decision of R. J. Perry, General Superintendent, who was not the Hearing Officer, was done without the benefit of impartial and unbiased consideration being given to the testimonies of the transcript record that denied the Claimant "due process". It concluded by requesting that the discipline be rescinded and the claim be sustained as presented.

It is the Carrier's position that during the Investigation the Claimant admitted he failed to document or record that he had in fact stopped to remove and put on full set of snow chains on January 22, 2010, which is a Department of Transportation (DOT) requirement or federal law that he failed to observe. It also argued Claimant testified that he did not believe he had to document when his truck was stopped for periods of time and the record verifies that Claimant was pulled over by the highway patrol on January 23, 2010, and he did not record the time he was stopped. The Officer's report indicates he was stopped for 30 minutes and Claimant's log book only indicates he was stopped, it does not document for how long. According to the

Carrier, that is not consistent with DOT regulations and it closed by asking that the claim remain denied.

The Board has thoroughly reviewed the transcript and the record of evidence and will next address the Organization's procedural arguments. In the case at hand the Organization has argued that the Hearing Officer should have rendered the decision because he was in the best position to make credibility decisions and judge the demeanor of witnesses, therefore, when an Officer who was not present at the Hearing issued the decision the Claimant was denied "due process". That argument is not without merit, however, Organization's have successfully made the counter argument that has sometimes resulted in rulings that have determined that the Hearing Officer should not render the decision because his neutrality is questionable as he also prosecuted the Carrier's case (See Third Division Awards 13443, 13978, 14496, 1062, 19914, 20471 28908 and Second Division Award 4536 to name just a few). Additionally, we have Awards wherein the same argument made by the Organization in this instance has been rejected such as Third Division Award No. 17532 which stated the following:

"...It is not fatal to the legality of the investigation to have someone who was not the Hearing Officer render the discipline decision...."

In Third Division Award No. 17965 it was stated in pertinent part the following:

"...There is nothing in the Agreement which provides that the official signing the discipline form must be present at the investigation...."

Based upon arbitral precedent the Board has determined that each case must be measured on its individual circumstances and in this instance the Investigation was held in compliance with the Agreement, therefore, the claim will resolved on its merits.

The facts reveal that Claimant was charged with violation of Rule 74.3 - Driver's Responsibility which states in pertinent part that employees are required to observe the following:

"* Know and observe all local, state, and federal laws and regulations governing vehicle operation."

On January 22, 2010, Claimant was operating a tractor and semi-trailer Unit #67311 when he stopped to remove and put on full sets of snow chains. The Claimant testified, on page 26 of the transcript, that he was required to make log entries when performing duties other than driving for more than 15 minutes and according to him he did not make the notation of placing

the tire chains on the units within the log book simply because he forgot to do such (See page 40 of the transcript).

The following day, January 23, 2011, Claimant was operating the aforementioned tractor and semi-trailer when he was pulled over at approximately 9:30 a.m. by Nevada Highway Patrol Officer T. Brooks who issued him a written warning for failure to drive in the designated right truck lane and a missing mud guard; after which he was released at 10:00 a.m. The Organization asserted that the Claimant spent the time he was pulled over by Officer Brooks behind the driving controls of the commercial motor vehicle Unit #67311, therefore, he believed he was not required to change his duty status for that period of time from "Driving" to "On Duty Not Driving". It further pointed out that he did note within his log book that he had been pulled over by "NV DOT".

The incidents of the two dates discussed above each took longer than 15 minutes and in the latter Claimant should have changed his status to that of "On Duty Not Driving". Despite the Organization's able defense of the Claimant he testified that he did not properly document the log book, as required, and substantial evidence was adduced at the Investigation that the Carrier met its burden of proof that Claimant was guilty as charged.

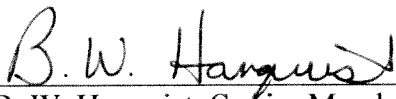
The only issue remaining is whether the discipline assessed was appropriate. The Board cannot find that the Carrier erred in its discipline as it was not arbitrary, excessive or capricious as it was in accordance with the Carrier's UPGRADE Policy. The discipline will not be set aside and the claim will remain denied.

AWARD

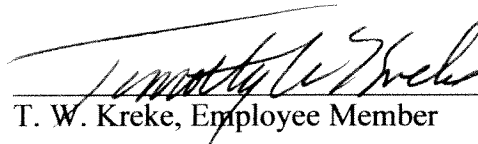
Claim denied.



William R. Miller, Chairman



B. W. Hanquist, Carrier Member



T. W. Kreke, Employee Member

Award Date: Sept 12, 2011