

**NATIONAL MEDIATION BOARD**

**PUBLIC LAW BOARD 6302**

**NMB NO. 187**

**AWARD NO. 175**

**PARTIES TO DISPUTE**

**CARRIER**

Union Pacific Railroad

**Carrier's File**

1524101

AND

**ORGANIZATION**

Brotherhood of Maintenance of Way Employees  
Division of International Brotherhood of Teamsters

**System File**

D-0948U-210

**STATEMENT OF CLAIM**

1. The Carrier violated among other rules violations of the July 1, 2001 Collective Bargaining Agreement, Rule 48 when, by letter dated July 15, 2009, it assessed Claimant, Brandt Truck Operator, Jim Watson a Level 5 disciplinary action under its UPGRADE Discipline Policy, dismissing him permanently from its service in connection with a derailment of the Brandt truck and three (3) flatcars on June 3, 2009, allegedly in violation of GCOR Rules, 1.6 Conduct – (1) Careless of Safety; and (2) Negligent; and 7.6 Securing Cars or Engines.

2. As a consequence of the violations set forth in Part 1 above, Claimant shall have the dismissal discipline expunged from all Company records; Carrier to reinstate Claimant to service with seniority unimpaired ; to restore Claimant's vacation rights and, to compensate Claimant for all loss of time including personal expenses incurred for his attendance at the investigation.

**STATEMENT OF BACKGROUND**

On June 3, 2009, Claimant was working as a Brandt Truck Operator assigned to operate Brandt Truck 82758. A Brandt Truck is described and likened to a semi-truck that has railroad wheels and is capable of pulling/moving a maximum of ten (10) or less railcars depending on the total weight of the cars. At about 10:30 am, the morning of

**AWARD NO. 175**

June 3, 2009, Claimant started at Black Butte, California pulling six (6) RTI Flatcars, five (5) of which were empty and the remaining one (1) nearly empty, loaded with about 60 to 80 ties ( a full load consisted of 200 ties ) destined for the Mott house track located, between Mt. Shasta, California and Dunsmuir, California. When Claimant approached the house track switch at Mott at about 1:15 pm, he stayed about 150 feet from the crossing, applied the emergency brake of the truck as he was located on a two (2) percent grade, but failed to secure five (5) of the six (6) rail cars, then dismounted the truck to walk to the switch to line it into the side track for the purpose of loading all the cars with ties after which he was to pull two (2) loaded rail cars at a time up to Shasta City and place them on the long stub track where they would be picked up by the train. When Claimant had walked approximately fifty (50) feet to half the distance to the switch, he heard a squealing sound behind him which caused him to look back and he then observed the Brandt Truck moving in his direction. The squealing sound Claimant heard was described by Dennis Bartsch, eyewitness to the event as it unfolded as the screeching noise made from the truck wheels due to moving against the truck's brakes. At that point in time, Claimant turned around and ran toward the Brandt Truck as it was moving toward him with the intention of jumping into the truck in order to stop it and the consist of the six (6) cars. As Claimant was running toward the Brandt Truck, he lost his footing twice and when he fell down for the second time, the Brandt Truck passed him by. As Claimant was unable to catch up with the moving Brandt Truck in chasing after it, thereby losing the opportunity to stop it, he borrowed co-worker Eric Bartsch's cell phone and called the Dispatcher to apprise him of the runaway consist.

In a written statement dated June 3, 2009, the same date of the incident, employee and eyewitness, Eric Bartsch reported he had driven the Company pick-up to Mott from Black Butte to load used railroad ties that were left over from a recent track renovation into the containers on the flatcars. As he was exiting the truck, he looked out and observed the Brandt Truck rolling toward the switch and yelled to Dennis that the truck was moving. Dennis, in his own separate written statement of the incident also dated June 3, 2009, reported that at the time the Brandt Truck began to move, he had begun walking toward Claimant anticipating a Job Briefing. Eric corroborated Claimant's account of his falling down and missing the opportunity to stop the Brandt Truck at which time he (Eric) heard the drive tire on the truck explode. Eric further reported that at that point in time, he took Claimant in the pickup truck and began chasing after the runaway train but after about a quarter to a half mile into the chase, they both concluded there was just no way they were going to be able to stop the train. In so concluding, Eric reported Claimant used his (Eric's) cell phone to apprise the Dispatcher of the situation. Eric further reported that he and Claimant returned to the spot at which the Brandt Truck commenced moving, to pick up Dennis and all three of them then proceeded to look for the truck and cars.

As reported in the Mount Shasta Area Newspaper the following day, June 4, 2009, the Brandt Truck and three (3) of the rail cars derailed and plummeted down a steep bank, finally coming to a stop approximately 150 feet short of the Sacramento River. The

## AWARD NO. 175

article quoted Carrier spokesperson, Zoe Richmond that the train, with no one on board traveled two (2) to three (3) miles achieving a speed of between 40 and 60 miles per hour before it derailed. Richmond in a statement to the paper speculated that the cause of the derailment was most likely attributable to the Brandt Truck Operator failing to properly apply the brakes. In another statement given to TRAINS News Wires on June 4, 2009, Richmond related that the Operator was authorized to operate the Brandt Truck and short train with no other employees present and, it was likely he forgot to set his train's brakes when he got out [of the truck] to throw the switch. This article noted that when the three (3) rail cars and the Brandt Truck derailed, the three (3) rail cars "crushed" the Brandt Truck beneath them. As to the remaining three (3) rail cars, this article noted they came to a stop and stayed on the track.

In response to the derailment, Carrier immediately withheld Claimant from service pending formal investigation of the incident, which investigation was convened on June 29, 2009. At the investigation, Claimant noted in his testimony that prior to 2002, when operating the Brandt Truck, he was assisted by a Pilot Conductor which allowed him to remain in the truck at all times while the Pilot Conductor performed all other duties associated with operating the truck which included among others, cutting in air and setting hand brakes. Essentially, according to Claimant, he was there in the cab just to go forward and backward and shut up. Claimant further noted that prior to 2002, he also had the assistance of ground men that were not pilot conductors that permitted him to remain in the cab of the truck while they threw switches and lined a cut of cars to take out. Ground men also performed cutting in the brakes and examining the workings of the brakes. Claimant related that in 2002, the Carrier ended the practice of providing pilot conductors and ground men and decided that the Brandt Truck could be operated by the Truck Operator alone with the exception of certain territories. According to Claimant, the elimination of pilot conductors and ground men made performing his work as Operator with the added duties, "scary". Claimant averred that had he had the assistance of either a pilot conductor or ground man at the Mott house switch on June 3, 2009, it would have allowed him to remain in the truck with the consist of six (6) rail cars while the switch was being thrown and, therefore, no derailment would have occurred. The record evidence reflects that on June 13, 2009, just ten (10) days after the derailment occurred, Carrier issued revised instructions pertaining to operating the Brandt Truck. The very first revised instruction, Instruction 1a provided that "Brandt Trucks will NOT operate on the following territories: Black Butte Subdivision: Black Butte – Dunsmuir".

By letter dated July 15, 2009, Carrier notified Claimant that in review and consideration of all testimony rendered at the hearing held June 29, 2009, it found, based on a substantial degree of evidence presented, he was guilty of all charges brought against him and, in so finding, the violations warranted the assessment of a Level 5 discipline, specifically, dismissal from service under its UPGRADE Discipline policy. Thereafter, the Organization filed the instant claim and as the Parties were unable to reach a

mutually satisfactory resolution of Claimant's dismissal on the property, the matter comes now before the Board.

### **CARRIER'S POSITION**

In first addressing the procedural issue raised by the Organization that it was improper and a violation of Rule 48 to withhold Claimant from service immediately following the derailment pending a forthcoming investigation and the rendering of a subsequent decision, Carrier submits it is a well established management right to exercise discretionary authority in deciding whether the circumstances of a particular situation warrant taking an employee out of service pending an investigation. In support of its position, Carrier cites Paragraph (o) of Rule 48 which reads in its entirety as follows:

***It is understood that nothing contained in this rule will prevent the supervisory officer from suspending an employee from service pending hearing where serious and/or flagrant violations of Company rules or instructions are apparent, provided, however, that such hearing will be conducted within thirty (30) calendar days from the date the employee is suspended and a decision rendered within twenty (20) calendar days following the date the investigation is concluded.***

Carrier argues that Claimant's failure to take the necessary measures with regard to properly setting the brakes on the rail cars which was the direct result of the Brandt Truck and the consist of the six (6) rail cars to commence moving while Claimant was walking to the switch and ultimately led to the derailment in question, qualified as a "serious" safety violation under Rule 48 (o) and therefore justified its decision to withhold Claimant from service pending investigation and the outcome of the investigation.

As to the merits of the claim, Carrier cites the three-prong test it must meet in all discipline cases as follows:

***1. Did the accused employee receive a full and fair investigation with due notice of charges, opportunity to defend, and representation?***

Contrary to the Organization's assertion that Claimant was not the recipient of a fair investigation as the Hearing Officer ruled to exclude certain evidence it deemed to be exculpatory, Carrier submits the rulings of the Hearing Officer were proper and Claimant received all due process he was entitled to receive.

***2. If so [in reference to 1. above], did the employer show by clear and convincing record evidence that the employee was culpable of the***

***charged misconduct or dereliction of duty?***

Carrier submits that not only did the record evidence meet the requirement that it be substantial to prove Claimant violated the Rules he was charged with, but Claimant admitted during the hearing he had not complied with Rule 7.6, "securing cars or engines" which reads as follows:

***Do not depend on air brakes to hold a train, engine, or cars in place when left unattended. Apply a sufficient number of hand brakes to prevent movement. If hand brakes are not adequate, block the wheels.***

***When the engine is coupled to a train or cars standing on a grade, do not release the hand brakes until the air brake system is fully charged. When cars are moved from any track, apply enough hand brakes to prevent any remaining cars from moving.***

Carrier submits that contrary to the Organization's position, the record evidence adduced at the hearing also proved Claimant violated Rule 1.6 (1) and (2).

***3. If so, [referring to the second prong of the test as set forth above] was the penalty imposed arbitrary, capricious, discriminatory, or unnecessarily harsh in facts and circumstances of the particular case?***

Carrier submits that due to the seriousness of the safety violation engendered by his non-compliance with Rule 1.6 (1) which pertains to being careless of his safety and the safety of others combined with his violation of Rule 1.6 (2) as exemplified by his act of negligence in not meeting the responsibilities of his position as Brandt Truck Operator under the given circumstances, the penalty of dismissal assessed Claimant was both proper and appropriate. Carrier further submits the assessment of dismissal was in accord with previous Board decisions as well as the Carrier's UPGRADE discipline policy. Accordingly, Carrier urges the Board to either dismiss or deny the instant claim.

**ORGANIZATION'S POSITION**

The Organization disagrees with Carrier's argument that Claimant's role in the derailment constituted a "serious" violation as provided for under Rule 48 (o), as according to the traditional view of the term, "seriousness", required the charges alleged to have been committed by an employee, as a threshold matter had to implicate safety or, affect Carrier operations and/or discipline administration going forward. The Organization argues that the derailment was a discrete event and given that Claimant had never incurred a safety violation leading to an accident at any time during his nearly ten (10) years as a Brandt Truck Operator, Carrier's withholding of Claimant pending investigation was not warranted under the given circumstances and cannot be

supported by the provision set forth in Paragraph (o) of Rule 48. Additionally, the Organization asserts that withholding Claimant from service pending investigation was an act of pre-judging Claimant's guilt. Such pre-judgment was compounded with public statements by Carrier's spokeswoman Zoe Richmond to the press that the cause of the derailment was Claimant's failure to set the brakes.

As to the merits of the claim, the Organization concedes that Claimant did not comply with Rule 7.6 but argues that was the only rule he violated and that rule calls only for the assessment under Carrier's UPGRADE discipline policy of a Level 3 discipline not a Level 5 discipline of dismissal from service. The Organization submits that the discipline should be moderated not only on the ground that Claimant admitted the violation of Rule 7.6 but that Carrier must also be held culpable for the derailment in that it eliminated the pilot conductor and ground man from assisting Brandt Truck Operators in performing some of the responsibilities associated with operating the Brandt Trucks which includes having to perform the duty of switching, thereby requiring the Operator to leave the Brandt Truck unattended during some period of time. The Organization notes that almost immediately after the occurrence of the subject derailment, Carrier determined that its change in policy making the Brandt Truck Operator a crew of one (1) employee was a mistake which prompted Carrier to amend the policy barring Brandt Trucks from operating altogether in the Black Butte Subdivision entailing the Black Butte – Dunsmuir territory.

Based on the above argument asserted, the Organization urges the Board to sustain the claim in its entirety as presented.

## **FINDINGS**

Public Law Board No. 6302, 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.

The Board finds it unnecessary to address all arguments but one and that is, whether, under all the prevailing circumstances, Carrier met its burden as required by the third prong of the three-prong test, to wit, that having to do with the quantum of discipline imposed relative to the consideration of it being any one of the following: arbitrary, capricious, discriminatory, or unreasonably harsh in facts and circumstances of the particular case. We are persuaded by the Organization's argument that Carrier must bear some degree of culpability for the derailment in that eliminating a pilot conductor or ground man from assisting a Brandt Truck Operator when operating in a territory such as the Black Butte – Dunsmuir territory with a number of steep grades was an operating change that built in an unsafe condition of employment for the Brandt Truck Operator.

The Board further concurs in the Organization's position that had this operating change not been made, it would not have been necessary for Claimant to leave the truck unattended in order to accomplish the duty of switching the tracks. This finding does not however excuse Claimant's failure to comply with Rule 7.6 and, in this regard, Claimant is deserving of the assessment of a proper penalty which the Organization notes warrants a Level 3 disciplinary action. We therefore further find that under all the prevailing facts and circumstances of this case, the Level 5 discipline assessed Claimant of being dismissed from service to have been unreasonably harsh and, in so finding, we also conclude that Carrier failed to meet the requirement of the third prong of the well established three-prong test as set forth above.

Accordingly, we rule to sustain the claim but not in its entirety. Claimant is to be reinstated with seniority unimpaired but without back pay or other such monetary benefits he would have been entitled to receive had he not been dismissed from service.


### AWARD

#### Claim Sustained as Per Finding



George Edward Larney

Neutral Member & Chairman



B. W. Hanquist  
Carrier Member



T. W. Kreke  
Employee Member

Chicago, Illinois

Date: Oct 4, 2010