

PUBLIC LAW BOARD NO. 7194

AWARD NO. 8
CASE NO. 8

PARTIES TO THE DISPUTE:

Brotherhood of Maintenance of Way Employes Division – IBT Rail Conference

vs.

Union Pacific Railroad Company

ARBITRATOR: Janice K. Frankman

DECISION: Claim partially sustained

STATEMENT OF CLAIM:

1. The five (5) day suspension imposed upon M. Matthews for violation of GCOR Rules 1.19 (Care of Property) for personal use of a Company vehicle and 74.3 (Driver Responsibility) for traveling on Express Lanes with no transponder reading on three days is based on unproven charges, unjust and unwarranted (Carrier File 1473568D SPW)
2. As a consequence of the violations referred to in Part (1) above, Claimant shall be compensated for all wage and benefit loss suffered by him for observing the five (5) day suspension and the alleged charge(s) expunged from his personal record.

FINDINGS:

The Board, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employes within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties; that the Board has jurisdiction over the dispute herein; and that the parties were given due notice of the hearing.

Claimant commenced service with Carrier on December 19, 1978, and held seniority rights in various classes of the Track Sub-Department. He was Track Foreman on Gang #8719 when this matter arose. He was assessed UPGRADE Level 2 discipline on February 14, 2007, which with existing Level 2 status equated to Level 3 discipline resulting in a five (5) day suspension. Organization submitted this Claim on April 2, 2007.

Employees are required to know and observe all state laws while driving a vehicle and are prohibited from using railroad property for their own use.

Carrier received notice that the Company vehicle assigned to Claimant was identified on three dates in December, 2006, traveling Route 91 Expressways without a transponder. Fines were imposed for violation of state law.

MTP Henry Frates and Chuck Smote¹ met with Claimant to determine what had happened. Claimant admitted that he had used the express lanes on those dates in his Company vehicle, and told them he was traveling to his girlfriend's home. Claimant had worked his regular shift two of the three dates. The third date was a rest day. When he was asked why he was traveling to his girlfriend's home in his Company vehicle on a rest day, he said he had talked with A.S. Gonzales, Director of Track Maintenance², that day to advise he was available for call. He drove the Company vehicle to his girlfriend's so that he could respond more quickly to a call.

At the investigation, Claimant described a casual conversation he had had with a Cal Trans employee. He asked the employee if he could drive his Company vehicle in express lanes without a transponder and was told his vehicle would be recognized on video as a railroad vehicle and would not be subject to fines. Claimant testified at the investigation hearing that he realized the employee "lied" to him, and he paid the fines.

MTP Frates testified at investigation that Claimant was allowed to take his Company vehicle home "so that he could leave his home and go as being On Line to any particular place where (Carrier) might have a switch problem as he primarily takes care of the- the Hot Line issues that we have concerning hard to throw switches and other track problems like that . ." He also was permitted to drive his vehicle to wherever he chose "to tie up" for the day as long as he drove directly from work to wherever he chose to spend the night. TR pages 15 and 16. In response to Mr. Gonzales' questions, he testified that travel on a rest day was not allowed and added that Claimant is not a first responder; consequently, if he did receive a call, he would have time to return to his home to pick up his Company vehicle. Mr. Frates had never discussed the Rules in question with Claimant.

Claimant knew he was not authorized to drive the vehicle for personal use. He testified he did not know that he had done anything wrong when he drove the vehicle to his girlfriend's on his rest day after speaking with Mr. Gonzales. He owned four vehicles and kept one of them parked at his girlfriend's home for his personal use.

Organization challenges Carrier's action procedurally and on its merits. It argues Claimant was denied a fair and impartial hearing and that Carrier has failed to provide evidence that Claimant violated its Rules. It argues it was inappropriate for Mr. Gonzales to conduct the investigation hearing and, as a result, to be unavailable to testify. It argues Carrier permitted Claimant to take his Company vehicle to his home or to his girlfriend's home and that he was open and truthful in explaining why he drove in the express lanes and why he drove the vehicle to his girlfriend's home on his rest day. Organization argues there is no evidence Claimant used his Company vehicle for personal use.

Carrier takes the position it provided a full and impartial hearing consistent with parties' Agreement and that substantial evidence supports its discipline of Claimant, the only standard of review appropriate for this Board to apply. It asserts it is inappropriate for the Board to evaluate credibility of witnesses in considering this Claim on appeal.

¹ Mr. Smote's position is not identified in the record. MTP Frates identified himself as an "indirect" supervisor of Claimant.

² DTM A.S. Gonzales was Managing Conductor of the investigation hearing.

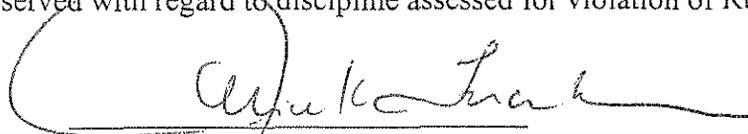
DTM Gonzales issued Notification of Discipline Assessed on February 14, 2007. He concluded that Claimant had violated two of the three Rules cited in the NOI. Alleged violation of Rule 1.13 relative to failure to follow instructions was dropped. The remaining Rule violations are distinct. Informal investigation of the alleged driving violation revealed possible violation of the Rule prohibiting personal use of a Company property.

Organization raises a valid issue relative to Mr. Gonzales' role as Conducting Manager of the investigation hearing and author of the assessed discipline. He could not provide a fair and impartial hearing with regard to the issue of appropriate use of the vehicle given his supervisory relationship with Claimant and direct contact with him on his rest day. His roles were clearly and inappropriately in conflict. His conversation with Claimant, testified to by Mr. Frates' and Claimant, is significant in determining whether substantial evidence supports the decision that Claimant violated Rule 1.19. Mr. Frates had no knowledge of the detail of the conversation. Careful consideration of the record as a whole supports the conclusion that Carrier failed to demonstrate substantial evidence that Claimant used his Company vehicle for personal use. Claimant's testimony that he drove the vehicle on his rest day for Company purpose is unrefuted.

Nonetheless, there is clear, admitted and unrefuted substantial evidence that Claimant violated driving rules which require compliance with state law. His reliance on an opinion expressed in casual conversation does not overcome his blatant violation of state law. Consequently, it is appropriate to sustain the discipline. There is no evidence that Mr. Gonzales' role with regard to the first issue adversely impacted his ability to decide the second. There has been no argument relative to UPGRADE and its application in this case, and no basis shown for reducing the discipline assessed. It is appropriate to direct Carrier to expunge Claimant's record relative to alleged violation of Rule 1.19.

AWARD

Claim is partially sustained. Claimant's record shall be expunged consistent with this Award and otherwise preserved with regard to discipline assessed for violation of Rule 74.3



Janice K. Frankman, Chairperson
Neutral Member



Dominic A. Ring
Carrier Member

Oct 9 2008



Timothy W. Kreke
Organization Member

Oct, 9, 2008