

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7426
AWARD NO. 21, (Case No. 21)**

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

vs

UNION PACIFIC RAILROAD COMPANY (SPWL)

William R. Miller, Chairman & Neutral Member
K. D. Evanski, Employee Member
P. Jeyaram, Carrier Member

Hearing Date: September 19, 2012

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

- 1. The Level 3 discipline [five (5) day suspension] imposed upon Track Foreman S. G. Singh, for violation of Rules 70.3 and 1.13 as contained in the General Code of Operating Rules in connection with his alleged failure to conduct a risk assessment and job briefing resulting in a vehicle collision between Vehicle 1282W and a forklift in the Newark office parking lot on January 25, 2011 is based on unproven charges, unjust, unwarranted, excessive and in violation of the Agreement (System File RC-1145S-451/1552517D).**
- 2. The Level 3 discipline [five (5) day suspension] imposed upon Welder R. A. Cihla, for violation of Rules 70.3 and 1.13 as contained in the General Code of Operating Rules in connection with his alleged failure to conduct a risk assessment and job briefing resulting in a vehicle collision between Vehicle 1282W and a forklift in the Newark office parking lot on January 25, 2011 is based on unproven charges, unjust, unwarranted, excessive and in violation of the Agreement.**
- 3. The Level 3 discipline [five (5) day suspension] imposed upon Machine Operator R. Ibarra, for violation of Rules 70.3 and 1.13 as contained in the General Code of Operating Rules in connection with his alleged failure to conduct a risk assessment and job briefing resulting in a vehicle collision between Vehicle 1282W and a forklift in the Newark office parking lot on January 25, 2011 is based on unproven charges, unjust, unwarranted, excessive and in violation of the Agreement.**
- 4. As a consequence of the violation referred to in Part 1 above, Mr. Singh shall have the discipline expunged from his personal record and he shall be compensated for all wage lost both straight time and overtime and benefit**

loss suffered for the five (5) day suspension without pay.

5. As a consequence of the violation referred to in Part 2 above, Mr. Cihla shall have the discipline expunged from his personal record and he shall be compensated for all wages lost both straight time and overtime and benefit loss suffered for the five (5) day suspension without pay.
6. As a consequence of the violation referred to in Part 3 above, Mr. Ibarra shall have the discipline expunged from his personal record and he shall be compensated for all wages lost both straight time and overtime and benefits loss suffered for the five (5) day suspension without pay."

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 January 28, 2011, Carrier notified Claimants to appear for a formal Investigation on February 11, 2011, concerning in pertinent part the following charge:

"...to develop the facts and place responsibility, if any, that while employed as Welder on Gang 8887, at Newark, California, near Milepost 31, at approximately 0745 hours, on January 25, 2011, you allegedly failed to conduct a risk assessment and job briefing before departing the Newark office in Company Vehicle 1282W. This resulted in a vehicle collision between the 1282W and a fork-lift in the Newark office parking lot.

These allegations, if substantiated, would constitute a violation of Rule 70.3 Job Briefing, Rule 1.13 Reporting and Complying with Instructions, as contained in the General Code of Operating Rules, effective April 7, 2010, System Special Instructions, effective April 7, 2010, and Safety Rules, effective July 30, 2007. Please be advised that if you are found to be in violation of this alleged charge the discipline assessment may be a Level 3, and under the Carrier's UPGRADE Discipline Policy may result in up to five (5) days off work without pay or up to one (1) day training without pay and a Corrective Action Plan must be developed upon return to work."

On March 3, 2011, Claimants were notified that they had been found guilty as charged and were assessed a Level 3 discipline with a five day suspension without pay.

The facts indicate that on the morning of January 25, 2011, Gang 8887 assembled for their morning safety briefing at the Carrier's facility in Newark, California. After the meeting Gang 8887 exited the building and walked into a busy and congested parking lot and entered their work truck. As the Claimants drove out of the parking lot they proceeded past a semi-truck which was parked in front of the neighboring commercial tenant's storefront. Parked behind that semi-truck was a forklift that suddenly and unexpectedly backed into the Claimant's work truck. Claimants then stopped their work truck and determined there had been no injuries and reported the incident to their Supervisor. Based upon the accident a formal Investigation was convened.

It is the position of the Organization that the Carrier failed to prove that the Claimants were in violation of any Rules and that the evidence and the testimony in the record established that the Claimants did exactly what they were supposed to do as they discussed their daily assignments and safety issues as they walked towards their truck, surveyed the parking lot for any issues, relied on that information in choosing a departure route and they acted in a reasonable manner. Additionally, it argued that if there was any merit to the Carrier's argument, which there was not, the Claimants were subjected to disparate treatment because Ballast Regulator Operator Dietrich performed the same type of common sense risk analysis and job briefing as the Claimants did on the date in question, but he was neither charged, investigated nor disciplined. It concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the Carrier's position that the evidence proves that the Claimants failed to comply with instructions by failing to perform a job briefing and risk assessment before driving. It argued that was a direct violation of Rule 70.3, which requires a job briefing to be planned and conducted before performing work. It further argued that it was also a direct violation of Rule 1.13, which requires employees to comply with the instructions given them by their Supervisors. According to it, Supervisor Franklin had required employees for the past year to conduct a job briefing and risk assessment throughout the day as circumstances change. It alleged that the Claimants failed to perform a proper job briefing and risk assessment before getting into their vehicle that contributed to the subsequent accident which was verified by the fact that the Claimant's testified they talked about defensive in passing as they walked to their truck. It closed by asking that the discipline not be disturbed and the claim remain denied.

All of the Claimants were charged with and subsequently assessed a Level 3 discipline for allegedly having failed to perform a proper job briefing before moving their vehicle that resulted in vehicular collision. Manager Track Maintenance, K. P. Fitzgerald was questioned as to whether he asked each of the Claimants if they had performed a risk assessment in accordance

with Rule 70.3 - Job Briefing which states in pertinent part: **"Discuss existing or potential hazards and ways to eliminate or protect against them."** On page 29 of the transcript, Mr. Fitzgerald testified as follows:

"I asked them in the course of my investigation if they had seen the forklift operating in the parking lot to and from the warehouse. They each stated they had, did not- did not consider it a risk and they did not consider as part- and did not conduct a job briefing or risk assessment and that risk was ignored and they chose that path and that's what resulted in the vehicle collision with the forklift."

As previously stated the Organization asserted that after the Claimants entered their work truck they did one last review of various vehicle safety issues before departure. According to it, the route they chose was not arbitrarily taken or randomly decided upon and was instead based on a multitude of factors such as: (1) it was considered to be the easier and safer route out of the Carrier's parking lot; (2) because of the congested parking lot observed by the Claimants that morning, their route meant they avoided multiple blind spots, difficult turns and the various other hazards and (3) based on their evaluations, their route past the neighboring commercial tenant posed no foreseeable risk.

The Organization's version of the incident was that Claimants after making a left turn out of their parking spot, proceeded past a semi-truck that was parked in front of the neighboring commercial tenant's building and parked behind that vehicle was a forklift that had not moved since they had come out of the office. According to the Claimants they made visual contact with the Forklift Operator which had still not moved and based on the Forklift Operator's reaction after making eye contact with the Claimants, they believed he understood and acknowledged that they would be passing him (See Transcript pages 49 - 52).

The Organization reasoned that Claimants exercised due caution and the accident was unavoidable. It also made an interesting argument that Ballast Regulator Operator Dietrich who left shortly after the Claimants testified that when he departed the parking lot, he simply observed his surroundings and made a reasonable decision that it wasn't best to try and drive by what was then an on-going accident investigation around the Claimants' work truck (See Transcript pages 60 and 61). According to the Organization Dietrich did the same thing the Claimants did, he used common sense in his exit, and for using common sense he was not questioned whereas the Claimants were disciplined.

The Organization's argument is not without some appeal as all three of the Claimants testified they talked about defensive driving and using common sense. However, that argument ignores two facts, the first being that Employee Dietrich after surveying the situation chose an

alternative exit route and he did not have an accident and secondly it ignores the testimony of Claimant Ibarra who was questioned on page 58 of the transcript as follows.

"Q Okay, wasn't Steve Dietrich not in the same parking lot as you guys?

A Yeah, he was there.

Q He stated in his- in his testimony that he saw this guy-

A Yeah, because he was- he was sit- he was-

**Q In a hurry, zipping around, backing up, not looking and the lack of-
[overtalk]**

A Yeah, that's what he is there, because where he was standing- where he was- he was up against the wall, facing this way. We were facing the opposite way.

Q So you guys didn't see a backhoe- or the forklift before you left?

A Yeah, but when we left. when we turned the corner, we seen him."
(Underlining Board's emphasis)

Claimants Cihla and Singh did not dispute Ibarra's recollection of the incident which confirmed that the Claimants did not thoroughly assess the parking lot conditions before they entered their vehicle and they did not discuss the location of the forklift because they did not see it until they rounded the corner. Substantial evidence was adduced at the Investigation that the Claimants were guilty as charged.

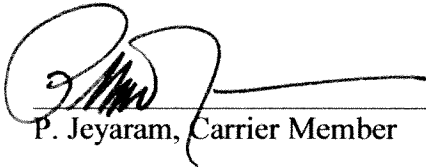
The only issue remaining is whether the discipline was appropriate. Review of the Claimant's work records combined with proven infraction confirms that the discipline was in accordance with the Carrier's UPGRADE Discipline Policy and because it was not excessive, arbitrary or capricious it will not be set aside and the claim will remain denied.

AWARD

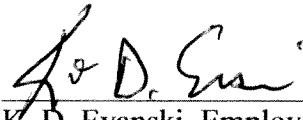
Claim denied.



William R. Miller, Chairman



P. Jeyaram, Carrier Member



K. D. Evanski, Employee Member

Award Date: Dec 17, 2012