

PUBLIC LAW BOARD NO. 7357

PARTIES TO THE DISPUTE:

Brotherhood of Maintenance of Way Employees
Division – IBT Rail Conference

Award No. 50
Case No. 50

-and-

Delaware and Hudson Railroad Company d/b/a Canadian Pacific Railway

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

1. The 10 day actual suspension assessed Mr. James Williams, by letter dated September 12, 2014, in connection with the allegation that he operated a CP work truck in an unsafe manner in Binghamton Yard on August 20, 2014 was in violation of the Agreement.
2. As consequence of the Agreement violation referred to in Part 1 above, we request that the discipline be removed from the Claimant's record and that he be compensated for all losses suffered due to the Carrier's improper discipline.

FINDINGS:

This Public Law Board No. 7357 finds that the parties are Carrier and Employee, within the meaning of the Railway Labor Act, as amended, and that this Board has jurisdiction.

By letter dated September 12, 2014, the Claimant, Mr. James Williams, was notified by the Carrier that he was assessed a 10 day suspension to be served, as follows:

Dear Sir:

As a result of the facts developed at the formal investigation hearing, held Friday August 29th, 2014 you have been found failing to comply with Engineering Safety Rules and Operating Rules, in violation of GCOR Section 1.1.1 Maintaining a Safe Course – failing to take the safe course; in violation of GCOR Section 1.6 Conduct – careless of the safety of themselves and others; in violation of Engineering Safety Rule Book Section E-2 Vehicles Used for Company Business – failing to operate vehicle in a controlled and

careful manner. This is a result of your operation of a company vehicle erratically at Binghamton Yard on August 20, 2014.

Your record has been accessed with a 10 day suspension, to be served. This suspension will begin on September 15th to September 26th, 2014 with an expected return to work the date of September 29th, 2014.

S/Todd Dragland – Division Engineer – Northeast US Division

The Organization appealed this discipline, and the matter has been progressed to this Board for adjudication.

By letter dated August 21, 2014 the Carrier set forth the charge against Mr. Williams as follows:

The purpose of this investigation will be to determine your responsibility, if any, for alleged incident, whereby you operated a CP work truck in an unsafe manner in Binghamton Yard on August 20, 2014.

I.

“Company official N. Denzer testified about observing the company truck driven by the Claimant pass him by “driving erratically and aggressively with the throttle”. Where upon he jumped in his truck to locate the driver Mr. Williams and discuss why he would drive the truck in that manner. The Hearing Officer questioned Mr. Denzer as follows:

- Q. So you stated that he accelerated in an aggressive manner. Can you describe that, was it just once, was it multiple times, was there some kind of pattern to it?
- A. It was a little bit of a pattern as he was just gunning or goosing the truck at least three times in my observation. Three to four times.
- Q. So having observed this action of the vehicle, was it an unsafe operation of the vehicle?
- A. In my opinion, I don't know that there was a safety component to it. Obviously if you're accelerating the vehicle in that manner, there's a potential for something to

happen, somebody steps out and you're not able to hit the brake because you're accelerating like that, so yes. But for the most part, my concern is the abuse of the vehicle itself. (Tr. 16)

The Hearing Officer further questioned Mr. Denzer.

Q. Okay. At the time of the incident where Mr. Williams allegedly operated the vehicle in the manner that he's been charged with today, were there any other vehicles or objects in the vicinity of the line of travel in which he was traveling?

A. Numerous vehicles in the parking area, yes.

Q. But were they actually in the roadway or in his line of travel?

A. Well, that's the issue, isn't it? There's a potential for somebody to pull out at any time.

Q. I understand that's what you're saying. But was there at that time, was there any obstructions or anything in the line of travel at that particular point in time?

A. Not that I noticed, no. (Tr. 19, 20)

The Claimant's representative questioned Mr. Denzer in part as follows:

A. On the roadway in question, it's 25 miles per hour.

Q. Okay. And was Mr. Williams exceeding the speed limit?

A. In my estimation, no. (Tr. 66)

II.

Road Foreman of Engineers Kristan McMahon testified in part:

Q. Please state for the record your account of the incident.

A. I was actually exiting the building on the outside door here and I was going to meet up with Mr. Denzer who was on the opposite side of the road at his truck getting his PPE on when I witnessed the vehicle, the BME plumbers vehicle,

drive by in an irregular pattern and I noticed the engine revving up and down approximately two to three times. (Tr. 20)

Mr. McMahon gave his opinion that Mr. Williams' operation of the vehicle was an unsafe operation under the Carrier's rules. For example, Mr. McMahon testified in part in response to a question by the Claimant's representative.

- Q. So if it was irregular but he wasn't exceeding the speed limit -- we'll let Mr. Williams when he gets his opportunity to talk. So, if he wasn't exceeding the speed limit, was he actually endangering anybody that was walking in and out of the building if he wasn't exceeding 25 miles an hour?
- A. I would say yes.
- Q. And basing that on what?
- A. Basing that on the speed limit is a suggested posted limit. It doesn't mean that you always have to drive right at 25 miles an hour, especially when you're driving past a terminal where people enter and exit regularly. And common sense would dictate that any person driving a vehicle would want to slow down and be able to see people coming in and out of the building and be able to stop in case they had to in case a person was walking in their path. (Tr. 33, 34)

III.

On the date in question Mr. Denzer pursued and then questioned Mr. Williams for some 15 to 20 minutes. Mr. Williams testified in part as follows under questioning from the Hearing Officer.

- Q. Okay, Why don't you describe your operation of the vehicle on that day, particularly as you were coming by Mr. Denzer.
- A. I was coming from the south end of the yard past the water treatment plant. I was approaching the diesel shop facing towards the north. I see Denzer off to the right, he was taking his PPE off. He was next to his truck or behind his truck. I approach from the diesel shop all the way to the NS trailer going 10 miles an hour. After 10 miles an hour, after I saw Denzer there and I went by -- I didn't see McMahon, he must have came out of the door when I already went by the building and I didn't see anybody else in the roadway. I was the only vehicle in

the roadway. There was no other people, there was no other vehicles. And after I went pass the NS trailer, I increased my speed. I let the gas off and checked my speed because I didn't want to go over the speed limit because Denzer already raised it to 25. And I let off again and I increased it to 20 miles an hour and then I let off the gas making sure that I didn't go over and then I increased to 25 and proceeded to the tool house.

And as I was rounding or going around the tool house and as I parked the truck, Denzer was already out front talking to two people. I didn't know why he was there and then he approached me to the truck. And as he approached me, he asked me what I did and I said I don't know what you're talking about. And I kind of like looked at him with a strange face like what's wrong and he said, well, you know, you were driving the truck. And I said, no, I don't know. And he kept trying to say, well, would you do that with your own vehicle. And I said, yeah, I would do it with my own vehicle because I didn't do anything that would be an unsafe act of driving any kind of vehicle whatsoever in what I did because I didn't rev the engine. I didn't drive aggressively or erratically as they stated.

(Tr. 45, 46, 47)

Mr. Williams further testified:

HEARING OFFICER:

- Q. Mr. Williams, I just want to ask you a few more questions here. Earlier I asked you if there was any type of operation of the vehicle that could have been perceived as the descriptions that Mr. Denzer and Mr. McMahon described and you said no. Do you still feel that there was no operation that could have been perceived that way?
- A. I feel nothing that I did was wrong. I feel that the issue is as I stepped on the gas and let off and stepped on the gas, number one, I have a lot of tools that are on my side boxes. And regardless if I step on the gas and let off and then step on the gas, my truck is always bouncing up and down. It's always going like this all the time. I mean, it's not – I don't think the shocks are bad but that's just the way it operates because there's a lot of weight in the back.

Now revving the engine a little bit because of what the speed was was in no way whatsoever in any danger or any unsafe condition. It's just that that's the way the truck sounds and that's what the truck does. And by that little bit, it might have made it go up and down that much more. So there really isn't any where there's unsafe or any carelessness whatsoever.

(Tr. 73, 74)

The Hearing Officer further questioned Mr. Williams:

- Q. Okay, When Mr. Denzer came to address you about what he perceived, did you ever explain it to him that way?
- A. No, because he approached me in an unmanageable way. Just felt threatened. So when you feel threatened, you're going to like – at first I was bewildered because I didn't know what he was talking about because he probably perceived it as something because it's the eye of the beholder in the first place. He heard a noise and he looked down the roadway past the NS trailer and he saw my truck going up and down, which it always goes up and down. But maybe it went up and down a little bit more because he heard a noise and he looked. (Tr. 76, 77)

Mr. Williams testified about being questioned by Mr. Denzer in part as follows:

...But the thing is is that what he did to me felt – I felt that I was threatened. And the way he approached me and the way that he talked to me, I felt like he was harassing me and bullying me into trying to tell him what he felt that I should tell him which is what he saw. I didn't see what he saw. I was driving. My truck, yeah, maybe it went up and down but I'm trying to tell you that the whole thing was blown out of proportion from the very beginning.... (Tr. 18)

IV.

The Carrier has not met its burden of proof that Mr. Williams operated a CP work truck in an unsafe manner in Binghamton Yard on August 20, 2014 as charged. And, the Carrier has not met its burden of proof that Mr. Williams was in violation of any of the rules cited in its September 12, 2014 notice of discipline while the sole charge against Mr. Williams was “operating a CP work truck in an unsafe manner”. Mr. Denzer, the Carrier official who initiated the actions responded to the question “so having observed this action of the vehicle, was it an unsafe operation of the vehicle?”, stating “In my opinion, I don't know that there was a safety component to it... But for the most part, my concern is the abuse of the vehicle itself.”

Mr. Williams' testimony is un rebutted that while driving his truck he observed Mr. Denzer and did not see Mr. McMahon, and did not see anybody else in the roadway, and that he was the only vehicle in the roadway stating: "there were no other people, there were no other vehicles." Mr. Denzer agreed that the speed limit on the roadway in question is 25 mph and that Mr. Williams was not exceeding the speed limit. And Mr. Denzer forthrightly testified that there were no obstructions or anything in the line of travel as he observed Mr. Williams' vehicle.

Mr. McMahon testified that in his opinion Mr. Williams' operation of the vehicle was an unsafe operation under the Carrier's rules. He admits that Mr. Williams did not exceed the 25 mph speed limit but stated that common sense would dictate that a person driving a vehicle would want to slow down and be able to view people coming in and out of the building and be able to stop in case a person was walking in their path. The testimony of record shows that Mr. Williams was observant of all the actual roadway conditions on August 20, 2014, and operated within the speed limit. Mr. Denzer testified that there was no actual obstruction or anything in the line of the travel of Mr. Williams' vehicle. Mr. McMahon's speculative conditions which were not the actual facts of record, have no probative worth.

There was simply no probative evidence of record that Mr. Williams' increasing the speed three times between 10 mph and 25 mph constitutes abuse of a company truck. No certified mechanical official was called to validate that increasing the speed three times as explained in this case between 10 mph and 25 mph would be harmful to the truck in question.

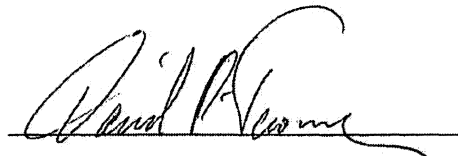
Mr. Williams was aware of Mr. Denzer's presence and accordingly used the truck's accelerator, letting off the gas in three intervals while checking his speed to make sure he did not exceed the speed limit. Absent the presence of any obstruction or other presence in the line of travel, or horseplay of some nature involving, for example, braking and accelerating with a

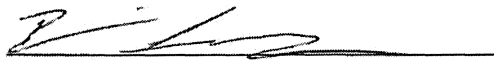
vehicle, a competent employee is entitled to rely on the Carrier's established speed limit and be free of the fear of discipline.

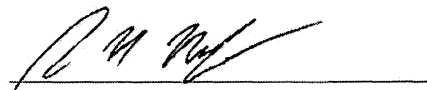
Mr. Williams is an eleven-year employee with an unblemished record. He operated a truck for several years on the B & B with no incidents, and drove thousands of miles across the whole NEUS area with no incidents whatsoever. (Tr. 38) We find that the Carrier has not met its burden of proof, by any measure, in this case. The 10 day discipline assessed shall be expunged from Mr. Williams record and he shall be made whole for all time lost in accordance with the claim before this Board.

Award

Claim sustained.


Chairman and Neutral Member


Carrier Member


Organization Member

Dated: 12/28/2016