

BEFORE PUBLIC LAW BOARD NO. 7566

CASE NO. 105

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION

and

CANADIAN NATIONAL RAILWAY, WISCONSIN CENTRAL

Carrier's File WC-BMWED-2016-00034
Claimant: T. KIZEWSKI

STATEMENT OF CLAIM

Claim of the System Committee of the Brotherhood that:

1. The discipline (suspension) imposed upon Mr. T. Kizewski for alleged violation of the CN Vehicle Backup Policy in connection with its allegedly backing into a light pole on the Hydro Lead while backing up in super truck CN 070676 on February 5, 2016 was arbitrary, capricious and in violation of the Agreement (Carrier's File WC-BMWED-2016-00034 WCR).
2. As a consequence of the violation referred to in Part 1 above, Claimant T. Kizewski's personal record shall be cleared of the charges immediately and he shall be provided the remedy prescribed in Rule 31 of the Agreement."

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier or employee within the meaning of the Railway Labor Act as approved June 21, 1934.

Public Law Board 7566 has jurisdiction over the parties and the dispute involved herein.

Claimant received a notice dated February 10, 2016, to appear for an investigation:

[T]o develop the facts and to determine your responsibility, if any, in connection with an incident that occurred at approximately 1410 hours, February 05, 2016 at or near Wisconsin Rapids, WI, with allegedly backing into a light pole on the Hydro Lead while you were backing up in super truck CN 070676, and whether you violated any Company rules, regulations and/or policies in connection with the incident.

Following the investigation, Claimant received a letter dated March 7, 2016, that provided in pertinent part:

The record contains credible testimony and substantial evidence proving that you violated the CN Vehicle Backup Policy.

In consideration of the incident, the proven rule violations, and your past discipline record, you are hereby assessed the following discipline:

5 days Actual Suspension From Service
(March 09, 2016 through March 15, 2016)

The Carrier states that there is substantial evidence in the instant matter of the improper conduct in backing the vehicle. The rule requires that there be an employee assisting in the backward movement of a truck. There were three passengers in the truck and none of them assisted. They should have insisted that the driver cease backing up until he complied with the rule.

The Organization argues that Claimant was a passenger in the truck. The evidence establishes that the driver started to back up and Claimant offered to protect the movement. The driver responded that assistance was not needed and, by the driver's own admission, backed immediately into a pole. The Organization continues that Claimant would have had to leap from a moving vehicle in order to comply with the Rule.

The Board sits as an appellate forum in discipline cases. As such, it does not weigh the evidence *de novo*. Thus, it is not our function to substitute our judgment for the Carrier's judgment and decide the matter according to what we might have done had the decision been ours. Rather, our inquiry is whether substantial evidence exists to sustain the finding against Claimant. If the question is decided in the affirmative, we are not warranted in disturbing the penalty absent a showing that the Carrier's actions were an abuse of discretion.

Claimant is charged with a violation of the backup policy. The relevant portion of the backup policy provides:

2. If backing up is required and there are passengers in the vehicle. At least one person must be out of the vehicle to guide driver.

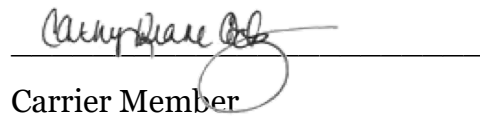
The movement can also be guided by another employee who has a full view of the path of the movement and who remains visible to the driver, or,

alternatively another employee who maintains communication with the driver by radio or other means.

3. The passenger or passengers of the vehicle are equally responsible to ensure at least one person gets out to guide the vehicle.

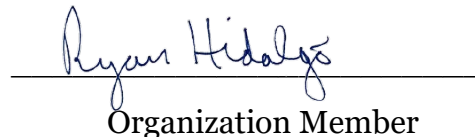
The evidence establishes that the driver began backing up unannounced. He said they were only backing up a truck length and that a maintainer would protect the backward movement. The driver's actions indicated a lackadaisical approach to the back up rule. Claimant inquired whether he should exit to spot the driver and the driver said no. There is no action the Claimant could have taken to remedy the situation without putting himself in danger by leaping from the truck. Carrier cannot show that the Claimant violated the rule. The driver's statement indicated that he admitted culpability and the remaining evidence indicates that Claimant acted appropriately when the vehicle was put in motion and he asked whether he should protect the move.

Claim sustained.



Carrier Member

Cathy Cortez



Organization Member

Ryan Hidalgo



Neutral Member

Brian Clauss

Dated: November 19, 2019