

PUBLIC LAW BOARD NO. 7660
CASE NO. 27

BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES

PARTIES

TO DISPUTE:

and

UNION PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The Carrier’s dismissal of Claimant T. Lloyd by letter dated May 21, 2014, in connection with allegations that he violated the UPRR Safety Rule 74.2 Driver Requirements, was arbitrary, unsupported, unwarranted, disparate and in violation of the Agreement (System File D-1448U-307/1607485 UPS).

2. As a consequence of the violation referred to in Part 1 above, the Carrier shall overturn the dismissal of Claimant T. Lloyd, reinstate him with seniority intact and expunge all mention of the incident from his personal record. The Carrier shall further compensate Claimant T. Lloyd for lost time, including any benefits related to vacation, insurance and Railroad Retirement credit as well as any other relief provided by Rule 48(h).”

FINDINGS:

Upon the whole record, after hearing, this Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted under Public Law 89-456 and has jurisdiction of the parties and the subject matter.

Claimant, a Sectionman Truck Driver with 8 years of service, was issued a Notice of Investigation (NOI) dated April 17, 2014 on charges that on April 9 he drove on the side of a ballast shoulder where there was no road, then slid into some concrete barricades that caused an accident resulting in damage to the vehicle. He was removed from service pending the results of the Investigation eventually held on May 9, 2014. The May 21, 2014 Notice of Discipline finds Claimant guilty of the charge in violation of Safety Rule 74.2 Driver Requirements, a Level 4 offense, which, when considered with his current Level 4C discipline status, results in a Level 5 permanent dismissal. The instant appeal resulted.

On April 9, 2014 at approximately 2:30 pm, Claimant was driving a company vehicle with hydraulic equipment, going to fix a pull-apart. His Foreman and another truck driver were passengers in the vehicle. There had been no previous job briefing. Claimant chose to take a route between the main and house tracks that was laid with ballast and had three concrete barricade obstructions, rather than right-of-way roads to the north or south of the tracks. In order to get around the barricades, he had to drive up a slope of soft ballast towards the main track. The back of his truck slid down and made contact with the last concrete block, causing damage to the vehicle. The Foreman called Manager Weston to report the accident and ask for a track hoe to pull the truck out from where it had landed.

In accord with Carrier policy, Claimant called Manager Weston to report the accident, and left a voicemail message, saying he wrecked the section truck and wondered if Weston would be at the depot to “chew his ass” when they returned. Weston investigated, interviewed, and took written statements from the three people in the truck. He also had pictures taken of the area. Foreman Wuthrich testified, and his statement generally confirms, that when Claimant turned the truck between the main and house tracks, he could see the barricades and he told Claimant - no, don't, you won't make it -

and Claimant responded “oh yeah” and continued down the approximately 10 foot wide area between the tracks. Truck Driver Brown confirms that he heard the Foreman tell Claimant - no you won’t make it - and Claimant responding - oh yeah. Neither said anything further as Claimant continued driving toward the barricades. Claimant testified that he never heard either man say “no,” and that he would have stopped if he did. Claimant stated that the Foreman never told him which way to go, he chose this route because it would get them closer to the pull-apart to access it with the hydraulic equipment (as the south right-of-way by the house track was blocked with material), and he figured he could go around the concrete blocks that he saw as he turned. He admitted not doing a risk assessment at the time, but stated that he did not see the risk here as he felt there was ample room to go around. Claimant took responsibility for his decision to take that route, noting that it would have been safer to use the right-of-way to the north.

The Carrier argues that Claimant was provided a fair and impartial hearing, and its decision to remove him from service pending investigation, and denial of entry into SAP , were based upon the nature of the charges, and do not reveal any prejudgment of guilt. It contends that, by Claimant’s own admission, he was guilty of knowingly and deliberately taking a course that was clearly barricaded, which meets its burden of proving the charge against him and a violation of Safety Rule 74.2. The Carrier relies upon the evidence of Claimant’s passengers that the Foreman voiced objection to the route chosen, indicating that he would not make it past the concrete barricades, and Claimant responded “oh yeah,” revealing the willfulness of his actions. The Carrier maintains that, in compliance with its UPGRADE policy, Claimant received a Level 5 dismissal for this Level 4 infraction, since he was already at a Level 4C for a previous serious safety infraction.

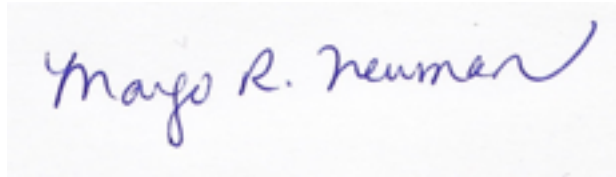
The Organization contends that Claimant did not receive a fair and impartial hearing as he was prejudged when he was removed from service prior to the

investigation, and denied entry into the SAP. The Organization asserts that Claimant made an assessment that he could get closer to the job location by traveling adjacent to the house track, and that he had room to clear the barricades. It maintains that, absent a prior job briefing or order to the contrary from his Foreman, the Carrier failed to meet its burden of proving that this was a willful or deliberate violation of the cited Rule, or cause to deny Claimant entry into the SAP. The Organization argues that the penalty imposed was arbitrary, excessive, and disparate, noting that another employee was issued a lesser penalty for a similar violation.

On the basis of the entire record, the Board concludes that there were no procedural defects impacting on Claimant's receipt of a fair and impartial hearing. The Board finds that the Carrier met its burden of proving that Claimant violated Safety Rule 74.2 when he chose to take, and continue down, a clearly obstructed path, that necessitated avoiding concrete blocks by traveling up a slope of soft ballast, despite his Foreman's caution that he was not going to make it when he started to turn down that path. While Claimant does not recall hearing "no" from either of his passengers, or responding to the comment that he was not going to make it, the evidence of both passengers confirm that Claimant's response to the warning was "oh yeah." From that evidence, it was not unreasonable for the Carrier to conclude that Claimant's actions were deliberate and willful. The Organization did not establish that the penalty imposed was disparate, as the individual identified as a comparator was not found to have engaged in a willful act and had no prior discipline on his record. The Level 5 dismissal issued was in compliance with the Carrier's UPGRADE progressive discipline policy for elevating a Level 4 offense to dismissal when the employee is currently at Level 4C status, which there is no dispute Claimant was. Accordingly, the claim is denied.

AWARD:

The claim is denied.



Margo R. Newman
Neutral Chairperson

Dated: _____



K. N. Novak
Carrier Member



Andrew Mulford
Employee Member