

PUBLIC LAW BOARD NO. 6621

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

And

UNION PACIFIC RAILROAD COMPANY

Case No. 63

* * * *

Statement of Claim: Claim of the System Committee of the Brotherhood that:

1. The dismissal of Semi Truck Operator J. A. Rosadillo for his alleged carelessness of safety to others, negligence and placing himself and others in a dangerous position while loading a switch panel at Mile Post 830.75 on June 15, 2005, was without just and sufficient cause, based on an investigation that was neither fair nor impartial and based on unproven charges.
2. As a consequence of the violations referred to in Part (1) above, Semi Truck Operator J. A. Rosadillo shall now be reinstated to the service of the Carrier on his former position with seniority and all other rights restored unimpaired, compensated for all wage and benefit loss suffered by him since his dismissal, and the alleged charge(s) be expunged from his personal record.

Facts

Claimant, with seniority dating from February 9, 1981 and Semi Truck Operator seniority dating from June 1991, was working in that classification when the incident at issue occurred.

By letter dated July 7, 2005, Claimant was instructed to report for an investigation to develop the facts and place responsibility, if any, in connection with the charge that

"...on June 15, 2005 in the vicinity of MP 830.75 on the Gila Subdivision, while working as a Semi-Truck Driver, you were allegedly careless of safety to yourself and others and negligent, despite past counseling, when you allegedly placed yourself and others in dangerous position while you were lifting a switch panel, you allegedly altered equipment or circumvented the safety system, you allegedly failed to inspect your equipment and follow and employ proper crane operator responsibilities in the use of outriggers. You also were allegedly dishonest in the personal injury (accident) report you have submitted concerning the incident."

After two postponements, the hearing was held on August 30, 2005. Thereafter, by letter dated October 27, 2005, Claimant was found guilty of violating Union Pacific General Code of Operating Rules 1.6 (1), (2) and (4), 1.23, and Safety Rule 138.3.4-D. He was assessed Level 5 discipline under the Carrier's Upgrade Discipline Policy and dismissed from service.

The Organization appealed the discipline by letter dated December 16, 2005, contending that the Carrier violated Rules 1 and 45 of the Collective Bargaining Agreement. The claim was processed through the steps of the grievance procedure and discussed in conference on June 6, 2006. The parties were unable to resolve the dispute during the conference, and the claim was ultimately docketed to this Board for adjudication.

Contentions of the Carrier

The Carrier contends that it imposed discipline following a fair and thorough investigation. There were no procedural deficiencies and Claimant's due process rights were protected.

With respect to the merits, the Carrier argues that it presented substantial evidence that Claimant was negligent in the performance of his assigned work and endangered himself and others by altering the equipment on his vehicle and/or circumventing the

safety system. Specifically, the Carrier submits that Claimant deliberately circumvented the safety devices of the crane on the truck that he was operating when he placed a filler block on the override button. By doing this, he disarmed the safety system which alerts the operator when he is exceeding the rated lifting capacity. Claimant also parked his vehicle in an unsafe area, causing the outrigger to collapse and also impact the safety and integrity of the lift. According to the Carrier, Claimant had no valid reason to have compromised the safety of himself and others. Because of his actions, he incurred an extensive arm injury.

In support of its position, the Carrier cites the following rules:

1.6: Conduct

Employees must not be:

- (1) Careless of the safety of themselves or others
- (2) Negligent
- (4) Dishonest

* * * *

1.23 Altering Equipment

Without proper authority, employees must not alter, nullify, change the design of, or in any manner restrict or interfere with the normal function of any device or equipment on engines, cars, or other railroad property, except in the case of an emergency.

138.3.4 Using Outriggers

Follow these requirements when using outriggers.

A. Job Briefing

B. Before beginning work conduct a job briefing that includes the following:

Use of outriggers

Note: If in doubt, set the outriggers.

Type of blocking to be used
Scope of work
Procedures for leveling and preparing the outrigger site for blocking
Proper lifting techniques to use when lifting and setting outriggers and
Blocks

B. When To Use Outriggers

Outriggers must be used when:

* * * *

C. Inspection and Availability of Equipment

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D. Outrigger Use

When using outriggers:

1. Level and prepare the outrigger site for blocking as discussed in the job briefing.
2. Complete a dry run on the picking and handling of the load.
Calculate the total load, including slings, blocks, and fittings, to
Ensure that the load is within the crane's capacity.

The Carrier contends that Claimant violated these rules and was fortunate that he did not sustain even more serious injuries as a result of his negligent actions. He admitted to placing the filler block on the override buttons, which was a serious breach of the safety rules. He was also negligent when he positioned his truck in a compromising position by placing his outriggers on the unstable ground of an embankment that gave way.

Additionally, the Carrier submits that the testimony demonstrates that Claimant failed to adhere to the verbal warning and hand signals of his groundman, Mr. Zamorano, which caused the panel that Claimant was lifting to swing toward him, pinning his arm against the truck. Zamorano had tried to signal Claimant to not pick up the load and, instead, to extend his boom to permit a safer pick-up. In the Carrier's view, Claimant's failure to adhere to the groundman's signal caused the load to drift toward and injure Claimant.

The Carrier asserts that Claimant was an experienced employee who had no excuse for blatantly disregarding legitimate safety rules. Given the seriousness of his actions, his dismissal should be upheld.

Contentions of the Organization

The Organization contends that the Carrier has not sustained its burden of proof and that Claimant's dismissal was arbitrary and capricious. Specifically, the Carrier relied on speculation from supervisors who were not present when the incident occurred. But when all the speculation and innuendos are stripped from the Carrier's "proof," the real reason emerges for Claimant's dismissal: the fact that he was injured.

The Organization further asserts that neither Claimant nor any of the witnesses foresaw the ground collapsing under the outrigger. Each manager had an opinion as to the proper placement of the outrigger, but the lay of the land and the placement of the trucks, along with the way in which the material was situated, did not allow for the perfect pick-up. The employees involved decided to perform the lift in the manner they thought best. In the Organization's view, it was unfair for the Carrier to blame Claimant for circumstances beyond his control. The ground could have collapsed regardless of whether the outrigger was on flat ground, given the load that was being lifted.

With respect to the charge that Claimant altered equipment, the Organization contends that the truck assigned to Claimant was in excellent condition and was not altered in any manner. While he admitted that he operated the crane with the assistance of the hydraulic override, the Organization maintains that there was no proof that this had anything to do with his injury.

As to Claimant's allegedly ignoring his groundman, the Organization argues that there was a misunderstanding and confusion between Claimant and Mr. Zamorano just prior to the incident:

There was testimony from the accused...explaining to the tag line holder (Montijo) that the panel was supposed to swing in a clockwise direction during the lift and transfer process. Add to that, that there was no track and time obtained while the lift was happening and then the outrigger sank into the embankment unexpectedly. The accused was then forced to set the panel down with the panel fouling the live track and all he could focus on was getting the panel in the clear of the live track. The yelling he heard was from others, not his groundman. (Employees' Exh. A-7).

Given these circumstances, the Organization urges the Board to sustain its claim. Claimant did not deliberately behave in an unsafe or negligent manner. Nor was he dishonest in completing his accident report.

Opinion

The Board has studied this voluminous record. While the Organization has offered a variety of excuses for what occurred, the credible evidence supports the Carrier's conclusion that Claimant, in fact, performed his work in a negligent and unsafe manner. He was personally responsible for the accident and injury to himself, and he is fortunate that he was not killed.

With respect to the procedural issues, there is no evidence of due process violations. First, it is noted that the Carrier twice postponed the hearing, at the Organization's request. Thereafter, when the investigation actually occurred, Claimant was afforded a thorough and fair hearing, having been afforded time to prepare a defense, the presence of witnesses he requested, the opportunity to examine and cross-examine witnesses, and the availability of representation.

On the merits, it is the finding of this Board that the Carrier presented substantial evidence in support of its determination that Claimant was careless and negligent in the conduct of his work.

While the Organization insists that Claimant did not alter his equipment, the credible testimony was that he did, in fact, circumvent the safety devices of the crane which he was operating when he placed a filler block over the override button. Claimant himself admitted engaging in this conduct, which was a clear violation of Rule 1.23 (Altering Equipment) and Rule 1.6(1) (Careless of the Safety of Themselves or Others). There was no valid reason for Claimant to have taken this action, which seriously jeopardized his safety and that of co-workers.

While the Organization accuses the Carrier of unfairly blaming Claimant for the accident, the credible evidence in the Record demonstrates that Claimant positioned his truck dangerously by placing his outriggers on unstable ground of an embankment. He compounded this error by failing to perform a dry run prior to attempting the move. Numerous witnesses testified that it was Claimant's decision to place the outriggers on the embankment, which was not the safest location to move the load because of the gravel and debris. As a result, the truck shifted as the ground beneath the outriggers gave way. Claimant's behavior was in violation of Rule 1.6(2) (Negligent) and Rule 138.3(D) (Using Outriggers). He was the assigned semi truck driver making the move, and it was his responsibility to adhere to the safety rules when performing his job.

Claimant also was negligent when he failed to adhere to the instructions given by his groundman, Mr. Zamorano. Witnesses testified that Zamorano gave both verbal warnings and hand signals instructing Claimant not to pick up the load. The

Organization argues that there was a "misunderstanding" due to the confusion of the situation. But the record evidence supports the conclusion that Claimant did not watch his groundman carefully. Zamorano was trying to signal Claimant to not lift the load and to extend his boom in order to perform a safer pick-up. But Claimant was either inattentive or unwilling to obey Zamorao's signals. The result was that the load moved toward Claimant and pinned his arm against his truck, causing serious injury.

Claimant, although an experienced Semi Truck Operator, conducted himself in a negligent and careless manner on June 15, 2005. His negligent and unsafe conduct caused injury to himself and put others at risk of being hurt. Given the factual determinations that have been sustained herein, there is no valid basis for this Board to overturn the Carrier's decision to dismiss Claimant. The Carrier assessed discipline in accordance with its Upgrade Discipline Policy, which has been upheld in numerous arbitration awards, and it may not be said that imposition of Level 5 discipline constituted an abuse of managerial discretion.

For all of the foregoing reasons, the claim must be denied.

Award

The claim is denied.

W.A.R.
Carrier Member
Dated: May 7, 2007

Joan Parker
Joan Parker, Neutral Member

[Signature]
Organization Member
Dated: 5-7-07