

BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 924

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION
IBT RAIL CONFERENCE**

and

**UNION PACIFIC RAILROAD COMPANY
(FORMER CHICAGO & NORTHWESTERN TRANSPORTATION COMPANY)**

Case No. 271

Award No. 247

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

1. The Level 3 (five day suspension) assessed Truck Driver J.E. Johnson for his alleged failure to comply with Rules 1.13, 70.1 and 74.3 in that he was involved in an accident with a Company vehicle on January 12, 2005, was without just and sufficient cause, in violation of the Agreement and based on unproven charges (System File 3KB-6876D/1419417D).
2. As a consequence of the violations referred to in Part (1) above, Truck Driver J.E. Johnson must be compensated for all lost time, be made whole all losses and have any reference to the investigation removed from his personnel record as outlined in Rule 19(d) of the effective Agreement."

FINDINGS:

At the time of the events leading up to this claim, the Claimant was employed by the Carrier as a truck driver in its Material Handling Department.

By letter dated January 18, 2005, the Claimant was directed to appear for a formal investigation and hearing on charges that the Claimant had failed to comply with Rules 1.13, 70.1 and 74.3 in that he was involved in a vehicle accident while operating a Carrier vehicle. After a postponement, the investigation was conducted on February 7, 2005. By letter dated February 17, 2005, the Claimant was informed that as a result of the

investigation, he had been found guilty as charged and was being assessed Level 3 Discipline, a five-day actual suspension. The Organization thereafter filed an appeal, challenging the Carrier's decision to suspend the Claimant. The Carrier denied the claim.

The Carrier initially contends that the Claimant was afforded all of the elements of due process, as set forth in the controlling Agreement. The Carrier asserts that the Notice of Investigation adequately apprised the Claimant of the charges against him so that he could prepare a defense, call witnesses, and prepare cross-examination of the Carrier's witnesses. The Carrier argues that the hearing officer's reference to the Claimant's current discipline level did not, in any way, prejudice the results of the investigation. There is no support for the premise that the introduction into the record of the Claimant's current discipline level was used in determining the Claimant's guilt or innocence on the charges in question. The Carrier insists that it merely mentioned the past discipline to explain why the Level 2 charges could result in the assessment of Level 3 discipline.

The Carrier then addresses the Organization's assertion that the Carrier violated Rule 19(A). The Carrier points out that the hearing initially was scheduled for January 18, 2005, well within the ten-day period provided for in the Agreement; the hearing thereafter was postponed until February 7, 2005. The Carrier maintains that the Notice of Hearing was precise, and the Claimant was well aware of the purpose of the investigation. The Carrier insists that it properly notified the Claimant and the Organization of the postponement, and it emphasizes that the Organization did not object to the postponement before the hearing was held. Moreover, the Claimant and his Organization representative were present at the hearing and had prepared a defense. The

Carrier contends that the Claimant was duly represented by the Organization, and he had ample time to present witnesses of his choice. The Carrier argues that based on the relevant facts, none of the Claimant's due process rights were violated, and the Organization's procedural allegations are without merit.

The Carrier goes on to argue that substantial testimony was introduced at the hearing to support the finding of the Claimant's guilt. The Carrier points out that the testimony establishes that the Claimant was involved in a vehicle accident while driving a Carrier truck. The cited Rules make it obvious that employees must take responsibility for their own safety while performing duties associated with their assignments. The Carrier insists that it had to develop and enforce stringent rules to protect the safety of its employees, and any accidents occurring on the property are subject to extreme scrutiny. The Carrier maintains that the record demonstrates that the Claimant was the responsible party who caused the accident in question when he rear-ended another vehicle coming out of its driveway.

The Carrier points out that for reasons known only to the Claimant, the Claimant elected to continue driving the Carrier vehicle even though the weather was foggy and visibility was hindered. The Carrier asserts that by driving in limited visibility, the Claimant failed to comply with his supervisor's instructions. The Carrier points out that the Claimant's supervisor stressed to Claimant that he should take his time and be safe. The Claimant should have reasoned that due to the foggy weather conditions that impaired his visibility, he should not have been on the road. The Carrier argues that this conduct clearly violated Rules 1.13 and 70.1 in that Claimant elected not to take every

precaution to prevent injury to himself and the general public.

As for the Organization's argument that the mere fact that an accident occurred does not equate to a rule violation, the Carrier maintains that this argument is inapplicable in this case because the circumstances surrounding this accident were such that the accident was entirely preventable had the Claimant exercised normal care while on the property. The Carrier asserts that these facts were not challenged by the Organization, leaving the Carrier no option but to find against the Claimant.

The Carrier goes on to argue that once an arbitral panel has verified the presence of substantial evidence, it lacks the authority to overturn the level of discipline assessed, even though it may seem harsh, unless the discipline is arbitrary, capricious, or an abuse of Carrier discretion. The Carrier insists that the instant discipline was not arbitrary, capricious, or an abuse of Carrier discretion. The Carrier asserts that because safety of Carrier employees always has been of paramount concern, the Carrier has been willing to take the extreme measure of punishing an employee who sustains an injury as a result of his own carelessness, despite the potentially negative impression this might create. The Carrier maintains that the Claimant's violation of agreed policy rules was met with discipline assessed in accordance with established policy. The Carrier argues that there is no evidence of arbitrariness or capriciousness in connection with the discipline at issue, and it points to several prior Awards that have upheld the same amount of discipline.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Organization initially contends that the hearing in this matter was prejudiced

when the Carrier included the Claimant's past discipline in the charges against him. The Organization asserts that the Carrier violated Rule 19 by failing to issue a precise charge in this matter, in that the charge did not even cite any date that the alleged violations occurred. The Organization maintains that the Carrier also acted improperly when it unilaterally postponed the hearing in this matter.

Turning to the merits of this matter, the Organization argues that the Carrier failed to show that the Claimant did not comply with the cited Rules. The Organization points out that the foggy weather conditions occurred while the Claimant was on his way to West Chicago, not on his return trip when the vehicle backed onto the highway in front of him. The Organization emphasizes that the Claimant testified that weather and road conditions had nothing to do with the accident. The Organization maintains that the accident occurred simply because another vehicle backed into the highway in front of the Claimant, and the Claimant could not get into the other lane because of oncoming traffic. The Organization contends that the Carrier failed to adduce any testimony or evidence to support the charges against the Claimant.

The Organization further asserts that the discipline imposed was capricious and unsupported. The Organization ultimately contends that the instant claim should be sustained in its entirety.

The parties being unable to resolve their dispute, this matter came before this Board.

This Board has reviewed the procedural arguments raised by the Organization, and we find that the Carrier did violate the Claimant's procedural rights by including the

Claimant's current discipline level in the Notice of Hearing. Evidence of the Claimant's previous discipline under a progressive discipline system is appropriate only after the Claimant has been found guilty of the charges against him and an effort is being made to determine what type of disciplinary action should be taken against him for the current offense. It is inappropriate for the Carrier to mention the Claimant's discipline level in the Notice of Hearing and it is inappropriate for any evidence of the Claimant's discipline level to be received before it has been determined that the Claimant was guilty of the offense with which he was charged in the current case.

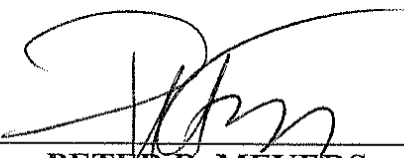
This Board has also reviewed the evidence and testimony in this case, and we find that there is insufficient evidence to support the Carrier's case that the Claimant acted in violation of a Carrier rule when he was involved in a vehicle accident on January 12, 2005. The record reveals that the Claimant was operating a truck in extremely poor weather conditions and that another truck pulled out in front of him. There were no witnesses to determine whether or not the Claimant was driving in excess of the appropriate speed and, consequently, the Carrier failed to meet its burden of proof that the Claimant was responsible for the accident. This Board has held on numerous occasions that in order to sustain discipline, the Carrier must come forth with sufficient evidence that the Claimant acted negligently or in violation of Carrier rules.

Since the Carrier has failed to bring sufficient evidence before this Board to support its case, and because the Notice of Hearing contained inappropriate language relating to the Claimant's previous disciplinary record, this Board must find that the claim in this case shall be sustained.

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AWARD:

The claim is sustained.



PETER R. MEYERS
Neutral Member



ORGANIZATION MEMBER

DATED: 6-25-07



CARRIER MEMBER

DATED: 6/25/07

CARRIER DISSENTS TO
THE FINDING OF A
PROCEDURAL VIOLATION.