

BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 924

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

and

UNION PACIFIC RAILROAD COMPANY

Case No. 279

Award No. 253

STATEMENT OF CLAIM:

It is the claim of the Brotherhood that the charges against Claimant D. L. Frierson must be overturned and the level 5 discipline removed from his record. Furthermore, Claimant Frierson must be reinstated to service with all rights and privileges restored and compensated for all time and wages lost. Claimant Frierson must also be made whole for any health and welfare issues he was deprived of during this process, including months of service to the Railroad Retirement Board.

FINDINGS:

By letter dated May 1, 2006, the Claimant was directed to appear for a formal investigation and hearing to develop the facts and place responsibility, if any, in connection with an April 26, 2006, incident in which the Grievant allegedly failed to comply with rules and instructions by failing to stop short of other equipment, resulting in a collision with other standing equipment that may have caused injury to co-workers. The investigation was conducted, as scheduled, on May 16, 2006. By letter dated June 2, 2006, the Claimant was informed that as a result of the investigation, he had been found guilty of violating Rules 1.6(1) of the Carrier's Operating Rules, Rule 42.1.7 of the Maintenance of Way Rules, and Rule 70.1 of the General Safety Instructions; this letter further advised the Claimant that he was being dismissed from the Carrier's service. The

Organization thereafter filed a claim on the Claimant's behalf, challenging the Carrier's decision to discharge the Claimant. The Carrier denied the claim.

The Carrier initially contends that it has met its burden of proving through substantial evidence that the Claimant was in violation of the rules. The Carrier asserts that it has produced substantial evidence demonstrating that the Claimant did violate the cited rules, and there is no reason to overturn what is clearly appropriate discipline, in light of the Claimant's actions.

The Carrier emphasizes that the Organization has not raised any sort of procedural objections, so the Board should find that no procedural errors occurred during the handling of this claim. The Carrier maintains that the Claimant's dismissal therefore should not be disturbed for any procedural allegation.

The Carrier goes on to assert that it is well-established that once an arbitral panel has substantiated the presence of substantial evidence, it lacks the authority to overturn the level of discipline assessed, even if that discipline seems harsh. The Carrier points out that discipline may be overturned only if the panel finds that it was arbitrary, capricious, or an abuse of Carrier discretion. The Carrier emphasizes the exchange of correspondence between the parties in which the Carrier stated that the request for a leniency reinstatement was being denied; the discipline cannot be considered arbitrary in light of this. The Carrier also insists that the discipline imposed in this matter was in accordance with the Carrier's UPGRADE Policy, and that Rule 1.6 violations are accorded Level 5 discipline, which is dismissal.

The Carrier argues that the Claimant received a job briefing and was as

responsible as the other two employees to be vigilant for obstructions in the track. The Carrier maintains that substantial evidence demonstrates that no one was paying attention. The Carrier asserts that the Board cannot turn a blind eye to a serious breach of the safety rules. The Carrier contends that it cannot allow employees to exhibit a disregard for their own safety and the safety of their co-workers.

The Carrier insists that the Claimant committed very serious rule violations. The Claimant's proven violation of Rule 1.6(1) alone supports the assessment of Level 5 discipline. The Carrier points out that Boards routinely have upheld Level 5 discipline when the claimants have violated Rule 1.6(1) and endangered the safety of themselves and others. The Carrier asserts that the Claimant behaved recklessly, and the instant claim therefore should be denied in its entirety.

The Carrier then addresses the Organization's reliance on discipline assessments in other cases. The Carrier insists that these other cases involve incidents that are quite different from the situation at issue. Moreover, numerous referees have held that each discipline case must stand on its own merits. The Carrier maintains that there is no way that the Board can conclude that the Claimant was treated harshly when he was dismissed for a serious breach of the safety rules.

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

The Organization initially contends that the record shows that on the date in question, the Claimant was belted in and facing in a forward direction while the machine he was on was moving in a rearward direction. The Organization asserts that the

Claimant could turn around to look behind, in the direction that the machine was moving. The Claimant was not the operator of the machine, and he could not see out the sides or the back of the machine; the operators were looking to the side mirrors in order to see the track behind the machine.

The Organization insists that the Claimant and the two operators were complying with Carrier rules by being seat-belted in their respective seats. Once belted in, these employees were restrained from actually turning around, and their vision is limited to what the operators can observe by watching their side mirrors and what they can see directly to the side. The Claimant, as the spike feeder, was able to see only through and around the operators on either side.

The Organization additionally points out that due to the weather conditions, the Claimant was wearing a coat and a couple of hoods that further restricted his vision. The Claimant was unable to see the mirrors that the operators were using.

The Organization maintains that under these circumstances, the Carrier failed to show that the Claimant violated the cited rules. The Organization argues that as the spike feeder, the Claimant was nothing more than a passenger, and his responsibility was limited to his position. The Claimant had no control over the machine, and his line of vision was restricted. The two operators were responsible for observing the track in the direction of travel, while the Claimant was unable to see in that direction.

The Organization then points to a number of prior cases involving machines and/or vehicles in which Rule 1.6 charges were not alleged. The Organization argues that there is no reason to use this Rule in the instant case because it is not applicable. The

Carrier has failed to show that the Claimant was careless of his own safety or that of others. The Organization emphasizes that the two operators, in separate investigations, were offered leniency reinstatements and have returned to work, but the Claimant, who had the least amount of responsibility, has not. The Organization maintains that the Claimant clearly has been discriminated against.

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 evidence and testimony in this case, and we find that there is sufficient evidence in the record to support the finding that the Claimant was guilty of failing to comply with the Carrier's rules and instructions when the machine that he was occupying failed to stop short of other standing equipment and led to an accident which caused injury to other workers. The Claimant was clearly in violation of Rules 1.6(1), 42.1.7, and 70.1. Although the Claimant attempts to blame the two other employees who were on the machine, it is clear that the Claimant was inattentive to his work and violated the rules leading to the finding of guilt.

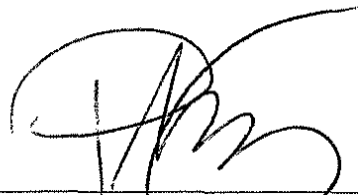
Once this Board has determined that there is sufficient evidence in the record to support the guilty finding, we next turn our attention to the type of discipline imposed. This Board will not set aside a Carrier's imposition of discipline unless we find its actions to have been unreasonable, arbitrary, or capricious.

The Claimant in this case was found guilty of a Rule 1.6 violation. That is a

serious rule violation which often leads to the termination of the employee. This Board cannot find that the Carrier's action in terminating the Claimant because he endangered the safety of himself and others was unreasonable, arbitrary, or capricious. Therefore, the claim must be denied.

AWARD:

The claim is denied.



PETER R. MEYERS
Neutral Member


ORGANIZATION MEMBER

DATED: Oct. 3, 2008


CARRIER MEMBER

DATED: Oct 3, 2008